

Study Circle

CS EXECUTIVE

NEW SYLLABUS

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

Our Team



CA Jinesh Shah



Prof. Rahul Malkan



Prof. Jaivin Sir



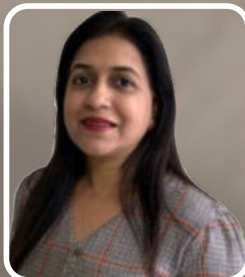
CA Devangi Shah



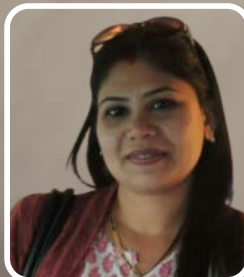
CA Ashish Patil



CA Devendra Vyas



Prof. Sonali Rajput



Prof. Mayuri Lokhande



CS Deepika Arya



CS Riddhi Ganatra

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

CS EXECUTIVE

SR.NO	INDEX	PG.NO
1.	Source of Law	1 - 14
2.	Constitution of India	15 - 61
3.	Interpretation of Statutes & General Clauses Act,1897	62 - 85
4	Administrative Laws	86 - 102
5	Law of Torts	103 - 113
6	Law relating to Civil Procedure	114 - 144
7	Laws relating to Crime and its Procedure	145 - 179
8	Law relating to Evidence	180 - 206
9	Law relating to Specific Relief	207 - 229
10	Law relating to Limitation	230 - 235
11	Law relating to Arbitration, Mediation and Conciliation	236 - 257
12	Indian Stamp Law	258 - 284
13	Law relating to Registration of Documents	285 - 338
14.	Right to Information Law	339 - 353
15.	Law relating to Information Technology	354 - 374
16.	Contract Law	375 - 432
17.	Law relating to Sale of Goods	433 - 473
18.	Law relating to Negotiable Instruments	474 - 518

CHAPTER 1 : SOURCE OF LAW

SOURCES OF INDIAN LAW

The expression “sources of law” has been used to convey different meanings. There are as many interpretations of the expression “sources of law” as there are schools and theories about the concept of law. The general meaning of the word “source” is origin. The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:

- i) Principle sources of Indian Law
- ii) Secondary sources of Indian Law

Principle sources of Indian Law



1) Customs or Customary law

Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent. It was felt that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

Classification of Customs

The customs may be divided into two classes:

- Customs without sanction.
- Customs having sanction.

Customs without sanction are those customs which are non-obligatory and are observed due to the pressure of public opinion. These are called as “positive morality”.

Customs having sanction are those customs which are enforced by the State. It is with these customs that we are concerned here.

These may be divided into two classes:

- (i) Legal, and
- (ii) Conventional (also known as usages).

Further, legal customs are again of two kinds:

- (a) Local Customs
- (b) General Customs.

Local customs may be divided into two classes:

- Geographical Local Customs
- Personal Local Customs

Requisites of a valid custom

1. Immemorial (Antiquity)
2. Certainty
3. Reasonableness
4. Compulsory Observance
5. Conformity with law and public morality
6. Unanimity of opinion
7. Peaceable Enjoyment
8. Consistency

2) Judicial Decision or Precedents

In general use, the term “precedent” means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions of the courts for future cases. Only such decisions which lay down some new rule or principle are called judicial precedents. Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of stare decisis.

Kinds of Precedents

- (i) Declaratory and Original Precedents:** According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same.
- (ii) Persuasive Precedents:** A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. A persuasive precedent, therefore, is not a legal source of law; but is regarded as a historical source of law. Thus, in India, the decisions of one High Court are only persuasive precedents in the other High Courts. The rulings of the English and American Courts are persuasive precedents only. Obiter dicta also have only persuasive value.
- (iii) Absolutely Authoritative Precedents:** An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong. Unlike a persuasive precedent which is merely historical, an authoritative precedent is a legal source of law. Absolutely authoritative precedents in India: Every court in India is

absolutely bound by the decisions of courts superior to itself. The subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. A single judge of a High Court is bound by the decision of a bench of two or more judges. All courts are absolutely bound by decisions of the Supreme Court.

(iv) Conditionally Authoritative Precedents: A conditionally authoritative precedent is one which, though ordinarily binding on the court before which it is cited, is liable to be disregarded in certain circumstances. The court is entitled to disregard a decision if it is a wrong one, i.e., contrary to law and reason. In India, for instance, the decision of a single Judge of the High Court is absolutely authoritative so far as subordinate judiciary is concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

3) Statutes or Legislation

1. Legislation is that source of law which consists in the declaration or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called *jus scriptum* (written law) as contrasted with the customary law or *jus non-scriptum* (unwritten law). Salmond prefers to call it as “enacted law”. Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).
2. Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repealed, annulled or controlled by any other legislative authority.
3. Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature, a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws which are recognised and enforced by courts of law.
4. The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment.

4) Personal Law

In many cases, the courts are required to apply the personal law of the parties where the point at issue is not covered by any statutory law or custom. In the case of Hindus, for instance, their personal law is to be found in:

The Shruti which includes four Vedas.

The 'Smritis' which are recollections handed down by the Rishis or ancient teachings and precepts of God, the commentaries written by various ancient authors on these Smritis. There are three main Smritis; the Codes of Manu, Yajnavalkya and Narada.

Hindus are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, succession, marriage, adoption, coparcenary, partition of joint family property, pious obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable endowments.

The personal law of Mohammedans is to be found in:—

The holy Koran.

The actions, percept and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as Hadis.

Ijmas, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.

Kiyas or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.

Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya which was composed in the 12th century and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre-emption.

SECONDARY SOURCES OF INDIAN LAW

1) Justice, Equity and Good Conscience

The concept of “justice, equity and good conscience” was introduced by Impey’s Regulations of 1781. In personal law disputes, the courts are required to apply the personal law of the defendant if the point at issue is not covered by any statute or custom. In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case what is known as “justice, equity and good conscience”, which may mean the rules of English Law in so far as they are applicable to Indian society and circumstances. Justice, equity and good conscience have been generally interpreted to mean rules of English law on an analogous matter as modified to suit the Indian conditions and circumstances.

The Supreme Court has stated that it is now well established that in the absence of any rule of Hindu Law, the courts have authority to decide cases on the principles of justice, equity and good conscience unless in doing so the decision would be repugnant to, or inconsistent with, any doctrine or theory of Hindu Law.

2) Sources of English Law

Since the main body of rules and principles of Indian law is an adaptation of English law, in the following pages the main sources of English law are discussed in some detail. The chief sources of English law are:

The Common Law

The Common Law, in this context is the name given to those principles of law evolved by the judges in making decisions on cases that are brought before them. These principles have been built up over many years so as to form a complete statement of the law in particular areas. Thus, Common Law denotes that body of legal rules, the primary sources of which were the general immemorial customs, judicial decisions and text books on Jurisprudence. Common Law is unwritten law of England which is common to the whole of the realm.

Law Merchant

The Law Merchant is the most important source of the Merchantile Law. Law Merchant means those customs and usages which are binding on traders in their dealings with each other. But before a custom can have a binding force of law, it must be shown that such a custom is ancient, general as well as commands universal compliance. In all other cases, a custom has to be proved by the party claiming it

Principle of Equity

Equity is a body of rules, the primary source of which was neither custom nor written law, but the imperative dictates of conscience and which had been set forth and developed in the Courts of Chancery. The procedure of Common Law Courts was very technical and dilatory. Action at Common Law could be commenced by first obtaining a writ or a process. The writs were limited in number and unless a person was able to bring his case within one of those writs, no action could lie at Common Law.

Statute Law

Statute law is that portion of law which is derived from the legislation or enactment of Parliament or the subordinate and delegated legislative bodies. It is now a very important source of Law. A written or statute law overrides unwritten law, i.e., both Common Law and Equity. Some of the important enactments in the domain of Mercantile Law are: The English Partnership Act, 1890, The English Sale of Goods Act, 1893, Bankruptcy Act, 1914, Carriers Act, 1830, The English Companies Act, 1948 etc.

DOCTRINE OF STARE DECISIS

The doctrine of stare decisis means "adhere to the decision and do not unsettle things which are established".

It is a useful doctrine intended to bring about certainty and uniformity in the law.

Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases.

In simple words, the principle means that like cases should be decided alike.

This rule is based on public policy.

Although doctrine should be strictly adhered to by the courts, it is not universally applicable

The doctrine should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice

The underlying principle of a judicial decision, which is only authoritative, is termed as ratio decidendi. The proposition of law which is necessary for the decision or could be extracted from the decision constitutes the ratio. The concrete decision is binding between the parties to it. The abstract ratio decidendi alone has the force of law as regards the world at large. In other words, the authority of a decision as a precedent lies in its ratio decidendi.

Prof. Goodhart says that ratio decidendi is nothing more than the decision based on the material facts of the case.

Where an issue requires to be answered on principles, the principles which are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements is known as ratio decidendi and such principle is not only applicable to that case but to other cases also which are of similar nature.

It is the ratio decidendi or the general principle which has the binding effect as a precedent, and not the obiter dictum. However, the determination or separation of ratio decidendi from obiter dictum is not so easy. It is for the judge to determine the ratio decidendi and to apply it on case to be decided.

OBITER DICTA

The literal meaning of this Latin expression is "said by the way". The expression is used especially to denote those judicial utterances in the course of delivering a judgement which taken by themselves, were not strictly necessary for the decision of the particular issue raised. These statements thus go beyond the requirement of a particular case and have the force of persuasive precedents only. The judges are not bound to follow them although they can take advantage of them. They sometimes help the cause of the reform of law. Obiter Dicta are of different kinds and of varying degree of weight. Some obiter dicta are deliberate expressions of opinion given after consideration on a point clearly brought and argued before the court. It is quite often too difficult for lawyers and courts to see whether

an expression is the ratio of judgement or just a casual opinion by the judge. It is open, no doubt, to other judges to give a decision contrary to such obiter dicta.

EXPLAIN MERCANTILE OR COMMERCIAL LAW

Mercantile Law or Law Merchant or Lex Mercatoria is related to the commercial activities of the people of the society. It is that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions. Mercantile Law is a wide term and embraces all legal principles concerning business transactions. The most important feature of such a business transaction is the existence of a valid agreement, express or implied, between the parties concerned.

Sources of Mercantile Law

The following are the main sources of Mercantile Law:

Law Merchant

Principles of Equity

Common Law

Statute law

Mercantile Law in India

Prior to 1872, mercantile transactions were regulated by the law of the parties to the suit (i.e., Hindu Law, Mohammedan Law etc.). In 1872, the first attempt was made to codify and establish uniform principles of mercantile law when Indian Contract Act, 1872 was enacted. Since then, various Acts have been enacted to regulate transactions regarding partnership, sale of goods, negotiable instruments, etc.

Sources of Indian Mercantile Law

1. English Mercantile Law : The Indian Mercantile Law is mainly an adaptation of English Mercantile Law. However, certain modifications wherever necessary, have been incorporated in it to provide for local customs and usages of trade and to suit Indian conditions. Its dependence on English Mercantile Law is so much that even now in the absence of provisions relating to any matter in the Indian Law, recourse is to be had to the English Mercantile Law.
2. Acts enacted by Indian Legislature or Statute Law: The Acts enacted by the Indian legislature from time to time which are important for the study of Indian Mercantile Law include,

The Indian Contract
Act, 1872,

The Sale of Goods Act,
1930,

The Indian Partnership
Act, 1932,

The Negotiable
Instruments Act, 1881,

The Arbitration and
Conciliation Act, 1996,

The Insurance Act,
1938.

3. **Judicial Decisions:** Judges interpret and explain the statutes. Whenever the law is silent on a point, the judge has to decide the case according to the principles of justice, equity and good conscience. It would be accepted in most systems of law that cases which are identical in their facts, should also be identical in their decisions. That principle ensures justice for the individual claimant and a measure of certainty for the law itself.
4. **Customs and Trade Usages:** Most of the Indian Law has been codified. But even then, it has not altogether done away with customs and usages. Many Indian statutes make specific provisions to the effect that the rules of law laid down in a particular Act are subject to any special custom or usages of trade. It may be noted that the whole law relating to Hundis and the Kachhi and Pakki Adat Systems of Agency is based on custom and usage of trade as recognised and given legal effect to by courts of law in India.

JURISPRUDENCE

The word Jurisprudence is derived from the word 'juris' meaning law and 'prudence' meaning knowledge. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it. Jurisprudence also improves the use of law by drawing upon insights from other fields of study.

In England, 'jurisprudence' came close to mean almost exclusively the analysis of the formal structure of law and its concepts because of the analytical exposition done by Bentham and Austin who were its pioneers.

Howsoever the term jurisprudence is defined; it remains a study relating to law. The word 'law' itself is used to refer more than one thing. Hence one of the first tasks of jurisprudence is to attempt to throw light on the nature of law

Analytical jurisprudence concentrates on abstract theory of law, trying to discover the elements of pure science which will place jurisprudence on the sure foundation of objective factors which will be universally true, not on the shifting sands of individual preference, of particular ethical or sociological views.

Sociological jurisprudence highlights the limitations of pure science of law and says that since the very purpose for the existence of law is to furnish an answer to social problems, some knowledge of these problems is necessary if one seeks to understand the nature of law.

The teleological school of jurisprudence emphasizes that a mere collection of facts concerning social life is of no avail. Law is the product of human reason and is intimately related to the notion of purpose.

According to Salmond in the widest of its applications the term jurisprudence means the science of law, using the word law in that vague and general sense, in which it includes all species of obligatory rules of human action. He said that jurisprudence in this sense can be further divided into three streams: civil jurisprudence, international jurisprudence, and natural jurisprudence.

LEGAL THEORIES

John Austin Theory "Law is the command of sovereign"

John Austin a noted English legal theorist was the first occupant of the chair of Jurisprudence at the University of London. Austin is known for the Command Theory of law. Austin was a positivist, meaning that he concerned himself on what the law was instead of going into its justness or fairness.

Austin differentiated between 'Law properly so called' and 'laws improperly so called' and said that laws properly so called are general commands but not all of it is given by men for men. A specie 'Laws properly so called' are given by political superiors to political inferiors.

According to Austin law is the command of sovereign that is backed by sanction. Austin has propagated that law is a command which imposes a duty and the failure to fulfil the duty is met with sanctions (punishment). Thus Law has three main features:

It is a command

It is given by a
sovereign authority

It has a sanction
behind it

In order to properly appreciate Austin's theory of law, we need to understand his conception of command and sovereign.

Command: It is an expression of wish or desire of an intelligent person, directing another person to do or to forbear from doing some act, and the violation of this wish will be followed by evil consequences on the person so directed. Command requires the presence of two parties- the commander (political superior) and the commanded (political inferior).

Sovereign: In Austin's theory, sovereign is politically superior. He has defined sovereign as an authority that receives habitual obedience from the people but itself does not obey some other authority habitually. According to Austin, the sovereign is the source of all laws.

Sanction: It is the evil consequence that follows on the violation of a command. To identify a law, the magnitude of the sanction is not relevant but the absence of sanction disentitles an expression of the sovereign from being a law in Austinian sense. Sanction should not also be confused with a reward that might be on offer if a given conduct is followed or refrained from. Reward confers a positive right whereas a sanction is a negative consequence.

ROSCOE POUND'S THEORY

Roscoe Pound a distinguished American legal scholar was a leading jurist of 20th century and was one of the biggest proponents of sociological jurisprudence which emphasized taking into account of social facts in making, interpretation and application of laws. Roscoe Pound drew a similarity between the task of a lawyer and an engineer and gave his theory of social engineering. The goal of this theory was to build such a structure of society where the satisfaction of wants of maximum was achieved with the minimum of friction and waste. Such a society according to Roscoe Pound would be an 'efficient' society. Realisation of such a social structure would require balancing of competing interests. Roscoe Pound defined interests as claims or wants or desires which men assert de facto, and about which law must do something, if organised societies are to endure. For any legal order to be successful in structuring an efficient society, there has to be :

A recognition of certain interests- individual, public and social.

A definition of the limits within which such interest will be legally recognized and given effect to.

Securing of those interests within the limits as defined.

According to Roscoe Pound, for determining the scope and the subject matter of the legal system, following five things are required to be done:

Preparation of an inventory of interests and their classification.

Selection of the interests which should be legally recognized.

Demarcation of the limits of securing the interest so selected.

Consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited,

Evolution of the principles of valuation of interests.

Roscoe Pound's classification of interests are as follows:

1. Individual interest: These are claims or demands determined from the standpoint of individual's life and concern. They are-

- (i) **Interest of personality:** This includes physical integrity, freedom of will, honour and reputation, privacy and freedom of conscience.
- (ii) **Interest in domestic relations:** This includes relationships of parents, children, husbands and wives.
- (iii) **Interest of substance:** This includes interests of property, freedom of association, freedom of industry and contract, continuity of employment, inheritance and testamentary succession.

2. Public interest: These interests are asserted by individual from the standpoint of political life. They are:

- (i) **Interests of the state as a juristic person:** It includes integrity, freedom of action and honour of the state's personality, claims of the politically organized society as a corporation to property acquired and held for corporate purposes.
- (ii) Interests of the state as guardian of social interest.

3. Social interests: These are claims or demands thought of in terms of social life and generalized as claims of the social group. It is from the point of view of protecting the general interest of all members of the society. Social interests include-

- (i) Social interest in the general security: This includes general safety, peace and order, general health, security of acquisition and transaction.
- (ii) Social interest in the security of social institutions such as domestic, religious, political and economic institutions.
- (iii) Social interest in general morals like laws dealing with prostitution, gambling, bigamy, drunkenness.
- (iv) Social interest in the conservation of social resources like the natural and human resource. This social interest clashes to some extent with the individual interest in dealing with one's own property as one pleases.
- (v) Social interest in general progress. It has three aspects- economic, political and cultural.
- (vi) Social interest in individual life. It involves self-assertion, opportunity and conditions of life. Society is interested in individual life because individuals are its building blocks.

JOHN WILLIAM SALMOND THEORY

John William Salmond was a law professor in New Zealand who later also served as a judge of the Supreme Court of New Zealand. He made seminal contribution in the field of jurisprudence, law of torts and contracts law. Salmond claimed that the purpose of law was the deliverance of justice to the people and in this sense, he differed from Bentham and Austin who went into the analysis of law as it stood without going into its purpose.

But Salmond also necessitated the presence of the state for implementation of laws just like Bentham and Austin. Salmond differentiated between 'a law' and 'the law' and said that the former refers to the concrete and the latter to the abstract. According to him this distinction demands attention for the reason that the concrete term is not co-extensive with the abstract in its application. In its abstract application we speak of civil law, the law of defamation, criminal law etc. Similarly, we use the phrases law and order, law and justice, courts of law. In its concrete sense, on the other hand, we talk about specific laws like the Indian Penal Code or the Right to Information Act.

According to Salmond law is the body of principles which are recognized and applied by the state in the administration of justice. His other definition said that law consists of a set of rules recognized and acted on in courts of justice. 'Law' in this definition is used in its abstract sense. The constituent elements of which the law is made up are not laws but rules of law or legal principles.

Salmond argued that the administration of justice was the primary task of a state and the laws were made to achieve that objective. Administration of justice was thus antecedent to the laws. Laws thus are secondary, accidental, unessential. Law consists of the pre-established and authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion.

Salmond says that development and maturity of a legal system consists in the progressive substitution of rigid pre-established principles for individual judgment, and to a very large extent these principles grow up spontaneously within the courts themselves.

JEREMY BENTHAM THEORY

Jeremy Bentham was the pioneer of analytical jurisprudence in Britain. According to him 'a law' may be defined as an assemblage of signs, declarative of volition, conceived or adopted by a sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or a class of persons, who in the case in question are or are supposed to be subject to his power. Thus, Bentham's concept of law is an imperative one. Bentham was of the initial contributors on the function that laws should perform in a society. He claimed that nature has placed man under the command of two sovereigns- pain and pleasure. 'Pleasure' in Bentham's theory has a somewhat large signification, including altruistic and obligatory conduct, the 'principle of benevolence'; while his idea of 'interest' was anything promoting pleasure. The function of laws should be to bring about the maximum happiness of each individual for the happiness of each will result in the happiness of all. The justification for having laws is that they are an important means of ensuring happiness of

the members of community generally. Hence, the sovereign power of making laws should be wielded, not to guarantee the selfish desires of individuals, but consciously to secure the common good.

Bentham said that every law may be considered in eight different respects:

Source	
Subjects	
Objects	
Extent	
Aspects	
Force	
Remedial appendage	
Expression	

CHAP 2. CONSTITUTION OF INDIA

PREAMBLE

“We, the people of India, are having solemnly resolved to constitute India in to a sovereign, socialist, secular Democratic Republic.”

The preamble of the constitution of India as stated above indicates the nature of our country. The preamble indicates the source from which the constitution derives its authority and the objects, which the constitution seeks to, establish and promote.

BROAD FRAMEWORK

The Constitution of India has a federal character having broad framework.

A federal constitution is one where there is a division of powers between the Central Government and the state Governments. Where the powers are centralized within the Central Government, it is called a unitary constitution.

The constitution of India came into force on 26th January 1950. The preamble of the Constitution declares that.

“We, the people of India, having solemnly resolved to constitute India into a Sovereign,
Socialist, Secular Democratic Republic and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and opportunity;
And to promote among all
FETERNITY assuring the dignity of the individual and the unity and integrity of the nation.”

Article 1 of the Constitution of India provides that, India, that is Bharat, shall be a Union of states. The States and their territories shall be as specified in the First Schedule, and such other territories as may be acquired.

As per Article 2, the parliament may by law admit into the Union or establish new states on such terms and conditions as it thinks fit

As provided in **Article 3**, the parliament may by law do the following:

Form a new State by separation of territory from any state or by uniting two or more States or parts of states or by uniting any union territory to a part of any state

Increase the area of any state

Diminish the area of any state

Alter the boundaries of any state.

Alter the name of any state

Every such bill for the purpose shall be introduced in either House of the parliament on the recommendation of the president. Where the proposal affects the area, boundaries or name of any state, the bill has to be referred by the President to the Legislature of the state for state for expressing its view thereon within such period as may be specified in the reference or within such further period as may be allowed.

Federal features of the Constitution –

A federal system works when there is Dual Government, and powers are distributed by the Governments. The following are the characteristics of a federal constitution:

The constitution is written one

The powers are distributed between the central and the state Government.

The Constitution has the supremacy power.

There is an independent judiciary system

There is rigid procedure for amendment of the constitution.

All the aforesaid features are present in our constitution. In our country, there are dual Government, i.e. Central Government and the State Governments; powers are distributed with the two sets of governments; the Constitution is

written and has supremacy; there is independent judiciary system and the procedure for amendment of the constitution is rigid.

As Dr. Ambedkar said, the Indian constitution is a federal constitution though some of the provisions empower the Central Government to override the States.

In the famous case *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, and the Supreme Court by majority observed that the Constitution of India is federal in nature. Different high courts have given their observation as whether our Constitution is federal or unitary in nature based on the particular case. However, our federal character of the constitution differs from the federal characteristic features of many other federal Constitutions of the world. The Indian constitution is, therefore, federal in structure having a strong centralizing tendency.

Salient features of the constitution of Indian -

The following are the salient features of the Constitution of India.

- 1) Lengthy:** - the Constitution of India is the most lengthy and detailed constitution in the world.
- 2) Establishment of sovereign, socialistic, secular, democratic republic:** – The constitution establishes a sovereign, socialistic, secular and democratic republic country. The preamble itself states that “we, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular Democratic Republic....”
- 3) Supremacy of people:** – The constitution is established by the people of India and the real power lies in their hands.
- 4) Parliamentary form of Government:** – The constitution is establishes a Parliamentary form of Government with President at the head with a council of ministers headed by the Prime Minister.
- 5) Rigidity:** – There are many provisions in the Constitution which cannot be easily amended, e.g. Election of president, representation of the States in the parliament etc.
- 6) Fundamental rights:** – the constitutions provide certain fundamental rights to the people which cannot be taken away by any law passed by the States.

7) Directive principles: – The Constitution provides some directive principles of State policy which the central as well as the state government shall implement as a moral duty.

8) Adult franchise: – The Constitution provides some certain fundamental rights to all persons who have attained the age of '18 years.

9) Federal nature: – the constitution is federal in nature with powers with the central government and also with the State Government.

10) Independent judiciary: - The constitution provides for an independent judiciary. It can nullify any act, which is against the provisions of the constitution.

11) Fundamental duties: – There are some fundamental duties which every citizen has to follow, e.g. to pay respect to the national flag etc.

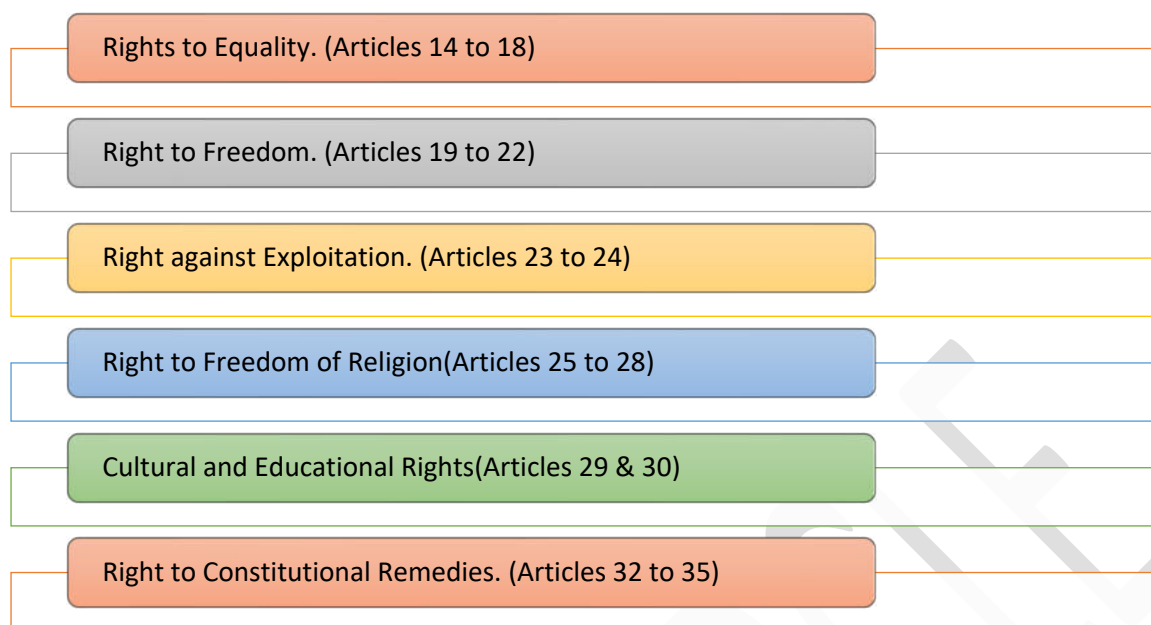
12) Separations of powers: – the powers are separated. The executive power is vested with the president, the judicial power with the Supreme Court and the legislative powers with the legislatures.

13) Rule of law: – the Constitution provides equality of justice to all irrespective of caste, creed, sex, religion etc.

FUNDAMENTAL RIGHTS:

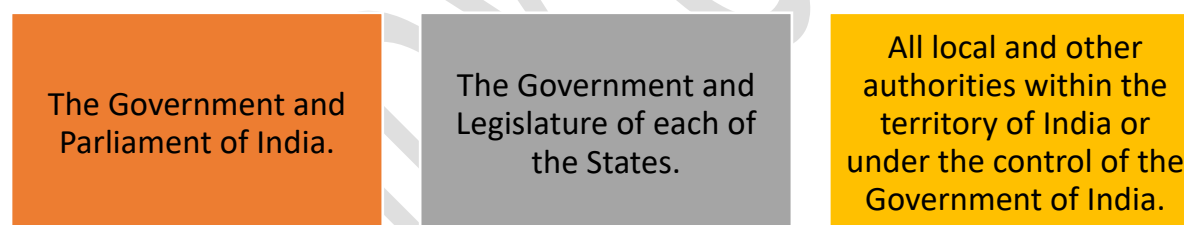
The constitution of India gives certain fundamental rights to the citizens of the country. State the fundamental rights.

The constitution of India gives certain fundamental rights to the citizens of the country. Part III of the Constitution provides such fundamental rights. These are follows:



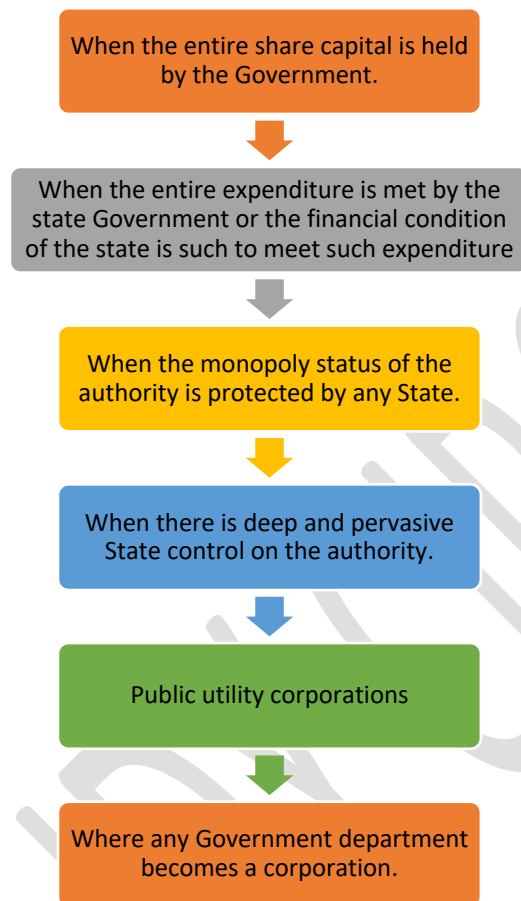
‘State’ with respect to fundamental rights guaranteed under part III of the Constitution of India.

As provided in **Article 12** of the Constitution of India ‘State’ includes the following:



Local authorities mean Municipalities, Panchayats etc. Other authorities refer to any authority created by the Constitution or by any law. Such other authorities may do any Government functions. Other authorities, as held by the supreme court in Electricity Board, Rajasthan v. Mohanlal AIR 1967 SC 1857, means and includes all authorities created by the constitution of statutes on whom powers are conferred by law. In Re: Angur Bala Parui AIR 1999 cal 102 the Kolkata High Court observed that State Electricity Boards are ‘States’ under Articles 12 of the Constitution. In University of Madras v. Shanta Bai AIR 1954 Mad. 67 it was observed that a ‘University’ is ‘State’ under the Constitution of India. In Rashid Ahmed v. M. B. Kairana, AIR 1950 SC 163 a Municipal Board was held to be a local authority, In Sukhdev Singh v. Bhagatram AIR 1975 SC 1331 the Supreme Court held that ONGC, LIC are ‘State’ under Article 12 of the Constitution.

The Supreme Court has in *Ajya hasia v. Khalid Mujib*, AIR 1981 SC 481, laid down certain tests for ascertaining an authority to be considered as State. These are as follows:



THE DOCTRINE OF ECLIPSE

- 1. DOCTRINE OF SEVERABILITY:-** Article 13 of the Constitution of India provides that all laws in force in India before the commencement of the Constitution. The state shall not make any law which takes away or abridges the rights conferred in part III of the Constitution shall be void. There are however, certain situation where it is found that the valid and invalid portion in any law in accordance with the aforesaid Article are so mixed up that they cannot be separated from one another. In such case, the validity of some provisions of the law or a portion of the law must result in the invalidity of the entire law. This is called the doctrine of severability.

- 2. DOCTRINE OF ECLIPSE:** - Article 13 of the constitution of India provides that all laws in force in India before the commencement of the Constitution shall be void in so far they are inconsistent with the provisions of the constitution. Any law existing before the commencement of the constitution. But the law does not become dead. It is overshadowed by the fundamental rights. The law remains a valid law in order to determine any question of law incurred before commencement of the Constitution. An existing law only becomes eclipsed to the extent it comes under the shadow of the fundamental rights.
- 3. DOCTRINE OF WAIVER:** - waiver means a document that records the waiving of a legal right. Article 14 of the Constitution of India provides that the fundamental rights cannot be waived by any person. The Supreme Court shall see that the fundamental rights are enforced even if anyone might have waived it. In *Bhadeshwar Nath v. I. T. Commissioner*, the question of waiver of the fundamental rights has been discussed and it was held that the fundamental rights cannot be waived. The doctrine of waiver is not applicable to suppress the fundamental rights.
- 4. DOCTRINE OF STARE DECISIS:-**The doctrine of stare decisis means that judicial decisions have a binding force for the future. Articles 141 of the Constitution provide that the decisions of the Supreme Court shall be binding on all courts within the territory of India. All the courts are bound to follow the decisions of the Supreme Court. The Supreme Court is not however bound by its own decisions. It can reconsider its own decisions. The Supreme Court strikes a balance between the doctrine of stare decisis and the doctrine of prospective overruling with a view to prevent unpleasant situations and to meet the changing scenario.
- 5. DOCTRINE OF EMINENT DOMAIN:-**The doctrine of eminent domain means the power of the sovereign authority of the state to take private property for public use without consent of the owner. The Constitution of India permits acquisition of property by States in public interest. However, as per Article 300A, no person can be deprived of his property simply by execution of an order. It should be backed by a law. The doctrine of domain cannot be enforced unless there is any law for acquisition of property by the Government. Land Acquisition Acts have been passed by the states under which the state Governments acquire private property for public interest.

6. DOCTRINE OF PLEASURE: - the doctrine of pleasure means holding any position in the service of the nation at the pleasure of the head of the state. In Britain the servant of the Crown holds office during the pleasures of the crown. In India, the Constitution provides that the defense personals and the civil servants shall hold office at the pleasures of the president. Civil servants in a state hold office at the pleasures of the Governor of the State. The doctrine of pleasure is based on public policy, public interest or public good. The rule of pleasure under Article 310 cannot however be exercised in a discriminatory manner.

7. DOCTRINE OF PITH AND SUBSTANCE: - 'pith' means a substance in the stem of a plant and 'substance' means an important and essential part of something. The term is used in law to ascertain the essential part of the law which the legislatures mean the most important in framing the law. While, making any law in any matter contained in list II or III, the legislatures may slightly encroach other list. If challenged, the court will apply the doctrine of pith and substance of the law and determine the validity of the law. The Court will apply the doctrine of pith and substance of the law and determine the validity of the law.

RIGHT OF EQUALITY(Articles 14-18)

Right of equality provided to all the citizens of India under the Constitution.

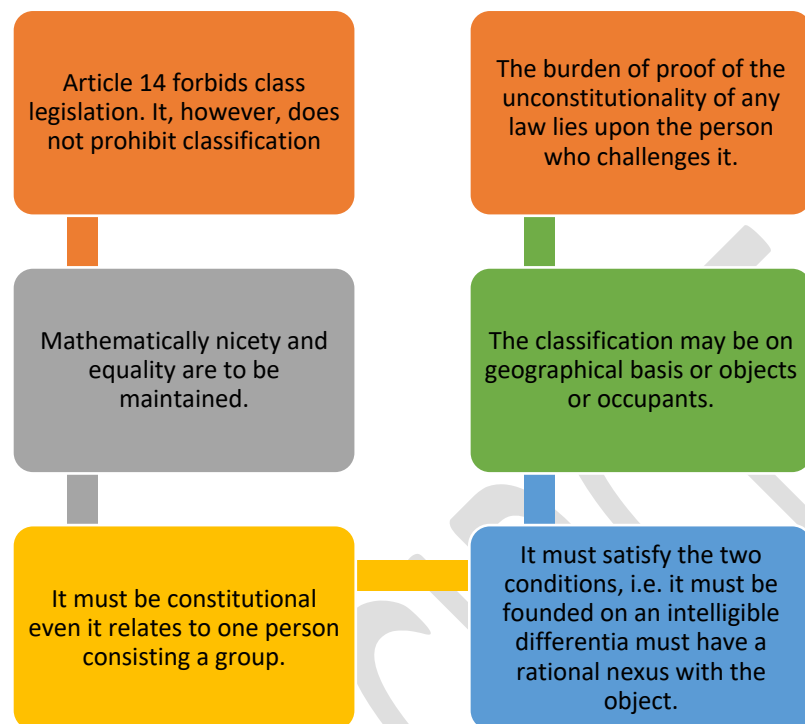
Article 14: Equality before law –

the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India. This article provides for equality of all citizens before law. This does not mean equality before one law. Legislative classification may be made on the basis of certain principles like, geographical location or object or occupations etc. such classification may be made on the principles laid down in state of west Bengal v. Anwar Ali, AIR 1952 SC 75 as stated below:

It must be founded on an intelligible differentia

The differentia must have a rational nexus with the object.

The rules for permissible classification are summarized in *Ram Kishan Dalmiya v. Justice Tendulkar*, AIR 1956 SC 538 as follows:



The principle of classification was applied in *R. K. Garg v. Union of India*, AIR 1976 SC 1559 (Special Bearer Bond case)

The principles of 'equality before law' and 'equal protection of the laws' under the constitution of India -

The principle of 'equality before law' and equal protection of the laws' seem to be same thing but these two conceptions are not identical in meaning. Equality before law is a native concept which implies absence of any special privilege in favour of any person. Equal protection before the laws is a positive concept which implies equal treatment in equal circumstances. The rule is that like should be treated alike and that unlike should be treated differently.

Article 14 of the Constitution of India provides that the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India. However, reasonable classification may be made within the framework of the constitution. Legislative classification may be made on the basis of certain principles like, geographical location or object or occupations etc. such classification must satisfy two basis conditions.

It must be based on intelligible differentia which distinguishes a group of persons from others.

The differentia must have a rational relation to the object sought by the statute.

Reasonable classification can be made on geographical basis, on historical considerations, on the basis of nature and position of persons, nature of business done etc.

Exceptions to the rule of 'equality before law'

The following exceptions are provided in the constitution to the rule of 'equality before law':

The president or the governors shall not be answerable to any court for exercise of their official duties and powers

No criminal proceeding can be initiated against the president or governors during their term in office.

No process of arrest shall be issued by any court against the president or governors.

No civil proceedings can be instituted claiming relief against the president or governors for any act done in his personal capacity during certain period.

Article 15: No discrimination on the basis of religion, race, and caste etc –

The State shall not discriminate against any citizens shall, on grounds only of religion, race, caste, sex, place of birth or any of them no citizens shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to the following:

Access to shops, public restaurants, hotels and places of public entertainment

The wells, tanks, bathing Ghats, roads and places of public resorts maintained wholly or partly out of State funds or dedicated to the use of general public.

The states may make any special provision for women and children or for the advancement of any socially and educationally backward classes of citizen or for schedule caste or Schedule Tribes.

Place of birth and residence do not imply the same meaning. As held by the Supreme Court in D.P. Joshi v. State of M. P. AIR 1955, Discrimination on the basis of residence does not violate Article 15.

Article 16: Equal opportunity in employment

There shall be equality of opportunity for all citizens in the matter relating to employment or appointment to any office under the state.

The state may make provisions for reservation of appointments or posts in favour of citizens which, in the opinion of the state, is not adequately represented in the service under the state.

No citizens shall on the grounds of religion, race, caste, sex, Descent, place of birth, residence or any of them, be ineligible for or discriminated against any employment or office under the state.

Exceptions:— the parliament may make any law prescribing, in regard to a class or classes or employment or appointment to an office under the government, local body within a state or union Territory, any requirement as to residence within the state or union territory prior to such employment or appointment.

The state may make provisions in the matter of promotion, with consequential seniority, to any class or classes of posts in the services under the state in favour of schedule Castes or Schedule tribes, which in the opinion of the state, is not adequately represented in the service under the state

The state may fill any unfilled vacancies of a year which are reserved for any

category to be filled in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies in that year

Nothing in the Article shall affect the operation of any law which provides that the incumbent of an office of any religious institution or shall be a person professing a particular denomination.

Amenability of the fundamental rights.

Article 368 of the Constitution, Parliament to amend the constitution. It says that not with standing anything in the constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provisions of the Constitution in accordance with the procedure laid down in this Article.'

Earlier it was observed that no part of the constitution was unamendable and parliament may amend any provisions in accordance with Article 368. But in Golak Nath's case the Supreme Court held that no authority including Parliament exercising the amending power under Article 368, was competent to amend the Fundamental Right provided in the Constitution.

Article 368 was amended by the 24th Amendment Act, 1971 making it clear that Fundamental Rights can be amended. The majority decision in Kesavananda Bharti's case upheld that the Parliament is competent to amend the Fundamental Rights.

Preferential treatment to certain persons belonging to backward classes in the form of reservation in education and jobs as provided in articles 15(4) and 16(4) of the Constitution of India.

The preamble of the constitution declares that-

'We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, Secular Democratic Republic and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and opportunity;

And to promote among all

FRATENITY assuring the dignity of the individual and the unity and integrity of the Nation."

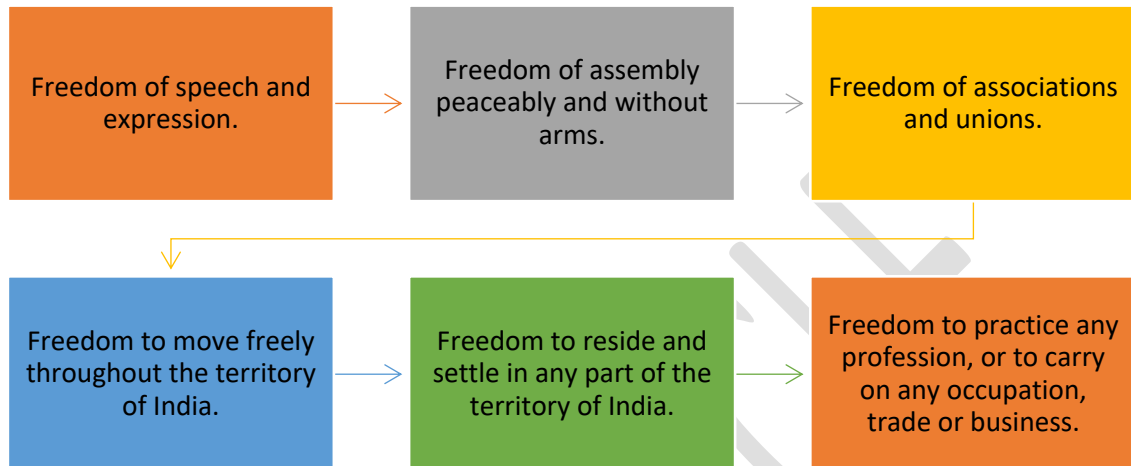
Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 16 of the Constitution India provides that the State Government may make provisions for reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

RIGHT TO FREEDOM

Freedoms guaranteed by the Constitution under article 19.

Article 19 of the Constitution of India guaranteed by the citizens the following six freedoms:



Restrictions. – These freedoms are not absolute and are subject to reasonable restrictions. The state has the power, to make laws imposing reasonable restrictions on the exercise of the above rights in the interests of the following:

- a) The sovereignty and integrity of India.
- b) The security of the state.
- c) Friendly relations with foreign States.
- d) Public order.
- e) Decency or morality.
- f) Contempt of court.
- g) Defamation.
- h) Incitement to an offence
- i) Prescribing professional and technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business.
- j) Carrying on by the state or by a corporation owned or controlled by the State of any trade, business, industry, service.

The freedom of speech and expression guaranteed by the constitution of India is not absolute.

Article 19(1) (a) of the state may make law imposing reasonable restrictions on the exercise of this right in the interest of the sovereignty and integrity of India, the security of the State, friendly relation with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Freedom of speech shall, however, not be used as a license to distort and misrepresent orders of courts and incomplete and one-sided picture tending to scandalize court and subject it to ridicule. [Narmada Bachao Andolan v. Union of India (1999) 8SCC 150.]

Freedom of speech and expression which includes a fair criticism of law and executive action could not be infringed on the ground of remote or speculative ground. [Baldev Singh v. state (2002) 3 SCC 667]

Freedom of speech including freedom of press is not absolute and unlimited. It is subject to restrictions contained in Article 19(2). (AIR 1986 SC 872)

The state can restrict the fundamental right to follow any profession.

Article 19(1) (g) of the Constitution of India provides that every citizen of India shall have the right to practice any profession, or to carry on any occupation, trade or business.

The fundamental rights given to a citizen are not uncontrollable. As provided in **Article 19(6)**, reasonable restrictions may be imposed in the interest of the public. The state may by making law impose reasonable restriction on the exercise of the rights conferred by the aforesaid section. Such law may be made relating to the following.

The profession or technical qualification necessary for practicing any profession or carrying on any occupation, trade or business

The carrying on by the state or by a corporation owned or controlled, trade or business.

1) EX POST FACTO LAWS: –

Article 20(1) of the constitution provides that no person shall be convicted of any offence except for violation of any law. No person shall be subject to a penalty greater than that has been inflicted under the law for the time being in force at the time of commission of the offence. A person can only be convicted on the basis of any law in force at the time of commission of the offence. No act can be changed into an offence with retrospective effect. No person can be given penalty greater than that have been inflicted under the law for the time being in force at the time of commission of the offence. Enhanced punishment subsequently inserted in the act for any offence cannot be applied to an offence committed before insertion of the enhanced punishment.

2) DOUBLE JEOPARDY: -

double jeopardy means punishment for more than once for the same offence **Article 20(2)** of the constitution provides that no person shall be prosecuted and punished for the same offence more than once. This is based on the maxim 'nemo debet bis vexari' which means that a man shall not be penalized for the same offence for more than once.

3) PROHIBITION AGAINST SELF-INCRIMINATION:-

Article 20(3) of the Constitution provides that no person accused of any offence shall be compelled to be witness against himself.

“No person shall be deprived of his life or personal liberty except according to the procedure established in law.”

Article 21: protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to the procedure established in law. Life means, as observed by the Supreme Court, 'the right to live with human dignity and the same does not cannot continued drudgery. Personal liberty does not mean merely the liberty of the body but more than that.

Article 21 protects the life and personal liberty of a person. Every person has the right to his life and personal liberty. No one can deprive him from enjoying such right. Even the State is obliged to protect the life and personal liberty of non citizens as observed in National Human Rights Commission v. State of Arunachal Pradesh(1996)1 SCC 742. Right to water is also right to life as observed in State of Karnataka v. State of A. P. (2000) 9 SCC 572.

The expression personal liberty is of the widest amplitude and cannot be restricted as observed in *Narinderjit v. Union of India*, (2002) 2SCC 210. Deprivation of life or personal liberty must be according to procedure, just, fair, reasonable and pragmatic. (*Ahmadabad Municipal Corp. V. Nawab Khan Gulab Khan*, AIR 1997 SC 152).

Procedure established by law' in Article 21 of the Constitution of India.

As provided in Article 21, no person shall be deprived of his life or personal liberty except according to the procedure established in law. Procedure established by law must be right, just, fair, reasonable, realistic and not arbitrary, fanciful or oppressive. It must follow the principle of natural justice. In *A. K. Gopalan v. State of Madras*, it was held that there must be a law and a procedure and the executive should follow the procedure to deprive a person of his personal liberty.

Executive should follow the procedure to deprive a person of his personal liberty. It extends to both substantive and procedural law.

In *Maneka Gandhi v. Union of India*, it was observed that a law prescribing a procedure for depriving a person of personal liberty has to meet the requirements of Article 14 and 19.

The State shall provide free and compulsory education to all children of the age of six to fourteen years.

Article 21A –

Right to education – the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may by law determine. This article was inserted by the eighty-sixth amendments to the Constitution in 2002. Before this, the constitution provided as a directive principle to provide compulsory education for all children up to the age of 14 years.

After announcement of the National Policy on education in 1986, the task of providing free and compulsory education to all children came to light. After long deliberation, the amendment came to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state might by law determine.

Protections available under the constitution against arrest and detention.

Safeguards in a law providing for preventive detention

Article 22: Protection against arrest and detention in certain cases:

1. No person who is arrested shall be detained without being informed, as soon as may be, of the grounds for such arrest. He shall not be denied the right to consult, and to be defended by a legal practitioner of his choice.
2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest to the court.
3. The aforesaid provisions shall not apply to
 - a) Any person who for the time being is an enemy alien; or
 - b) Any person who is arrested or detained under any law providing for preventive detention.
4. No preventive detention law shall authorize detention of a person for a longer period than three months unless-
 - a) An advisory board consisting of persons who are, or have been, or are qualified to be appointed as judges of a high court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.
 - b) Such person is detained in accordance with the provisions of any law made by the parliament.
5. Where any person is detained in pursuance to an order made under any law providing for preventive detention, the authority making the order, soon communicate to such person the grounds on which such order has been made and afford him the earliest opportunity for making a representation against the order.
6. The authority may not disclose the ground to the person if it is in their opinion against the public interest.
7. The parliament may make law prescribing the circumstances under which a person may be detained for a period longer than three months under any law providing for preventing detention without obtaining the opinion of the advisory Board.
8. The parliament may make law prescribing the maximum period for which any person may be detained.
9. The parliament may make law prescribing the procedure which Advisory Board shall follow.

A foreign national applied for permission to establish an industry for manufacturing shoes in Delhi. The permission was refused by the competent authority. The foreign national filed a writ petition challenging the order of

refusal on the ground that in India persons are guaranteed fundamental freedom of trade.

Article 19(1) of the Constitution of India provides that every citizens of India shall have the right to practice any profession, or to carry on any occupation, trade or business. The state may also impose reasonable restrictions in giving this guarantee in the interest of the public. The fundamental rights are not guarantee to the interest of the public. The fundamental rights are not guaranteed to any person who is not a citizen of India. In the given problem, a foreign national applied for permission to do business and denied by the authorities. He cannot challenge this as interference in his fundamental rights as he is not a citizen of India. His contention will therefore not succeed.

5. RIGHT AGAINST EXPLOITATION

Right against exploitation as guaranteed under the Constitution of India.

Article 23 – Prohibition of traffic in human beings and forced labour.

Traffic in human beings and other similar forms of forced labor are prohibited. Any contravention of this provision shall be an offence punishable in accordance with law.

The state may impose compulsory service for public purpose. In imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24 – Prohibition of employment of children in factories etc – No child below the age of fourteen years shall be employed to work in any factory or mine engaged in any other hazardous employment. Various laws like the Factories act, 1948, The Employment of children act, 1938, the child labour (Prohibition and Regulation) Act, 1986 are some of the legislation which protect employment of child labour.

RIGHT TO FREEDOM OF RELIGION

The constitution of India guarantees freedom of religion to every citizen.

Article 25- Freedom of conscience and free profession, practice and propagation of religion.-

Subject to public order, morality and health and other provisions, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

Nothing in this Article shall affect the operation of any existing law or prevent the state from making any law-

Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice

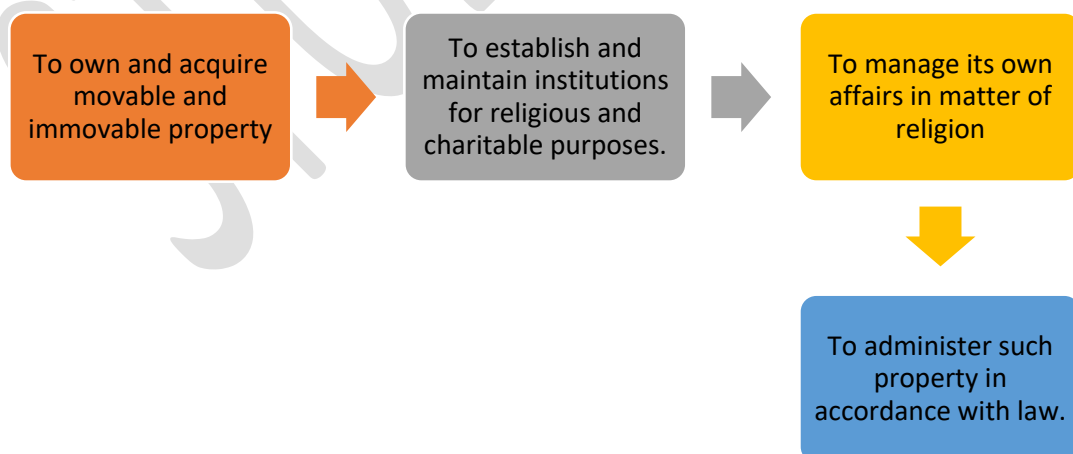
Providing for social welfare and reform or the throwing open Hindu religious institutions of a public character to all classes and sections of Hindus

The wearing of kirpans shall be deemed to be included in the profession of the Sikh religion.

The reference to Hindu shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

This Article applies to all persons in the country in addition to the Citizens of the country as observed in *Ratilal v. State of Bombay*, 1954 SCR 105.

Article 26– Freedom to manage religious affairs – Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to the following:



Article 27 – freedom as to payment of taxes for promotion of any particular religion

– No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28 – freedom as to attendance in religious instruction or religious worship in certain institutions.

No religious instruction shall be provided in any educational institution wholly maintained out of state funds.

This shall not apply to an educational institution which is administered by the state but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

No person attending any educational institution recognized by the State or receiving aid out of state funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

CULTURAL AND EDUCATIONAL RIGHTS

The Constitution provides for interest of minorities.

Article 29 – Protection of interest of minorities

A section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same

No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of State funds on the grounds only of religion, race, caste, language or any of them.

Article 30 - Right to minorities to establish and administer education institution.

All minorities, whether based on religion or language, shall have the right to establish and administer educational institution of their choice.

In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

In DAV College v. State of Punjab, AIR 1971 SC 1737 the Supreme Court held that any community having less than 50% of population of the State in a State is the minority in that State.

RIGHT TO CONSTITUTIONAL REMEDIES.

'Ubi jus ibi remedium.'

'Ubi jus ibi remedium.' This Latin expression means where a right there is a remedy is. A right without a remedy is useless. The fundamental rights guaranteed by the constitution are protected by adequate remedial measures. The constitution of India provides such remedial measures to all citizens of violation of any fundamental rights. Such remedies are available in the nature of-

Habeas corpus

Prohibition

Certiorari

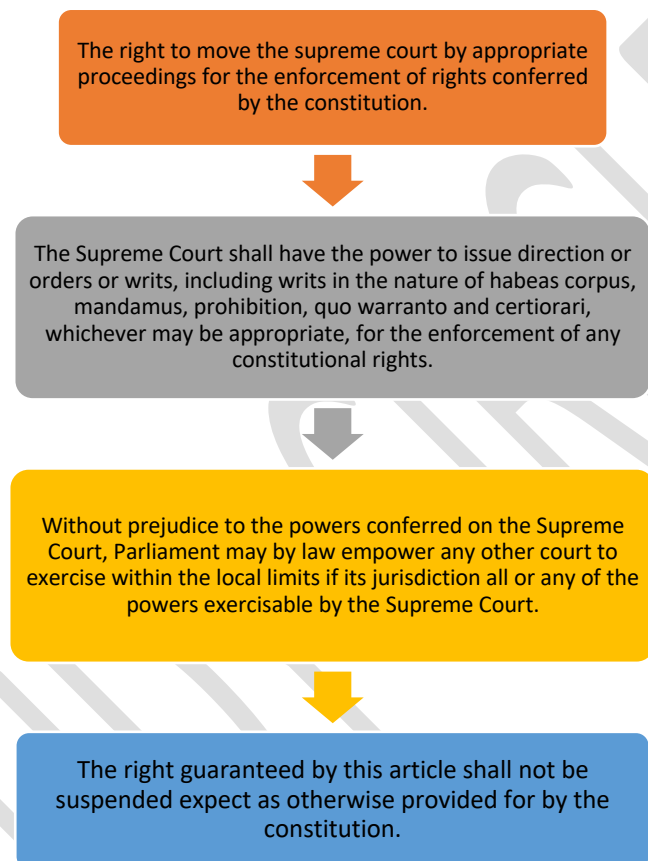
Mandamus

Quo warrantor

Article 32- of the constitution gives such fundamental rights to a citizen to move to Supreme Court

Article 226- provides such rights to move to the high court for any violation of fundamentals rights

Article 32 – remedies for enforcement of rights.



Article 33, 34 and 35 give supplementary right for enforcement of the fundamental rights.

Article 15: No discrimination on the basis of religion, race, and caste etc –

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

Access to shops, public restaurants, hotels and places of public entertainment

The wells, tanks, bathing Ghats, roads and places of public resorts maintained wholly or partly out of State funds or dedicated to the use of general public. The fundamental rights guaranteed by the Constitution are protected by adequate remedial measures. The Constitution of India provides such remedial measures to all citizens for violation of any fundamental rights.

Such remedies are available in the nature of writs of-

- a) Habeas corpus
- b) Mandamus
- c) Prohibition
- d) Quo warranto
- e) Certiorari

Article 32 of the Constitution gives such fundamental rights to a citizen to move to Supreme Court and **Article 226** provides such right to move to the High Court for any violation of fundamental rights.

Akshay may move to the High Court seeking redressal by means of writ.

DIRECTIVE PRINCIPLES

‘Directive Principles’ provided in the Constitution of India

Articles 38 to 51 of the Constitution deal with the Directive Principles of State Policy. **Articles 38:** State to secure social order for the promotion of the welfare of the people.

The state shall strive to promote the welfare of the people by securing and protecting as effective as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

The State shall strive to minimize the inequalities in income, and Endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups residing in different areas or engaged in different vocations.

Article 39: Certain principles of policy to be followed by the state – The state shall direct its policy towards securing following:

That the citizen, men and women equally, shall have the right to an adequate means of livelihood

That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good

That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment

That there is equal pay for equal work for both men and women

That the health and strength of workers, men and women, and the tender age of children are not abused and that citizen are not forced by economic necessity to enter avocations unsuited to their age and strength

That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A: Equal Justice And Free Legal Aid – The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunity for securing justice are not defined to any citizen by reason of economic or other disabilities.

Article 40: Organization of Village Panchayats – the states shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Article 41: Right To Work, Education And Public Assistance – The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42: Provisions for Just and Human Condition of Work and Maternity Relief – The state shall make provision for securing just and human conditions of work and for maternity relief.

Article 43: Living Wage etc For Worker – The State shall Endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, condition of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and also shall Endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Article 43A: Participation of Workers in Management of Industries – The State shall make steps by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishment or other organization engaged in any industries.

Article 44: Uniform Civil Code for Citizen – The State shall Endeavour to secure for the citizens uniform civil code throughout the territory of India.

Article 45: Provisions for Early Childhood Care and Education to Children below the Age of Six Years - The State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 46: Promotion Of Educational And Economic Interests Of Schedule Caste, Schedule Tribes And Other Weaker Section - The state shall promote with special care the educational and economic interests of the weaker section of the people and in particular Schedule Castes and the Schedule Tribes and shall protect them from social injustice and all forms of exploitation.

Article 47: To raise the level of nutrition and the standard of living and improve public health - The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and shall Endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Article 48: Organization of agricultural and animal husbandry – the State shall Endeavour to organize agricultural and animal husbandry on modern and scientific lines and shall take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

Article 48A: Protection and Improvement of Environment and Safeguarding of Forest and Wild Life - The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 49: Protection Of Monuments And Places And Objects Of National Interest – it shall be the obligation of the State protects every monument and place or object of artistic or historic interest declared by or under the law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or extort, as the case may be.

Article 50 – Separation Of Judiciary From Executive- The state shall take steps to separate the judiciary from the executive in the public services of the state.

Article 51 – Promotion of International Peace and Security– the State shall Endeavour to-



‘Fundamental Rights’ And ‘Directive Principles Of state policy’

The constitution provides of two types of fundamental rights. One which can be enforced in courts of law and the other which cannot be enforced in the courts of law. The former is called the Fundamental Rights whereas the later is called the directive principles. The directive principles are more do differ from the fundamental rights in many respects.

Some of them are given below:

The directive principles are not enforceable in courts.

The directives do not create any right in favour of the citizens

The directive principles are implemented by legislation.

No law can be declared void on the ground that it violates the directive principles.

The courts cannot compel the government to make law for directive principles.

The directives are to be complemented subject to the Constitution

The directive principles are wider in many cases than fundamental rights.

There may be conflict between directive principles and fundamental rights.

The directive principles cannot override the fundamental rights. In *State of Madras v. Champakran*, AIR 1951 SC 226, the Supreme Court observed that ‘The directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.’

FUNDAMENTAL DUTIES

Fundamental duties as indicated in the Constitution of India.

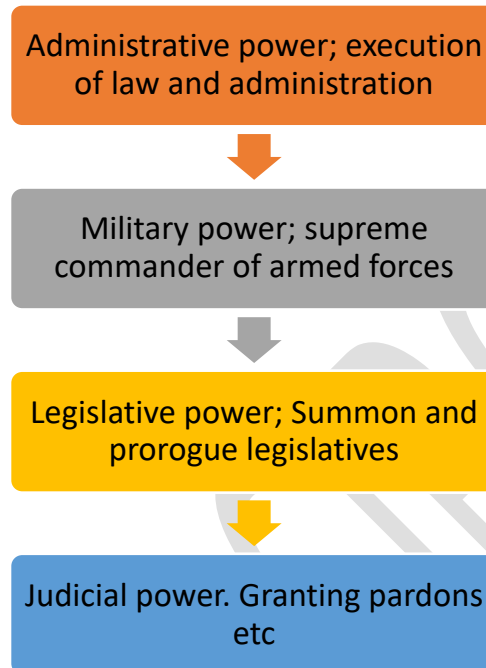
Article 51A of the Constitution provides that every citizen of India shall follow the following duties:

- a) To abide by the constitution and respect its ideals and institutions, the National flag and the national Anthem;
- b) To cherish and follow the noble ideals which inspired our national struggle for freedom.
- c) To uphold and protect the sovereignty, unity and integrity of India.
- d) To defend the country and render national service when called upon to do so
- e) To promote harmony and spirit of common brotherhood amongst the people of India transcending religious, linguistic and regional or sectional diversities renounce practices derogatory to the dignity of women.
- f) To value and preserve the rich heritage of our composite culture.
- g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have the compassion for living creatures.
- h) To develop the scientific temper, humanism and the spirit of inquiry and reform.
- i) To safeguard public property and to abjure violence.
- j) To strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of Endeavour and achievement.
- k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

ORDINANCE MAKING POWERS OF THE PRESIDENT.

Constitutional power of the President of India

Article 53 provides that the executive power of the Union shall vest on the President. Such power generally covers the following executive actions:



Article 123 provides that if at any time, except when both the houses of parliament are in session, the President is satisfied that circumstances appear to him to require.

An ordinance so promulgated shall have the same force and effects as an act of parliament.

Every such Ordinance-

Shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of parliament, or if before the expiration of that period resolution disapproving it are passed by both Houses, upon the passing of the second of the resolutions

May be withdrawn at any time by the President.
When both the houses are summoned to reassemble on different dates, the period of six week shall be reckoned from the later of those dates for this purpose. If an Ordinance makes any provision which Parliament would not under the Constitution be competent

ORDINANCE MAKING POWERS OF THE GOVERNORS.

The executive powers of a State are vested on the Governor of the State and are carried in his name. The Governors enjoy the executive, legislative and judicial powers like the President but the Governors have no military power. Article 213 provides specific power to the Governors to promulgate Ordinance under the following circumstances:

- 1) If at any time, when the Legislative assembly of a State is not in session, or where there is a Legislative Council in a State, when both Houses of the legislature are not in session, the governor is satisfied that circumstances exist which render it necessary for him to take necessary action, he may promulgate such Ordinance as the circumstances appear to him to require.
- 2) Such an ordinance shall have the same force and effects as an Act of the Legislature of the State assented to by the Governor.
- 3) Every such Ordinance shall be laid before the legislative Assembly of the State, or where there is a legislative Council in the State, before both the House, and shall cease to operate before expiration of six weeks from the reassembly of the legislature, or if before expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council.
- 4) Every such Ordinance may be withdrawn at any time by the Governor.
- 5) When both the houses of Legislature of a State are summoned to reassemble on different dates, the period of six week shall be reckoned from the later of those dates for this purpose.
- 6) If and so far as an Ordinance makes provisions, which would not be valid if enacted in an Act of the legislature of the state, assented to by the Governor, it shall be avoid.

Limitation of the powers: The Governor shall not, without instruction from the President, promulgate any Ordinance in the following cases:

- a) If a bill containing the same provisions would under the constitution have required the previous sanction of the President for the introduction thereof into the legislature.

b) If he would have deemed it necessary to reserve a bill containing the same provisions for consideration of the President.

c) If an Act of the Legislature of the State containing the same provisions would under the constitution have been invalid unless, having been reserved for the consideration of the President.

LEGISLATIVE POWERS OF THE UNION AND STATES.

The constitution of India provides for distinct legislative powers for the Central and State Governments.

1) The Constitution of India has a federal character. The Central Government is at the union level and various State Governments function in the State level. The federal principle of the Constitution coordinates the functions of these two Governments.

2) The parliament is at the Center and the State Legislature is at the State level. The Parliament can make laws for the whole country or any part thereof or even laws applicable to territories out of India. The state Legislatures can make rules for their respective States. The unions Territories are directly governed by the Central Government.

3) Distribution of powers between the Union and the States are demarcated in the Constitution. There are three lists contained in the VII Schedule to the Constitution.

List I, called the Union List II, called the State list, and list III, called the Concurrent list. Subjects, which are of national importance, are contained in the Union list. For example defense, railway, shipping, post and telecommunication, Currency, atomic energy, UNO matter, War and peace, etc. The subjects which generally relates to a particular State are included in the State List. For example. Public order, police, prisons, local government, public health, agriculture, fisheries etc. certain matters which are related to the States as well as to the whole country are contained in the Concurrent List. For example, Criminal law, civil procedure, forest, adulteration food, education, stamp duties etc.

4) There are few subjects which also appear in two lists. For example matters relating to tax, 'fees' relating to 'offences against laws with respect to any of the matters'.

- 5) The parliament has the exclusive power to make laws on the subjects enumerated in the Union list.
- 6) If for any mistake any subject is found to be included in the union and also the State List, the Union can make on those subject.
- 7) The state Legislature has the power to make laws on the subjects mentioned in the State list.
- 8) For any matter contained in the Concurrent list both the Parliament and the State can make laws on the subjects. However, if there is any controversy in the laws made by the Parliament and the State on any subject contained in the Concurrent list, and then the laws made by the parliament shall prevail. If any law already exists on any subject contained in the Concurrent List, then the laws made by the parliament shall prevail. If any law already exists on any subject than the State can do so if the law is reserved for the consideration of the President and got his assistant. In such case the State law shall prevail in the said State.
- 9) The parliament may at any time by making law override such State law.
- 10) If any subject is not stated in any of the Lists, the parliament has the exclusive power to make law on such subject.

Central Government Makes Laws On The State List

The parliament has power to make laws on any subject in the State List under the following situation:

- a) **In nation interest –(Article 249)** If the council of State has declared by resolution supported by not less than two third of the members present and voting that it is necessary or expedient in the national interest that the Parliament shall make laws with respect to any matter enumerated in the State list, the Parliament can make such laws with respect to that matter while the resolution remains in force. Such resolution shall remain in force for a period not exceeding one year as stated in the resolution.
- b) **During emergency –(Article 250)** The parliament may make laws in respect of any matter in the State list either for whole or part of the territory of India while a proclamation of emergency is in operation.
- c) **By consent of States –(Article 252)** if two or more States pass resolutions for any matter effecting the States and which is in the State list and the Parliament has no power to make laws on such subject, the parliament may make laws on such subject regulating the matter accordingly.

d) **For international agreement – (Article 253)** the Parliament can make laws for any matter for whole or part of the territory of India for implementing any treaty, agreement or convention with any other country or any decision made by international conference, association or other country or any decision made by international conference, association or other bodies.

IMPORTANT SHORT NOTES

- 1) **PITH AND SUBSTANCE RULE:** - In a federal system a subject in one list may touch another List and are so closely bind that no clear interpretation can be understood. In such cases the law as a whole with its objects and effects are considered to find out the competent legislature to make the law. The basic object to be seen is called the pitch and substance of the law. The rule of pitch and substance means that where any law enacted by any legislature with competent power to legislate touches any other law shall not become invalid because of such touching. The essential part of the law shall be studied. The Supreme Court in *G. Chawla v. state of Rajasthan* upheld such rule.
- 2) **COLOURABLE LEGISLATION:** - colorable legislation refers to a legislation that gives a colour of constitutional validity to any law made by legislatures but actually the legislatures could not do that. A simple example to illustrate the doctrine can be better understood from the following fact. The Bihar Government passed the Bihar land reforms Act, 1950 which provides that the full unpaid rents shall be collected by the State and half of the rent so collected be refunded to the landlords for acquisition of the unpaid rents shall be collected by the State and half of the rent so collected be refunded to the landlords for acquisition of the unpaid rents. The State list under which the law was passed provides that no property shall be acquired without payment of compensation. The Supreme Court in *Kameshwa Singh v. State of Bihar*, AIR 1952 SC observed that the aforesaid act was a colorable legislation because returning half of the amount dose not amount to compensation.
- 3) **HARMONIOUS CONSTRUCTION:** - where any subject appears in two Lists, the two retries should be interpreted in suitable manner to avoid any conflict between the two. The scope and meaning of one subject be restricted to get clear interpretation. The object of the makers of the Constitution is not to create any conflict. So, the manner in which such clear conclusion can be arrived at may be called harmonious construction.

- 4) **PLENARY POWERS:** - When a legislative power is given with respect to any subject, the legislatures have the power to make laws on such subject and also any matter incidental to such subject. This is called giving plenary of powers. For example, when a power is given on tax matter, the legislatures have the power to make law for imposition of tax, refund of tax, and also not to impose and collect tax.

There are certain exceptional circumstances as given below when the sharing of the powers is suspended or the powers of the Union are extended over the State subjects.

- 1) **NATIONAL INTEREST:** - The Parliament shall have the power to make laws including State list if the Council of Ministers declares by two third majorities of the members present and voting that the Parliament shall have the power to legislate over such matter in the national interest.
- 2) **EMERGENCY:** - during emergency the parliament shall have the power to make laws with respect to any matter in the State List.
- 3) **AGREEMENT BETWEEN STATES:** - When legislators of two or more States resolve that the Parliament shall make laws in any matter relating to those States, the Parliament shall have the power to make such laws.
- 4) **IMPLEMENTATION OF TREATIES:** - The Parliament shall have the power to make law for any subject for implementing any treaties or international agreements or conventions.

Concurrent List includes subjects over which both the union and the States shall have power of legislation. This list includes Criminal law and procedure, Civil laws, Marriage contract, torts, insurance, Economic and social planning etc.

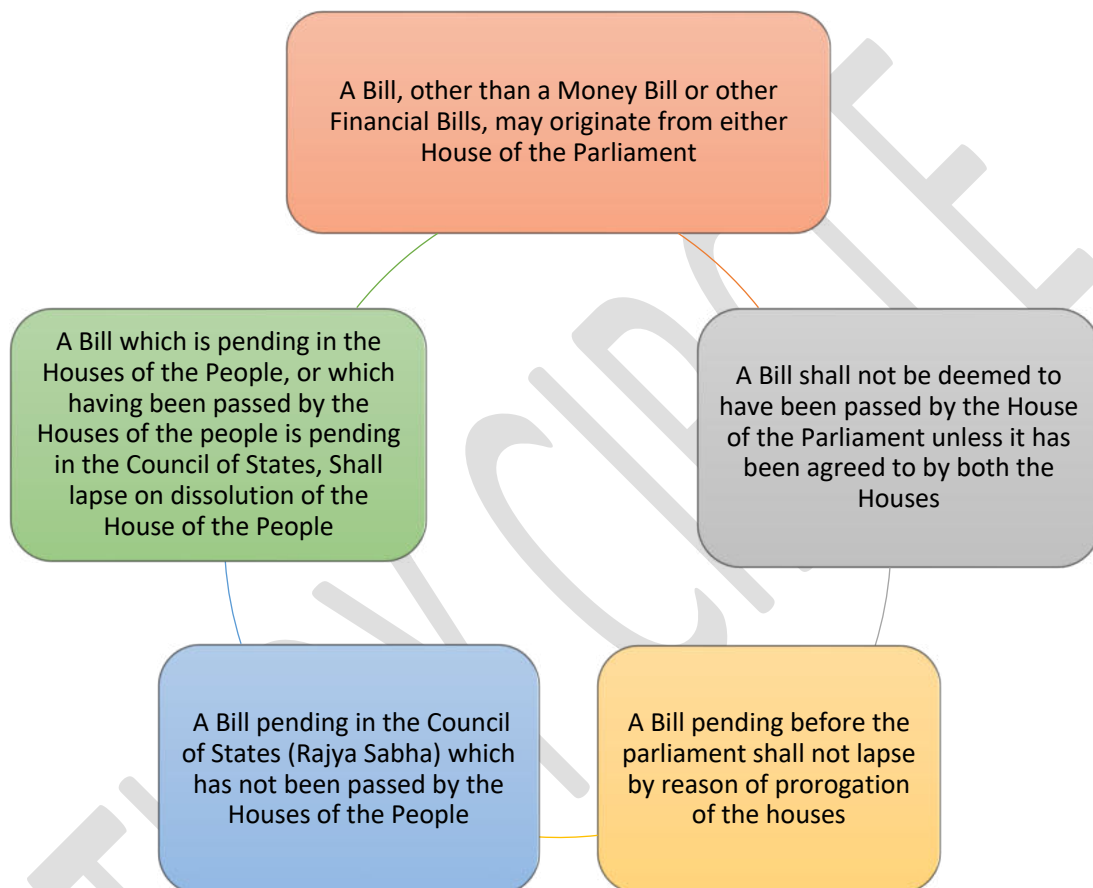
Based on the aforesaid provisions, the given problems can be decided as under.

A law of parliament on a subject enumerated in the Concurrent List on which the State law already exists is a valid law

A State law on a subject enumerated in the Concurrent List on which the law of Parliament already exists is a valid law.

LEGISLATIVE POWER OF THE UNION.

Procedure of passing of bills by the Parliament.

A. Introduction and Passing of Bills- (Article 107)**B. Joint Sitting Of Both Houses-(Article 108)**

- 1) If a Bill has been passed by one house and transmitted to other House
 - a) The bill is rejected by the other House
 - b) The houses have finally disagreed as to the amendments to be made in bill
 - c) More than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, The president may, unless the Bill has lapsed by reason of dissolution of the House of the People, notify the houses by message if they are sitting or by

public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill except a Money Bill.

2) In reckoning any such period of six months no accounts shall be taken of any period during which the houses is prorogued or adjourned for more than four consecutive days.

3) Where the President has notified his intention of summoning the houses to meet in a joint sitting, neither House shall proceed further with the bill. The President may at any time after the date of the notification, summon the houses to meet in a joint sitting for the purpose specified in the notification and if he does so, the houses shall meet accordingly.

4) If in the joint sitting of the Houses, the bill with such amendments if any, as are agreed to in the joint sitting, is passed by the majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of the Constitution to have been passed by both Houses.

5) At a joint sitting-

a) If the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments, if any, as are made necessary by the delay in the passage of the Bill

b) If the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments are relevant to the matters with respect to which the Houses have not agreed, and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

6) A joint sitting may be held under this article and a Bill passed thereat,

notwithstanding that dissolution of the House of people has intervened since the president notified his intention to summon the Houses to meet therein.

Money Bill

1) A Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters.

a) The impositions, abolition, remission, alteration or regulation of any tax.

b) The regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of any law with respect to any

guarantee by the Government of India, or the amendment of any law with respect to any financial obligations undertaken or to be undertaken or to be undertaken by the Government of India.

c) The custody of the consolidated fund of the Contingency Fund of India, the

payment of money into or the withdrawal of moneys from any such fund.

d) The appropriation of moneys out of the consolidated fund of India.

e) The declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure.

f) The receipt of money on account of the Consolidated Fund of India or the Public account of India or issue of such money or the audit of the accounts of the Union or of a State.

g) Any matter incidental to any of the matters specified above.

2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for imposition of fines or other pecuniary penalties or for the demand or payment or fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the Houses of the People thereon shall be final.

4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States and when it is presented to the President for assent, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

Procedure In Respect Of Money Bill. - (Article 109)

1) A money Bill shall not be introduced in the council of States (Rajya Sabha).

2) After Money Bill has passed by the House of the people it shall be transmitted to the Council of States (Lok Sabha) for its recommendation. The Council of State shall within a period of fourteen days. From the date of its receipt, return the bill to the House of the People with its recommendations. The House of the people may thereupon either accept or reject all or any of the recommendations. The House of the people may thereupon either accept or reject all or the recommendations of the Council of States.

3) If the house of the people accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both houses with amendments recommended by the Council of States and accepted by the House of the People.

4) If the House of the people does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both houses in the form in which it was passed by the houses of the People without any of the amendments recommended by the Council of States.

5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the people within the said period in the form in which it was passed by the House of the People.

TRADES, COMMERCE AND INTERCOURSE

The provisions of the Constitution of India relating to freedom of trade, commerce and intercourse.

1) **Article 301:** Freedom of trade, commerce and intercourse – Subject to the provisions of the Constitution of India, trade, commerce and intercourse throughout the territory of India shall be free.

2) **Article 302:** Power of Parliament to impose restriction of trade, commerce and intercourse – Parliament may by law impose such restrictions on the freedom of trade and intercourse between one State

and another or within any part of the territory of India as may be required in the public interest

3) Article 303: Restriction on legislative powers of the Union and of the States with regard to trade and commerce.

- a. Neither the Parliament nor the legislature of a State shall have power to make any law giving any preference to one State over another, or making of any discrimination between one state and another, by virtual of any entry relating to trade and commerce in any of the lists in schedule VII.
- b. Nothing above shall prevent the parliament from making any law, giving any decimation to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

4) Article 304: Restriction on trade, commerce and intercourse among States – The legislature of a State may by law.

- a) Impose from goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in the State are
- b) Impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest.

No Bill or amendment for this purpose shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

The Supreme Court in *Atiabari Tea Co. v. State of Assam*, AIR 1951 SC 232 observed that only the laws which directly or immediately restricts the freedom of trade or commerce is covered under **Article 301**. The laws, which incidentally affect the freedom given under **Article 301**, are not within its reach. Trade and commerce covered under **Article 301** are those which are lawful. Gambling, prize competitions are not covered under Article 301 as observed in *State of Bombay v. RMDC*. AIR 1957 SC 699.

THE JUDICIARY

Establishment and constitution of the Supreme Court and High courts. Though our Constitution provides for federal system, there is a single judiciary system followed throughout the country. At the helm of the entire judiciary system there is the Supreme Court of India followed by the High Courts and under each High Court there is a hierarchy of other subordinate courts.

A: Supreme Court Of India: - The Supreme Court is the highest court of the country. The laws declared by it are binding on all other courts of the country. It acts as federal court. As a court of appeal and also as the guardian of the Constitution. The jurisdiction of the Supreme Court is four fold:

Original jurisdiction

Writ Jurisdiction

Appellate Jurisdiction

Advisory Jurisdiction.

1. **Appointment:** - The Supreme Court consists of a Chief Justice and other judges. Every Judge of the Supreme Court shall be appointed by the President. While appointing the Chief Justice he shall take the advice of the Council of Ministers. In case of appointment of other judges, he shall consult with the Chief Justice of India.
2. **Qualification of Judges:** - A person shall not be appointed as a judge of the Supreme Court unless.
 - i. He is a citizen of India.
 - ii. He is a distinguished jurist, or has been a judge of a High Court for at least 10 years.
3. **Tenure:** - A judge of the Supreme Court shall cease to be a judge on attaining 65 years of age and no minimum age is prescribed.

4. **Independence:** - The independence of a judge of the Supreme Court is secured by the Constitution. He cannot be removed except by the joint address by both Houses of Parliament.

B: High Courts: - As provided in Article 214 of the Constitution, there shall be a High Court for each State. As provided in Article 231 of the Constitution, Parliament has the power to establish a common High Court for more than one state. The High Court is the highest judiciary of the State.

1) **Appointment:** - **Article 216:** Every High Court shall have a Chief Justice and other judges as the President may appoint.

Article 217: In appointing the judges of the High Court the President shall consult the Chief Justice of India and also the Chief Justice of that State in case of appointment of other judges.

2) **Qualification:- Article 217:** The qualification of the judges of a High Courts as per the Constitution are as under

- i. He must be a citizen of India
- ii. He must not be over 62 years of age
- iii. He must have held a judicial office in the territory of India for at least 10 years.
- iv. He must have been an advocate of a High Court or of two or more such Courts in succession for at least 10 years.

3) **Superintendence And Control:** - **Article 227:** Every High court shall have superintendence over all courts and tribunals throughout its territories. The High Court may call for return from such courts, and prescribe forms in which books entries and accounts shall be kept.

C: Subordinate Courts: - There are various subordinate courts below the High court's of each State. These courts may be civil courts or criminal courts. Either of them may have original and appellate jurisdiction. These courts are created by laws of the respective States. These subordinate courts have their own hierarchy. In the district level under the civil side there are district courts; below these courts is the Court of Munsiffs. In the criminal side there are the courts of the Magistrates, Sessions courts etc.

D: Special Tribunals: - There are also a number of tribunals dealing various matters like taxation, labour, customs, excise tribunals etc.

WRIT JURISDICTION OF SUPREME COURT AND HIGH COURTS.

1. Writs: - Fundamental rights guaranteed under the Constitution of India need basic protection to be effective. The power of the Courts to enforce obedience to the fundamental rights depends not only on the impartiality of the judiciary but also upon the effectiveness of the instruments available for its proper implementation.

The Constitution of India provides such instruments by giving powers to the judiciary by means of 'writs'. Such writs are entertained by the Supreme Court under **Article 32** and by the High Courts under Article 226 of the Constitution of India.

2. Power of Supreme Court to Issue Writs: Article 32:-Remedies for enforcement of rights. - The Supreme Court can entertain a writ made to it under **Article 32** of the Constitution. However, an application shall not lie unless any fundamental rights as stated under Part III of the Constitutions are infringed. **Article 32** provides the following:

- a) The right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by the Constitution.
- b) The Supreme Court shall have the power to issue direction or orders or writs, including writs in the nature of
 - (a) Habeas Corpus,
 - (b) Mandamus
 - (c) Prohibition
 - (d) Certiorari
 - (e) Quo Warranto.
- c) Without prejudice to the powers conferred on the Supreme Court, Parliament may by law empower any other to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court.
- d) The rights guaranteed by this article shall not be suspended except as otherwise provided for by the constitution.

3. Power of High Courts to Issue Writs: Article 226:- The High courts have the power under **Article 226** of the Constitution to issue writs for enforcement of the fundamental rights as enumerated in Part III of the Constitution and also for any other purpose. **Article 226** provides the following :

a) Every high court has the power, throughout the territory in relation to which it exercises jurisdiction, to issue direction to any person or authority, including in appropriate cases, any Government, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any constitutional rights or for any other purpose.

b) The above power to issue directions, orders or writs to any Government authority or person may be exercised by the High Court exercising jurisdiction in relation to the territories within which the cause of authority of the residence of such person is not within those territories.

c) Where any party against whom an interim order is made on a petition made under this article, without

- (i) Furnishing to such party copies of such petition and all documents in support of the plea for such interim order
- (ii) Giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to such party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within the period of two weeks from the date on which it is received or from the date on which the copy of the application is so furnished, whichever is later. Where the High Court is closed on the last day of that period, such disposal shall be made before expiry of the next day afterwards on which the court is open. If the application is not so disposed of, the interim order shall on expiry of that period stand vacated.

Various types of writs.

The Supreme Court or the high courts have the power to issue writs. These writs are discussed below:

1) Habeas Corpus: - The words 'habeas corpus' means 'to have a body'. The writ of habeas corpus is the nature of an order calling upon the person who has detained another to produce the latter before the Court in order to let the court know the ground of his detention and to set him free if there is no legal justification. This is a very powerful safeguard to the subject against arbitrary acts of private individuals and also executives.

The purposes for which the writs of habeas corpus are available are as under-

- a) For enforcement of fundamental rights
- b) Where the order of imprisonment or detention is ultra vires the statutes which authorize such imprisonment or detention.

The writ of habeas corpus are not issued under the following circumstances-

- i. Where the person against whom the writ is issued is not within the jurisdiction of the Court.
- ii. To secure release of a person imprisoned on a criminal charge.
- iii. To interfere with the proceeding for contempt by a court of record or by Parliament

2) Mandamus: - mandamus means 'command'. It is a writ under which the Court commands a person to whom it is addressed to perform some public or quasi-public duty which he has refused to perform and the performance of which cannot be enforced by any other legal remedy. The writ is also available against lower courts or other judicial bodies when they have refused to exercise their jurisdiction.

The purposes for which the writs of mandamus are available are as under-

- a) For enforcement of fundamental rights.
- b) To enforce the performance of a statutory duty by any public officer, to compel court or a court or a judicial tribunal to exercise its jurisdiction etc.
- c) To direct any public official or Government not to enforce any law which is unconstitutional

The writ of mandamus are not issued under the following circumstances-

- i. Against the President, or the Governors of States for exercise of their official duties.
- ii. Against private individuals except where the state is in collusion with such private party.

3) Prohibition: - This type of writ is issued by the Supreme Court or a High Court to an inferior court forbidding the later to continue proceedings in excess of its jurisdiction. It is a writ which commands inactivity. It is available against a public officer vested with judicial functions. The Supreme Court can issue a writ of prohibition where fundamental rights are affected due to jurisdictional defects.

4) Certiorari: - it is a writ issued by the Supreme Court or a High Court to an inferior court forbidding the later to continue proceeding in excess of its jurisdiction. Unlike prohibition, it is issued at a late stage. For issuing a writ of certiorari, there should be a tribunal or officer having legal authority to determine questions effecting rights and it has acted without jurisdiction or in excess of the authority vested on it. A writ of certiorari can be issued to quash the decision of the inferior tribunal.

5) Quo Warranto – This is a procedure by which the Court enquires into the legality of the claim which a party asserts to a public office and to oust him. For this purpose, the office must be a public office and is created by a statute or by the Constitution. There must be a violation of the Constitution or the statute in appointing such person to that office. The basic thing is that the public has an interest to see that an unlawful claimant does not usurp a public office.

Habeas Corpus – The words ‘habeas corpus’ means to have a body’. The writ of habeas corpus is the nature of an order calling upon the person who has detained another to produce the later before the Court in order to let the Court know the ground of his detention and to set him free if there is no legal justification. This is a very powerful safeguard to the subject against arbitrary acts of private individuals and also executives.

The writ of habeas corpus can be issued by the Supreme Court under Article 32 and by the High Court’s under **Article 226** of the Constitution of India.

The purposes for which the writs of habeas corpus are available are as under.

- a) For enforcement of fundamental;
- b) Where the order of imprisonment or detention is ultra vires the statutes which authorizes such imprisonment or detention.

The writ of habeas corpus is not issued under the following circumstance.

- a) Where the person against whom the writ is issued is not within the jurisdiction of the court
- b) To secure release of a person imprisoned on a criminal charge
- c) To interfere with the proceeding for contempt by a Court of record or by Parliament

DELEGATED LEGISLATION

Delegated legislation means legislation by authorities other than legislatures on the basis of power given by the legislatures. It is a process 'which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority'. When any law is enacted, it becomes necessary to delegate powers for carrying out the policy laid down in the law. Generally, ancillary and subsidiary powers are delegated and the legislative functions are retained in the hands of the legislatures, the delegate is authorized to make rules only on subsidiary and ancillary matters within the authority given. A rigid legislative procedure is not feasible for 'removal of difficulties; in executing the policy. The constitution of India is the supreme law of the country. No law should go beyond the scope of the Constitution. Delegated legislation should go beyond the scope of the policy. The Constitution of India is the supreme law of the country. No law should go beyond the scope of the Constitution.

Delegated legislation should not be above the legislative powers of the legislatures. As held in *Re: Delhi Laws Act, 1912* AIR 1951 Sc 332, there is a limit beyond which delegation must not go. India is a welfare country. The Central Government and the State Government frame policies and enact laws for making arrangement for maintenance of public health, sanitation etc. for this purpose, delegation of power is necessary to make the laws effective. Delegated legislation brings flexibility in implementation of laws.

'Delegates non potest delegare'.

'Delegates non potest delegare' means a delegate cannot delegate the powers delegated to him. A person who himself is a delegate cannot delegate the powers delegated to him. A trustee cannot further delegate the trust to others except certain circumstances as provided in the law of contract.

Sub-delegation is however permitted with prior permission. Such sub-delegation generally is applied in contracts. The principal delegates his authority to his agent, who in turn cannot delegate the same power to others on his own. Government authority to his agent, who in turn cannot delegate their powers to their subordinates or other officers of the Government.

MISCELLANEOUS

The constitutional provisions relating to state monopoly.

Monopoly of any trade rests the trade in the hands of the monopolies. It restricts the right of every person to carry on free trade and commerce. But there are certain exceptions to this rule.19 (6) (ii) does not provides restrictions of States for undertaking direct or indirect control over any trade or commerce. However, this article provides state monopoly for basic provisions and not subsidiary or incidental things. RC Cooper v. Union of India, 1970 SCC 248.

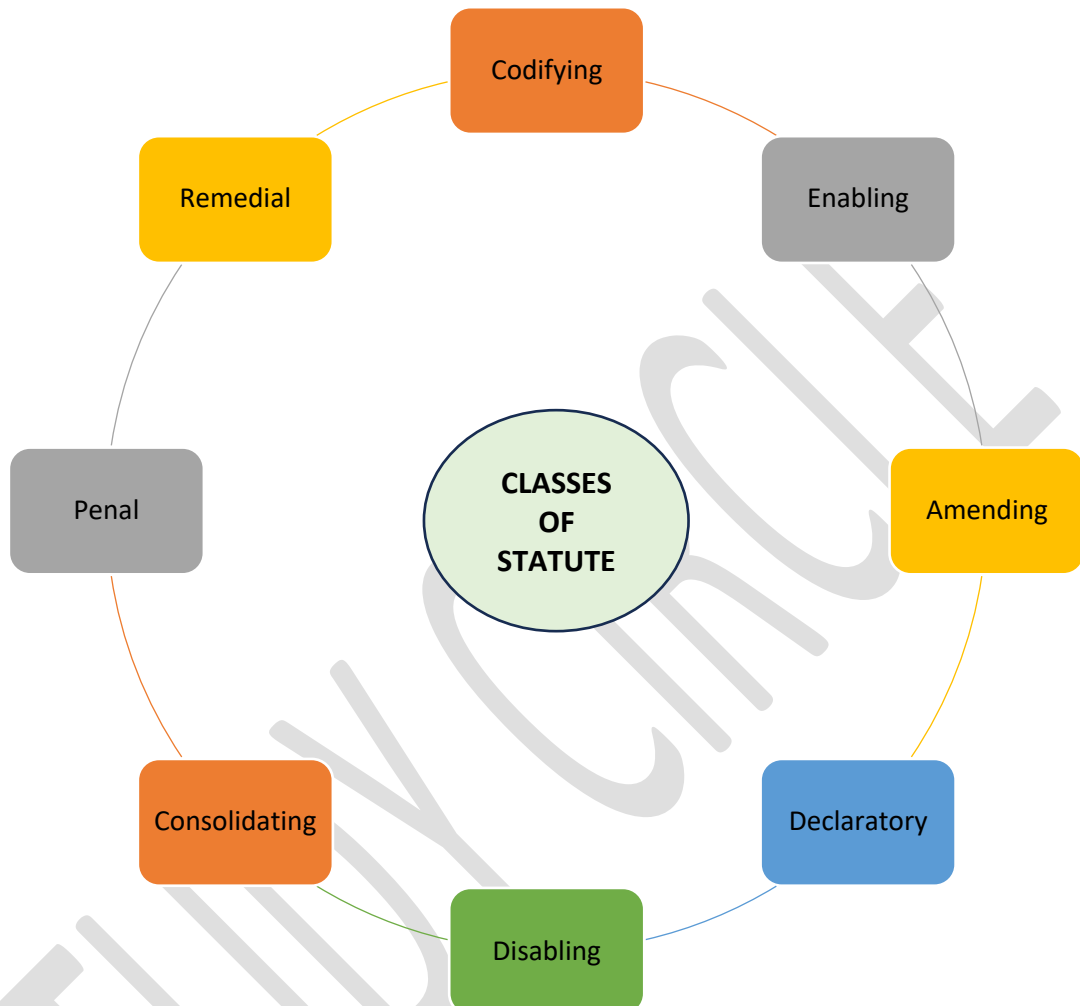
CHAP 3 : INTERPRETATION OF STATUTES

“Interpretation or construction is the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.” – Salmond

INTRODUCTION

A statute has been defined as “the will of the legislature” (Maxwell, Interpretation of Statutes, 11th ed. p. 1). Normally, it denotes the Act enacted by the legislature. A statute is thus a written “will” of the legislature expressed according to the form necessary to constitute it as a law of the State, and rendered authentic by certain prescribed forms and solemnities. (Crawford, p. 1) According to Bouvier’s Law Dictionary, a statute is “a law established by the act of the legislative power, i.e., an Act of the legislature. The written will of the legislature. The term ‘statute’ is generally applied to laws and regulations of every sort, law which ordains, permits or prohibits anything which is designated as a statute, without considering from what source it arises”. The Constitution of India does not use the term ‘statute’ but it employs the term “law” to describe an exercise of legislative power

STATUTES ARE COMMONLY DIVIDED INTO FOLLOWING CLASSES



- ✚ **Codifying**, when they codify the unwritten law on a subject;
- ✚ **Declaratory**, when they do not profess to make any alteration in the existing law, but merely declare or explain what it is;
- ✚ **Remedial**, when they alter the common law, or the judge made (non-statutory) law;
- ✚ **Amending**, when they alter the statute law;
- ✚ **Consolidating**, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance;
- ✚ **Enabling**, when they remove a restriction or disability;
- ✚ **Disabling** or restraining, when they restrain the alienation of property;
- ✚ **Penal**, when they impose a penalty or forfeiture.

NEED FOR INTERPRETATION OF A STATUTE

“The object of all interpretation of a ‘Written Document’ is to discover the intention of the author, the written declaration of whose mind the document is always considered to be.

Consequently, the construction must be as near to the minds and apparent intention of the parties as possible, and as the law will permit.

The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent of the intention.

It is not possible to guess at the intention of the parties and substitute the presumed for the expressed intention.

The ordinary rules of construction must be applied, although by doing so the real intention of the parties may, in some instances be defeated.

Such a course tends to establish a greater degree of certainty in the administration of the law”.

MEANINGS OF INTERPRETATION OF STATUTES

The phrase “Interpretation of Statutes” implies the judicial process of determining,, in accordance with certain rules and presumptions, the true meaning of the Acts of the Parliament. In this context, the phrase would mean a process or manner that conveys one’s understanding of the ideas of the creator, or understand as having a particular meaning or significance, explanation, explication or a clarification for a particular statute or law. It is often said that the purpose of interpretation is to ascertain the intention of the Legislature. The object of interpretation is to see what is intended by the words used by the lawmaker. But, sometimes it is very difficult to understand the meaning without making further inquiry. Therefore, it becomes necessary to find out the correct meaning by applying various rules of interpretation is necessary.

CASUS OMISSUS RULE

According to definition of Merriam-Webster, casus omissus rule is a situation omitted from or not provided for by statute or regulation and therefore governed by the common law. There are two basic rules of interpretation: 1. Every word in a statute to be given meaning. 2. The court cannot read anything into a statute or rewrite a provision which is unambiguous

PRINCIPLES OF INTERPRETATION

Primary Rules	Other Rules of Interpretation
❖ The Primary Rule: Literal Construction ❖ The Mischief Rule or Heydon's Rule ❖ Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat ❖ Rule of Harmonious Construction	❖ Expressio Unis Est Exclusio Alterius ❖ Contemporanea Expositio Est Optima Et Fortissima in Lege ❖ Noscitur a Sociis ❖ Strict and Liberal Construction

➤ Primary Rules

The Primary Rule: Literal Construction

According to this rule

The words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.

The objectives 'natural', 'ordinary' and 'popular' are used interchangeably.

(Nand Prakash Vohra v. State of H.P., AIR 2000 HP 65).

Interpretation should not be given which would make other provisions redundant

Some of the other basic principles of literal construction are:

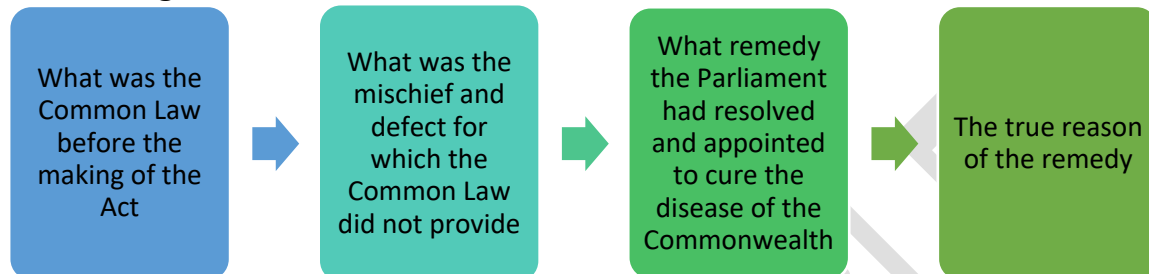
- ❖ Every word in the law should be given meaning as no word is unnecessarily used.
- ❖ One should not presume any omissions and if a word is not there in the Statute, it shall not be given any meaning.

While discussing rules of literal construction the Supreme Court in **State of H.P v. Pawan Kumar** One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.

THE MISCHIEF RULE OR HEYDON'S RULE

In Heydon's Case, it was resolved by the Barons of the Exchequer "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law)

Four things are to be discerned and considered:



Sodra Devi's case

Has expressed the view that the rule in Heydon's case is applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning.

The correct principle is that after the words have been construed in their context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule.

Rule of Reasonable Construction, i.e., Ut Res Magis Valeat Quam Pereat

Normally, the words used in a statute have to be construed in their ordinary meaning, but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words, does not meet the ends as a fair and a reasonable construction

According to this rule, the words of a statute must be construed ut res magis valeat quam pereat, so as to give a sensible meaning to them. A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.

It is the duty of a Court in constructing a statute to give effect to the intention of the legislature. If, therefore, giving of literal meaning to a word used by the draftsman particularly in penal statute would defeat the object of the legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning which will advance the remedy and suppress the mischief.

Newman Manufacturing Co. Ltd. v. Marrables,

To make the discovered intention fit the words used in the statute, actual expression used in it may be modified

RULE OF HARMONIOUS CONSTRUCTION

A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid “a head on clash” between two sections of the same Act

“whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise” **Raj Krishna v. Pinod Kanungo**

Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the “rule of harmonious construction”.

RULE OF EJUSDEM GENERIS

Ejusdem Generis, literally means “of the same kind or species”.

The ejusdem generis rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose. It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature

Jage Ram v. State of Haryana

To apply the rule the following conditions must exist:

The statute contains an enumeration by specific words

There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires

A general term follows the enumeration

The class is not exhausted by the enumeration

The members of the enumeration constitute a class

There is a distinct genus which comprises more than one species

OTHER RULES

Expressio Unis Est Exclusio Alterius

- The rule means that express mention of one thing implies the exclusion of another
- The method of construction according to this maxim must be carefully watched. The failure to make the 'expressio' complete may arise from accident. Similarly, the 'exclusio' is often the result of inadvertence or accident because it never struck the draftsman that the thing supposed to be excluded requires specific mention. The maxim ought not to be applied when its application leads to inconsistency or injustice
- Similarly, it cannot be applied when the language of the Statute is plain with clear meaning. (Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, AIR 1960 SC 801)

Contemporanea Expositio Est Optima Et Fortissima in Lege

- The maxim means that a contemporaneous exposition is the best and strongest in law. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the same meaning as they had when the statute was passed on the principle expressed in the maxim. In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful.
- The maxim means that a contemporaneous exposition is the best and strongest in law. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the same meaning as they had when the statute was passed on the principle expressed in the maxim. In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful.

Noscitur a Sociis

“Noscitur a Sociis” means known by associates. A word used in a statute should be interpreted in collocation with accompanying words. This helps in understanding the meaning clearly in a better way. This rule applies mainly when the same words bear the same meaning in a particular statute. When two or more words are used which are analogous with similar or same meaning, they should be construed in their true cognate sense. This rule however shall not be applied in the following cases.

1. When the principle is excluded from the text itself;
2. Where it causes injustice.
3. Where the circumstances in dealing are different.
4. Where the words are used in different context of the case on circumstantial value.

Strict and Liberal Construction

Liberal construction means ‘everything can be done in advancement of the remedy that can be done consistently with any construction of the statute’. Strict construction means “Acts are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended”. In tax laws provisions are made whether anything is taxable or exempted. The provisions should be clear and unambiguous so that clear provision can be construed from the words used.

PRESUMPTIONS

Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions

That the words in a statute are used precisely and not loosely.	That the legislature knows the state of the law	That a statute is not intended to be inconsistent with the principles of International Law. Although the judges cannot declare a statute void as being repugnant to International Law, yet if two possible alternatives present themselves, the judges will choose that which is not at variance with it
That the state is not affected by a statute unless it is expressly mentioned as being so affected	That "mens rea", i.e., guilty mind is required for a criminal act. There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent. The general rule applicable to criminal cases is "actus non facit reum nisi mens sit rea"	That vested rights, i.e., rights which a person possessed at the time the statute was passed, are not taken away without express words, or necessary implication or without compensation
That the legislature does not make any alteration in the existing law unless by express enactment	That the legislature does not make mistake. The Court will not even alter an obvious one, unless it be to correct faulty language where the intention is clear.	Legislature confers powers necessary to carry out duties imposed by it
That the legislature knows the practice of the executive and the judiciary	Legal fictions may be said to be statements or suppositions which are known, to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome, and substantial justice secured	Where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and vice versa, the delegation of powers takes with it the duties.

Aid To Interpretation

Internal Aids in Interpretation

- Title
- Preamble
- Heading and Title of a Chapter
- Marginal Notes
- Interpretation Clauses
- Proviso
- Illustrations or Explanation
- Schedules

External Aids in Interpretation

- Parliamentary History
- Reference to Reports of Committees
- Reference to other Statutes
- Dictionaries
- Use of Foreign Decisions

INTERNAL AIDS TO INTERPRETATION

▪ Title

The long title of an Act is a part of the Act and is admissible as an aid to its construction. The long title sets out in general terms, the purpose of the Act and it often precedes the preamble. It must be distinguished from short title which implies only an abbreviation for purposes of reference, the object of which is identification and not description. The true nature of the law is determined not by the name given to it but by its substance. However, the long title is a legitimate aid to the construction.

▪ Preamble

The true place of a preamble in a statute was at one time, the subject of conflicting decisions. In *Mills v. Wilkins*, (1794) 6 Mad. 62, Lord Hold said: “the preamble of a statute is not part thereof, but contains generally the motives or inducement thereof”. On the other hand, it was said that “the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischief it was intended to remedy”. The modern rule lies between these two extremes and is that where the enacting part is explicit and unambiguous the preamble cannot be resorted to, control, qualify or restrict it, but where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it (*Raj Mal v. Harnam Singh*, (1928) 9 Lah. 260). In *Powell v. Kempton Park Race Course Co.*, (1899) AC 143, 157, Lord Halsbury said: “Two propositions are quite clear – One that a preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment”.

▪ Heading and Title of a Chapter

In different parts of an Act, there is generally found a series or class of enactments applicable to some special object, and such sections are in many instances, preceded by a heading. It is now settled that the headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the headings. A “heading”, according to one view “is to be regarded as giving the key to the interpretation of clauses ranged under it, unless the wording is inconsistent with such interpretation; and so that headings, might be treated “as preambles to the provisions following them”.

▪ Marginal Notes

In England, the disposition of the Court is to disregard the marginal notes. In our country the Courts have entertained different views. Although opinion is not uniform, the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section. "There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament" (Balraj Kumar v. Jagatpal Singh, 26 All. 393). Patanjali Shastri, J., after referring to the above case with approval observed: "Marginal notes in an Indian statute, as in an Act of Parliament cannot be referred to for the purpose of construing the Statute" (C.I.T. v. Anand Bhai Umar Bhai, A.I.R. 1950 S.C. 134)

▪ Interpretation Clauses

It is common to find in statutes "definitions" of certain words and expressions used elsewhere in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply. A definition section may borrow definitions from an earlier Act and definitions so borrowed need not be found in the definition section but in some provisions of the earlier Act

▪ Proviso

"When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of proviso". In the words of Lord Macmillan: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to the case". As stated by Hidayatullah, J. : "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule".

▪ Illustrations or Explanation

Illustrations attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature. An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. But illustrations cannot have the effect of modifying the language of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment. The meaning to be given to an 'explanation' must depend upon its terms, and 'no theory of its purpose can be entertained

unless it is to be inferred from the language used” (Lalla Ballanmal v. Ahmad Shah, 1918 P.C. 249)

▪ Schedules

The schedules form a part of the statute and must be read together with it for all purposes of construction. But expression in the schedule cannot control or prevail against the express enactment (Allen v. Flicker, 1989, 10 A and F 6.40). In Ramchand Textile v. Sales Tax Officer, A.I.R. 1961, All. 24, the Allahabad High Court has held that, if there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former

External Aids in Interpretation

▪ Parliamentary History

The Supreme Court, enunciated the rule of exclusion of Parliamentary history in the way it is enunciated by English Courts, but on many occasions, the Court used this aid in resolving questions of construction. The Court has now veered to the view that legislative history within circumspect limits may be consulted by Courts in resolving ambiguities

▪ Reference to Reports of Committees

The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into “so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So we should not be unduly influenced by the Report [Letang v. Cooper (1964) 2 All. E.R. 929; see also Assam Railways & Trading Co. Ltd. v. I.R.C. (1935) A.C. 445]

▪ Reference to Reports of Committees

The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into “so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So we should not be unduly influenced by the Report [Letang v. Cooper (1964) 2 All. E.R. 929; see also Assam Railways & Trading Co. Ltd. v. I.R.C. (1935) A.C. 445]

▪ Dictionaries

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word, regard must always be had to the context as it is a fundamental rule that “the meaning of words and expressions used in an Act must take their colour from the context in which they appear”. Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers”.

▪ Use of Foreign Decisions

Use of foreign decisions of countries following the same system of jurisprudence as ours and rendered on statutes in pari materia has been permitted by practice in Indian Courts. The assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and the Indian conditions where it is to be applied.

Reading a Bare Act

Bare Act is the text of the legislation passed by the Parliament or State Legislature. It is essential for professionals working with regulatory framework to understand a Bare Act. Reading a bare act may look simple but it becomes difficult due to the use of legal language. Therefore, reading a bare act requires skills such as interpretational, comprehension, analytical and command over the language in which the act has been written.

The purpose of reading a bare act is to understand the correct meaning of a provision. A professional should read the bare act after keeping in consideration the object of the statute. Few important rules are as under:

- ✚ A Bare Act should be read according to the context
- ✚ Definition clause of the Act & pari materia statutes and General Clauses Act may be referred to
- ✚ Literal interpretation should be given initially
- ✚ Break the sentence but understand a provision as a whole
- ✚ Read – understand – apply rule would be beneficial
- ✚ Read the updated version of the bare act

Citation of Cases

Citation is a reference to a statute, reported case, regulation etc. The decisions of Higher Court are having binding force on the subordinate courts. This results to the need of citation of cases in the pleadings to made before the authorities and courts. Citations are also used by the authors in referring the cases in the books and publications.

Generally, law reports are referred by the professionals in their pleadings. The examples of the law reports used are as under:

1. All India Reporter (AIR)
2. Supreme Court Cases (SCC)
3. Supreme Court Journal (SCJ)
4. Supreme Court Reports (SCR)
5. Delhi Law Times (DLT)

Prospective and retrospective operation

Interpretation of Statutory and Procedural provisions

Statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective. However, they are retrospective only if by express words or by necessary implication the Legislature has made them retrospective. Generally, an amendment of substantive law is not retrospective unless expressly laid down. It may be noted that Declaration about existing law is not an amendment. Whether the law is declaratory and therefore retrospective or not depends upon the language of the Statute.

With respect to provisions of procedural nature, no person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. A change in the law of procedure may operate retrospectively and unlike the law relating to vested right is not only prospective.

Use of “May” and “Shall”

The words “shall” or “may” used in a provision depends on the nature of compliance and gravity of noncompliance. The standard rule is that the provision containing ‘shall’ is mandatory and the provision containing ‘may’ is either permissive or discretionary. In other words, ‘shall’ conveys mandatory nature of the provision, while ‘may’ conveys permissive or discretionary nature. The word ‘may’ is used where a power, permission, benefit or privilege given to some person may but need not be exercised: exercise is discretionary.

The provision using the word 'may' is an enabling provision and permissive in nature.

Use of "And" and "or"

In ordinary usage, 'and' is conjunctive (that connects words, phrases and clauses in a sentence) and 'or' is disjunctive (that separates words, phrases and clauses in a sentence). Thus 'and' connects two or more items and makes a cumulative group of them whereas 'or' separates two or more items and makes them alternative to one another. If a series of items lays down stipulations or conditions, all of them must be complied with if they are connected by 'and'. But sometimes it may be required to read 'and' in place of 'or' and vice versa. This may be understood with the help of following examples:

Interpretation of proviso

A clause, as in a document or statute, that begins with the words Provided that is called 'proviso'. The term 'proviso' is defined as a clause making some condition or stipulation; a clause in a statute, deed, or other legal document introducing a qualification or condition to some other provision, frequently the one immediately preceding the proviso itself.

Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

Thus, a proviso in a statutory provision carves out an exception to the main provision to which it has been enacted and to no other. The proper function of a proviso is to except and deal with a case, which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case.

Deeming provisions

A provision in a statute which contains the word 'deemed' is called a deeming provision or legal fiction. To deem means to regard or consider (something) in a specified way; to treat something as if it were something else; assuming a fact which does not really exist

It is well settled that a deeming provision is an admission of the non-existence of the fact deemed. The Legislature is quite competent to enact a deeming

provision for the purpose of assuming the existence of a fact which does not really exist.

Repugnancy with other statutes

To ascertain the meaning of a section, it is not permissible to omit any part of it, the whole section must be read together and an attempt should be made to reconcile all the parts. When reconciliation however is not possible, it has to be determined as to which is the leading provision and which must give way to the other. If this method also is not possible, then resort must be had to yet another well-established rule, namely that if two sections are repugnant, the known rule is that the last one must prevail.

Therefore, an attempt should be made in construing different provisions to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two provisions should prevail. But that question can arise only if repugnancy cannot be avoided.

Conflict between general provision and special provision

Another well known rule of construction is that general provisions yield to special provisions. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect.

It is the duty of courts to avoid that and, whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise. Provisions of one Section of a statute cannot be used to defeat those of another unless it is impossible to effect re-conciliation between them.

Socially beneficial construction

For a sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of common law), four things are to be discerned and considered:

- (1) what was the common law before the making of the Act,
- (2) what was the mischief and defect for which the common law did not provide,
- (3) what remedy the Parliament had resolved and appointed to cure the disease
- (4) the true reason of the remedy

Interpretation of Procedural Law

By its very nomenclature, Code of Criminal Procedure, 1973, is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescription are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of the word 'shall'.⁶

Interpretation of fiscal and taxing statutes

While dealing with a taxing provision, the principle of 'strict interpretation' should be applied. The court should not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted.

Delegated legislations

Delegated legislation (subordinate legislation) is legislation made under powers conferred by an Act of Parliament (an enabling statute, often called the parent Act). The bulk of delegated legislation is governmental. It consists mainly of orders, regulations rules, directions, and schemes made by ministers. Its primary use is to supplement Acts of Parliament by prescribing the detailed and technical rules required for their operation. Unlike an Act, it has the advantage that it can be made (and later amended if necessary) without taking up parliamentary time. Delegated legislation is also made by a variety of bodies outside central government, examples being the Rules of the Supreme Court, and bodies such as SEBI.

It is a principle of statutory interpretation that when rules are validly framed, they should be treated as a part of the Act. Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation. The statutory rules cannot be described as, or equated with, administrative directions

Doctrine of substantial compliance

In the domain of statutory interpretation, there exists the doctrine of substantial compliance. The Merriam Webster's Dictionary of Law defines the expression "substantial compliance" as "compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies or

purpose or objective even though its formal requirements are not complied with.” The Black’s Law Dictionary, 8th edition, gives the following meaning of “substantial compliance” as under: “substantial performance doctrine. The rule that if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished, subject to a claim for damages for the shortfall.” The Supreme Court has held that tendency towards technicality is to be deprecated; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non-compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused.

Doctrine of impossibility of performance

The “doctrine of impossibility of performance” which is reflected in the following legal maxims which court apply in interpreting a statutory provision: A l’impossible nul n’est tenu (No one is bound to do what is impossible; Nobody is expected to do the impossible); Impossibilium nulla obligatio est (There is no obligation to perform impossible things); Lex non cogit ad impossibilia (The law does not compel a man do to that which he cannot possibly perform); Impotentia excusat legem (Impossibility excuses the law; The law excuses someone from doing the impossible; Impossibility is an excuse in the law). Enactments which impose duties are subject to these maxims and are understood as dispensing with the performance of what is prescribed when performance of it is impossible. 8 In Broom’s Legal Maxims, 10th edition, page 162,163, the doctrine of impossibility is explained as follows: A general rule which admits of ample practical illustration, that impotentia excusat legem; where the law creates a duty or charge, and the party is disabled to perform it, without default in him, and has no remedy over, there the law will in general excuse him; and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse.

Strict Construction of penal statutes

Generally, penal provisions should be construed strictly. But at the same time it is one of the settled principles of interpretation of statutes that when two interpretations are possible of a penal provision, that which is less onerous should be preferred.⁹ The rule of strict interpretation of penal statutes in favour of an accused may not be of rigid or universal application. It may be considered along with other well established rules of interpretation. When it is seen that the scheme and object of the statute are likely to be defeated by a strict interpretation, courts may endeavour to resort to that interpretation which furthers the object of the legislation. Section 138 of the Act being a penal provision as is held in *Tolaram Relumal v. State of Bombay*, AIR 1954 SC 496, if two possible and reasonable constructions can be put on the said provision the court should lean towards that construction which would exempt the subject from the penalty rather than the one which would impose penalty.

Brief of General Clause Act, 1897

The General Clauses Act, 1897 is a consolidating Act. It consolidate the General Clauses Act, 1868 and the General Clauses Act, 1887. Before the enactment of the General Clauses Act, 1868, provisions of Interpretation Act, 1850 were followed. The provisions of that Act and certain additions were framed together and thus emerged the General Clauses Act, 1868. The object of the General Clauses Act, 1868 was to shorten the language used in the Acts of the Governor-General of India in Council. It contained only 8 sections.

The General Clauses Act, 1897 has been enacted with the aim and objective to provide a one single statute as a composite structure in defining different provisions as regards to the interpretation of words and legal principles which would better placed to be defined for the general application for various rules and regulations .

Importance of the General Clauses Act, 1897

The General Clauses Act 1897 belongs to the class of Acts which may be called as interpretation Acts. An interpretation Act lays down the basic rules as to how courts should interpret the provisions of an Act of Parliament. It also defines certain words or expressions so that there is no unnecessary repetition of the definition of those words in other Acts. The General Clauses Act is a consolidating as well as an extending measure. As a consolidating measure it did not purport to make any changes in the provisions of law repealed and reenacted by it. By reason of section 3, the Act becomes statutorily a part of

every Central Act passed after 1897 and by its own force applies to the interpretation of every such enactment.

The Central Acts to which the General Clauses Act applies are:

- (i) Acts of the Indian Parliament;
- (ii) Acts of the Dominion Legislature passed between the 15th August, 1947 and the 26th January, 1950;
- (iii) Acts passed before the commencement of the Constitution by the Governor-General in Council or the Governor-General acting in a legislative capacity.

Definitions

Section 3 is the principal section of the Act which contains definitions. The section applies to the General Clauses Act itself and to post- 1897 Central Acts and Regulations. This section seeks to define phrases and terms commonly used in enactments and is intended to serve as a dictionary for the phrases and terms so used and the Courts are expected to look into this dictionary in the first instance for their interpretation. The reason why the definition section contains words like “unless there is anything repugnant in the subject or context”. Ordinarily, terms defined in the section will have the same meaning in subsequent enactments which employ the same terms unless there is anything inconsistent with or repugnant to the context of the latter Act

Important provisions of General Clauses Act, 1897 (GCA) are as under:

Applicability of the definitions to Central Laws:

The definitions for the following words provided in GCA apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. The words are: “affidavit”, “barrister”, “District Judge”, “father”, “immovable property”, “imprisonment”, “Magistrate”, “month”, “movable “movable property”, “oath”, “person”, “section”, “son”, “swear”, “will”, and “year”. “abet”, “Chapter”, “commencement”, “financial year”, “local authority”, “master”, “offence”, “part”, “public nuisance”, “registered”, “schedule”, “ship”, “sign”, “sub-section” and “writing”.

Applicability of the definitions to all Laws:

The following definitions in section 3 of the expressions shall apply, unless there is anything repugnant in the subject or context, to all Indian laws. The words are: “British India”, “Central Act”, “Central Government”, “Chief Controlling Revenue Authority”, “Chief Revenue Authority”, “Constitution”,

“Gazette”, “Government”, “Government securities”, “High Court”, “India”, “Indian Law”, “Indian State”, “merged territories”, “Official Gazette”, “Part A State”, “Part B State”, “Part C State”, Provincial Government”, “State” and “State Government”.

Revenues of the Central Government or of any State Government:

In any Indian law, references, by whatever form of words, to revenues of the Central Government or of any State Government shall, on and from the first day of April, 1950, be construed as references to the Consolidated Fund of India or the Consolidated Fund of the State.

Effect of repeal:

If GCA or any central Act or regulations repeals any enactment then, unless a different intention appears, the repeal shall not-

- (i) revive anything not in force or existing at the time at which the repeal takes effect.
- (ii) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder.
- (iii) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed.
- (iv) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed.
- (v) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Repeal of Act making textual amendment in Act or Regulation:

If Central Act or Regulation repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.

Revival of repealed enactment :

It shall be necessary, for the purpose of reviving` either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

Computation of time:

Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period,

the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

Gender and number :

In all Central Acts and Regulations, unless there is anything repugnant in the subject or context,: (i) words importing the masculine gender shall be taken to include females; and (ii) words in the singular shall include the plural, and vice versa.

Power to issue, to include power to add to, amend, vary or rescind:

Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

Recovery of fines:

Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

Provision as to offences punishable under two or more enactments:

where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. According to the Supreme Court in *Baliah v. Rangachari*, AIR 1969 SC 701, a plain reading of section 26 shows that there is no bar to the trial or conviction of an offender under two enactments, but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence.

Meaning of service by post:

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post..

Reading Methodology of the Companies Act, 2013 and its Legal Aura

The Companies Act, 2013 is not a standalone piece of legislation but a complete ecosystem. It contains Orders, Rules, Notifications and Circulars. One should read each Section of the Act, with relevant Rule, Notification and Circular.

The Act is a superior authority in law passed by the Legislature. Notifications and Rules are notified by the Executive under the powers derived from the Act itself.

Understanding the structure of Companies Act and the manner of identifying complementary legislations.**1. The Principal Legislation/Statute**

2. **Statute law** is the body of law contained in Acts of Parliament. The Companies Act, 2013 is principal legislation.

3. **Schedules**- It is appended to an Act, to form part of it. They are generally added to avoid encumbering the statutes with matter of excessive details.

4. Delegated Legislations

Delegated legislation (subordinate legislation) is a legislation made under powers conferred by an Act of Parliament (an enabling statute, of ten called the parent Act). Here Parent Act is The Companies Act and the delegated legislations are Rules notified by Ministry of Corporate Affairs. Example Companies (Corporate Social Responsibility Policy) Rules 2014. Rule, Regulation or By-Laws must not be ultra-vires, that is to say, if a power exists by statute to make rules, regulations, by laws, forms etc., that power must be exercised strictly in accordance with the provisions of the statute which confers the power, for a rule, etc., if ultra-vires it will be held incapable of being enforced. Before a Rule can have the effect of a statutory provision, two conditions must be fulfilled, namely

- (1) It must confirm to the provision of statute under which it is framed
- (2) It must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rules so framed would be void.

5. Notifications/Circulars/Clarifications by Ministry of Corporate Affairs

A Notification means a notification published in the Official Gazette and the expression 'notify' and 'notified' shall be construed accordingly. In Bachu Lal

vs. State-Allahabad High Court, it was held that the words “notification, orders, rules and by-laws” have no reference to judicial orders the passing and cancellation whereof is subject to and regulated by the procedural law of the land. The Ministry of Corporate Affairs (MCA) has been entrusted with the responsibility of administering the Companies Act, 2013 (Act). The MCA, from time to time, issues circulars and clarifications to clarify the provisions of the Act and the rules made thereunder (Rules). The Circulars are issued by the Department interpreting a particular provision of the Act or the Rule in certain circumstances. The Companies Act, 2013 does not empower the Department to issue circular. In a series of judicial decisions, the Supreme Court has consistently held that clarificatory circulars cannot amend or substitute statutory rules. But if the Act or the Rules are silent then the Government can issue clarifications to supplement the Rules by issuing instructions.

CHAP 4: Administrative Laws

NEED FOR ADMINISTRATIVE LAW

Administrative law is that branch of law that deals with powers, functions and responsibilities of various organs of the state. There is no single universal definition of 'administrative law' because it means different things to different theorists.

The ambit of administration is wide and embraces following elements within its ambit:-

1. It makes policies.
2. It executes, administers and adjudicates the law.
3. It exercises legislative powers and issues rules, bye-laws and orders of a general nature

RULE OF LAW

Rule of Law was developed by British Jurist A.V. Dicey. He derived this term from French Principle 'La principle de legalite' which means the principle of legality. It states that the government should be governed by Rule of Law instead of Rule of Individual. Any dictator, monarch or one particular person should not govern the functioning of any nation. Each country should follow legality of law

THREE MAJOR PRINCIPLES GIVEN BY DICEY IN HIS BOOK "RULE OF LAW" ARE –

- 1. Supremacy of law:** It means that ordinary or regular laws shall remain supreme. Supremacy here means absolute and pre-dominance of regular laws as against arbitrary or wide discretionary powers.
- 2. Equality before the law:** According to Dicey, all classes must be equally subject to the ordinary law of the land as administered by the ordinary law courts. He states that there should be equality between people. According to Dicey, all classes must be equally subject to the ordinary law of the land as administered by the ordinary law courts. It provides that all are equal before law and everyone will be subjected to the same law.
- 3. The predominance of a legal spirit:** Legal Spirit refers to the judicial precedents upon any dispute raised by any individual. The judgment given in any case will be the legal spirit of that particular case. It basically refers to the law as set by the precedents that have evolved over time.

RULE OF LAW IN INDIA THE EVOLUTION OF RULE OF LAW IN INDIA CAN BE TRACED TO BRITISH CONCEPT

The evolution of Rule of Law in India can be traced to British concept but the modern concept of Rule of Law was introduced, only after the drafting of Constitution of India. Constitution of India laid the very foundation of rule of law in India and is the essence of it. Rule of Law is embedded in Constitution under multiple parts, important aspects are as under:

- 1. Preamble** – the Preamble to the Constitution of India upholds the basic structure of the Constitution. It talks about the justice, equality, liberty and dignity to all individuals. All of these aspects ensure Rule of Law in the country.
- 2. Part III- Fundamental Rights** – These are the rights and fundamental or core of the Constitution of India. They imply a duty on the state towards ensuring the welfare of its citizens. It helps to keep a check on the actions of administrative authorities and legislature.
- 3. Part IV- Directive Principles of State Policy (DPSP)** – These are the basic guidelines to be followed by all especially the government of India to ensure smooth functioning of the country. They are not enforceable by court of law. Few examples of Laws made under DPSP includes law relating to wages, labor laws etc.

RULE OF LAW

Rule of Law was developed by British Jurist A.V. Dicey. He derived this term from French Principle 'La principle de legalite' which means the principle of legality. It states that the government should be governed by Rule of Law instead of Rule of Individual. Any dictator, monarch or one particular person should not govern the functioning of any nation. Each country should follow legality of law

WHAT ARE THE SOURCES OF ADMINISTRATIVE LAW

Constitution of India

It is the primary source of administrative law. Article 73 of the Constitution provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws. Similar powers are provided to States under Article 62. Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity. The Constitution also envisages tribunals, public sector and government liability which are important aspects of administrative law.

Acts/ Statutes

Acts passed by the central and state governments for the maintenance of peace and order, tax collection, economic and social growth empower the administrative organs to carry on various tasks necessary for it. These Acts list the responsibilities of the administration, limit their power in certain respects and provide for grievance redressal mechanism for the people affected by the administrative action.

Ordinances,
Administrative
directions,
Notifications and
Circulars

Ordinances are issued when there are unforeseen developments and the legislature is not in session and therefore cannot make laws. Ordinances allow the administration to take necessary steps to deal with such developments. Administrative directions, notifications and circulars are issued by the executive in the exercise of power granted under various Acts

Judicial decisions

Judiciary is the final arbiter in case of any dispute between various wings of government or between the citizen and the administration. In India, we have the supremacy of Constitution and the Supreme Court is vested with the authority to interpret it. The courts through their various decisions on the exercise of power by the administration, the liability of the government in case of breach of contract or tortuous acts of Governments servants lay down administrative laws which guide their future conduct.

RULE OF LAW

Rule of Law was developed by British Jurist A.V. Dicey. He derived this term from French Principle 'La principle de legalite' which means the principle of legality. It states that the government should be governed by Rule of Law instead of Rule of Individual. Any dictator, monarch or one particular person should not govern the functioning of any nation. Each country should follow legality of law

THREE MAJOR PRINCIPLES GIVEN BY DICEY IN HIS BOOK "RULE OF LAW" ARE –

- 1. Supremacy of law:** It means that ordinary or regular laws shall remain supreme. Supremacy here means absolute and pre-dominance of regular laws as against arbitrary or wide discretionary powers.
- 2. Equality before the law:** According to Dicey, all classes must be equally subject to the ordinary law of the land as administered by the ordinary law courts. He states that there should be equality between people. According to Dicey, all classes must be equally subject to the ordinary law of the land as administered by the ordinary law courts. It provides that all are equal before law and everyone will be subjected to the same law.
- 3. The predominance of a legal spirit:** Legal Spirit refers to the judicial precedents upon any dispute raised by any individual. The judgment given in any case will be the legal spirit of that particular case. It basically refers to the law as set by the precedents that have evolved over time.

RULE OF LAW IN INDIA THE EVOLUTION OF RULE OF LAW IN INDIA CAN BE TRACED TO BRITISH CONCEPT

The evolution of Rule of Law in India can be traced to British concept but the modern concept of Rule of Law was introduced, only after the drafting of Constitution of India. Constitution of India laid the very foundation of rule of law in India and is the essence of it. Rule of Law is embedded in Constitution under multiple parts, important aspects are as under:

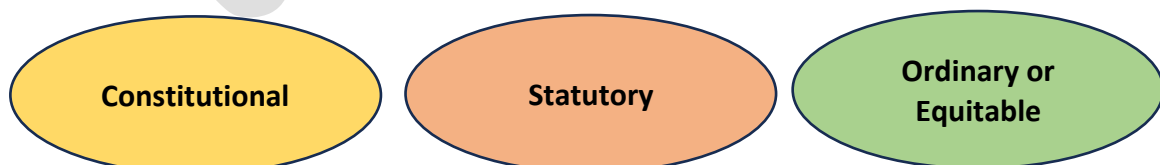
- 1. Preamble –** the Preamble to the Constitution of India upholds the basic structure of the Constitution. It talks about the justice, equality, liberty and dignity to all individuals. All of these aspects ensure Rule of Law in the country.
- 2. Part III- Fundamental Rights –** These are the rights and fundamental or core of the Constitution of India. They imply a duty on the state towards ensuring the welfare of its citizens. It helps to keep a check on the actions of administrative authorities and legislature.

3. Part IV- Directive Principles of State Policy (DPSP) – These are the basic guidelines to be followed by all especially the government of India to ensure smooth functioning of the country. They are not enforceable by court of law. Few examples of Laws made under DPSP includes law relating to wages, labor laws etc.

ADMINISTRATIVE DISCRETION

- It means the freedom of an administrative authority to choose from amongst various alternatives but with reference to rules of reason and justice and not according to personal whims and fancies. The exercise of discretion should not be arbitrary, vague and fanciful, but legal and regular.
- The government cannot function without the exercise of some discretion by its officials. It is necessary because it is humanly impossible to lay down a rule for every conceivable eventuality that may arise in day-to-day affairs of the government. It is, however, equally true that discretion is prone to abuse. Therefore there needs to be a system in place to ensure that administrative discretion is exercised in the right manner. Administration has become a highly complicated job needing a good deal of flexibility apart from technical knowledge, expertise and know-how.
- Freedom to choose from various alternatives allows the administration to fashion its best response to various situations. If a certain rule is found to be unsuitable in practice, the administration can change, amend or abrogate it without much delay. Even if the administration is dealing with a problem on a case to case basis it can change its approach according to the exigency of situation and the demands of justice

JUDICIAL REVIEW AND OTHER REMEDIES



CONSTITUTIONAL

The Constitution of India is supreme and all the organs of the state derive their existence from it. Indian Constitution expressly provides for judicial review. Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not that Act is in conformity with the Constitutional requirements. If it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

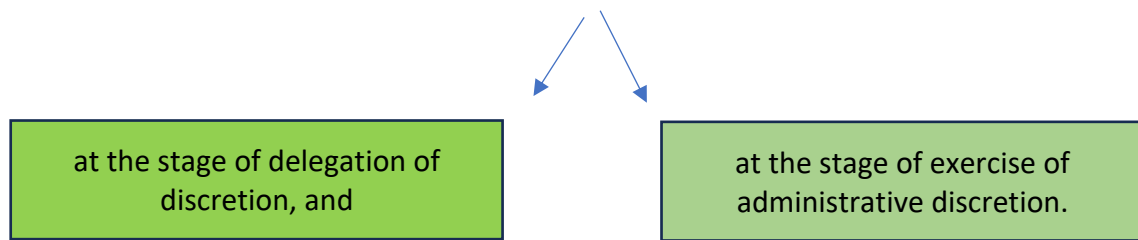
JUDICIAL REVIEW

The biggest check over administrative action is the power of judicial review. Judicial review is the authority of Courts to declare void the acts of the legislature and executive, if they are found in violation of provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for judicial review. Judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. It is concerned not with the decision but with the decision making process.

In Mansukhlal Vithaldas Chauhan v State of Gujarat,

The Supreme Court held that while exercising the power of judicial review it does sit as a court of appeal but merely reviews the manner in which the decision was made, particularly as the court lacks the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The court is to confine itself to the question of legality. Its concern should be: 1) whether a decision making authority exceeding its power? 2) committed an error of law? 3) committed a breach of rules of natural justice? 4) reached a decision which no reasonable tribunal would have reached, or 5) abused its power?

Stages of Judicial Review



(i) Judicial review at the stage of delegation of discretion

Any law can be challenged on the ground that it is violative of the Constitution and therefore laws conferring administrative discretion can thus also be challenged under the Constitution. In the case of delegated legislation, the Constitutional courts have often been satisfied with vague or broad statements of policy, but usually it has not been so in the cases where administrative discretion has been conferred in matters relating to fundamental rights. The courts exercise control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution.

Administrative Discretion and Article 14

Article 14 of the Constitution of India provides for equality before law. It prevents arbitrary discretion being vested in the executive. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer of government is given wide discretionary power.

In a number of cases, the statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14.

In State of West Bengal v. Anwar Ali

it was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution.

The court further held the Act invalid as it laid down “no yardstick or measure for the grouping either of persons or of cases or of offences” so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of “speedier trial” was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification.

Administrative Discretion and Article 19

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion. A number of cases have come up involving the question of validity of law conferring discretion on the executive to restrict the right under Article 19(1)(b) and 19(1)(e) (the right to assemble peacefully and without arms and the right to reside and settle in any part of the territory of India). The government has conferred powers on the executive through a number of laws to extern a person from a particular area in the interest of peace and safety.

Dr. Ram Manohar v. State of Delhi,

where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of externment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the executive on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his externment from the executive.

(ii) Judicial review at the stage of exercise of discretion

No law can clothe administrative action with a complete finality even if the law says so, for the courts always examine the ambit and even the mode of its exercise to check its conformity with fundamental rights. The courts in India have developed various formulations to control the exercise of administrative discretion, which can be grouped under two broad heads, as under:

Abuse of discretion

Non-application of mind

A) Abuse of discretion

1. Mala fides : If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion

2. Irrelevant considerations : If a statute confers power for one purpose, its use for a different purpose is not regarded as a valid exercise of power and is likely to be quashed by the courts. If the administrative authority takes into account factors, circumstances or events wholly irrelevant or extraneous to the purpose mentioned in the statute, then the administrative action is vitiated

3. Leaving out relevant considerations : The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid

4. Arbitrary orders : The order made should be based on facts and cogent reasoning and not on the whims and fancies of the adjudicatory authority.

5. Improper purpose : The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose it will amount to abuse of power

6. Colourable exercise of power : Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colourable exercise of the discretionary power and it is declared invalid

7. Non-compliance with procedural requirements and principles of natural justice: If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed

8. Exceeding jurisdiction : The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be ultra vires and, therefore, void

B) Non-application of mind

(i) Acting under dictation: Where the authority exercises its discretionary power under the instructions or dictation from superior authority it is taken as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind.

(ii) Self restriction: If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and the authority should not impose fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it

(iii) Acting mechanically and without due care: Non-application of mind to an issue that requires an exercise of discretion on the part of the authority will render the decision bad in law.

STATUTORY

Statutory appeals: There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law. e.g. Section 30 of Workmen's Compensation Act, 1923. (

Reference to the High Court or statement of case: There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court. Under Section 256 of the Income-tax Act, 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.

ORDINARY OR EQUITABLE

Apart from the remedies as discuss above there are certain ordinary remedies, which are available to person against the administration, the ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies and include:

A. Injunction: An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful act. In India, the law with regard to injunctions has been laid down in the Specific Relief Act, 1963. An action for declaration lies where a jurisdiction has been wrongly exercised or where the authority itself was not properly constituted. Injunction is issued for restraining a person to act contrary to law or in excess of its statutory powers. An injunction can be issued to both administrative and quasi-judicial bodies. Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission or torts, or breach of contract or breach of statutory duty. Injunction may be prohibitory or mandatory.

(a) Prohibitory Injunction:

Prohibitory injunction forbids the defendant to do a wrongful act, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.

(1) Interlocutory or temporary injunction: Temporary injunctions are such as to continue until a specified time or until the further order of the court. (Section 37 for the Specific Relief Act). It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code and are provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

(2) Perpetual injunction: A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect, it may be awarded for a fixed period or for a fixed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended for a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.

(3) Mandatory injunction: When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act

B. Declaratory Action: In some cases where wrong has been done to a person by an administrative act, declaratory judgments may be the appropriate remedy. Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief. Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes against the defendant.

By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the rights. It is an equitable remedy. It is a discretionary remedy and cannot be claimed as a matter of right.

- C. Action for damages:** If any injury is caused to an individual by wrongful or negligent acts of the Government servant, the aggrieved person can file suit for the recovery of damages from the Government concerned.

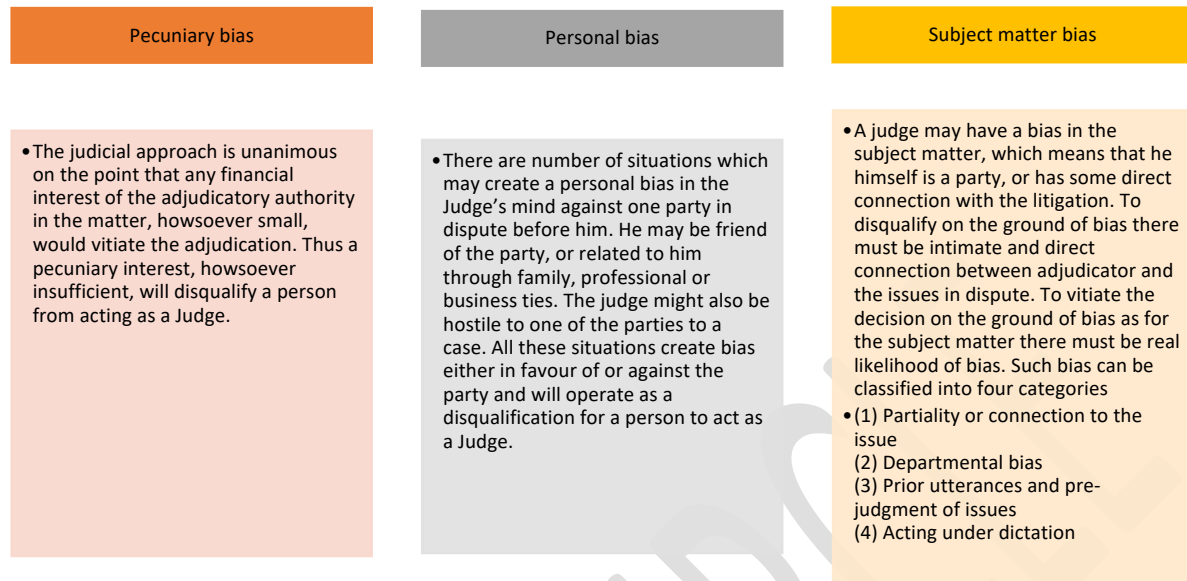
PRINCIPLES OF NATURAL JUSTICE

One of the most important principles in the administration of justice is that justice must not only be done but also seen to be done. This is necessary to inspire confidence in the people in the judicial system. Natural justice is a concept of Common Law and represents procedural principles developed by judges. Though it enjoys no express constitutional status, it is one of the most important concepts that ensure that people retain their faith in the system of adjudication. In India, the principles of natural justice are derived from Article 14 and 21 of the Constitution. The concept of natural justice has undergone a tremendous change over a period of time. In the past, it was thought that it included just two rules: rule against bias and rule of fair hearing. In the course of time many sub-rules were added

Rule against bias (*nemo judex in causa sua*)

According to this rule no person should be made a judge in his own cause. Bias means an operative prejudice whether conscious or unconscious in relation to a party or issue. It is a presumption that a person cannot take an objective decision in a case in which he has an interest. The rule against bias has two main aspects- one, that the judge must not have any direct personal stake in the matter at hand and two, there must not be any real likelihood of bias.

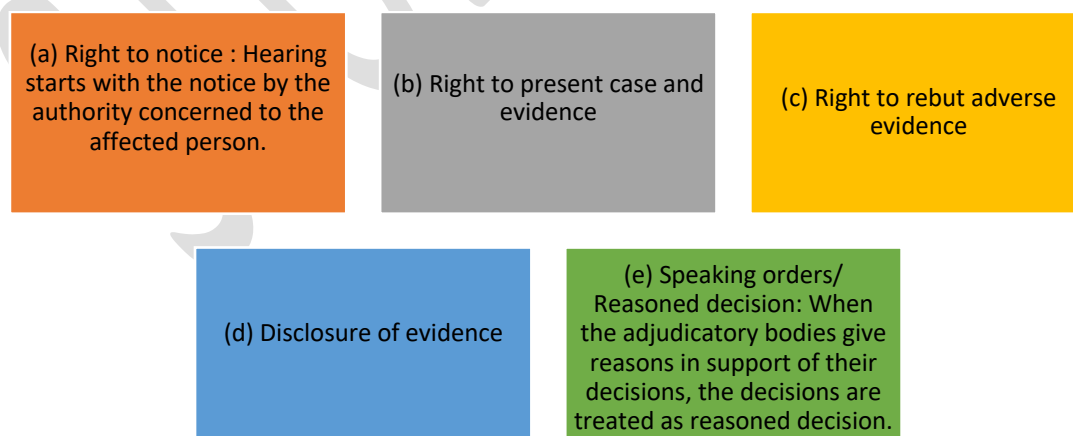
Bias can be of the following three types:



Rule of fair hearing (audi alteram partem)

The rule of audi alteram partem is the rule of fair hearing. The principle of natural justice is audi alteram partem (hear the other side) i.e. no one should be condemned unheard. It requires that both sides should be heard before passing the order. This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given an opportunity to submit his explanation thereto.

Following are the ingredients of the rule of fair hearing:



Exceptions to Natural Justice

Though the normal rule is that a person who is affected by administrative action is entitled to claim natural justice, that requirement may be excluded under certain exceptional circumstances.

Statutory Exclusion: The principle of natural justice may be excluded by the statutory provision. Where the statute expressly provides for the observance of the principles of natural justice, the provision is treated as mandatory and the authority is bound by it. Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto. However, the principles of natural justice are not incapable of exclusion.

Interim disciplinary action: The rules of natural justice are not attracted in the case of interim disciplinary action. For example, the order of suspension of an employee pending an inquiry against him is not final but interim order and the application of the rules of natural justice is not attracted in the case of such order.

Emergency: In exceptional cases of urgency or emergency where prompt and preventive action is required the principles of natural justice need not be observed. Thus, the pre-decisional hearing may be excluded where the prompt action is required to be taken in the interest of the public safety or public morality and any delay in administrative order because of pre-decisional hearing before the action may cause injury to the public interest and public safety. However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.

Academic evaluation: Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assess the work of a student over the period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded but this exclusion does not apply in the case of disciplinary matters.

Impracticability: Where the authority deals with a large number of person it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice.

Effect of Failure of Natural Justice

When an authority required to observe natural justice in making an order fails to do so, should the order made by it be regarded as void or voidable?

Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed. On the other hand, a void order is no order at all from its inception; it is a nullity and void ab initio.

In most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter. Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a court for an authoritative determination as to the nature of the order is void. For example, an order challenged as a nullity for failure of natural justice gives rise to the following crucial question: Was the authority required to follow natural justice?

Usually, a violable order cannot be challenged in collateral proceedings. It has to be set aside by the court in separate proceedings for the purpose. Suppose, a person is prosecuted criminally for infringing an order. He cannot then plead that the order is voidable. He can raise such a plea if the order is void. In India, by and large, the judicial thinking has been that a quasi-judicial order made without following natural justice is void and nullity.

Liability of State or Government in Contract

The Constitution of India allows the central and the state governments to enter into contracts under Article 299 of the Constitution of India. According to its provisions a contract with the Government of the Union or state will be valid and binding only if the following conditions are followed:

1. The contract with the Government must be made in the name of the President or the Governor, as the case may be.
2. The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.
3. A person duly authorized by the President or the Governor of the State, as the case may be, must execute the contract.

Article 299 (2) of the Constitution makes it clear that neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of the Constitution or for the purposes of any enactment relating to the Government of India. Subject to the provisions of Article 299 (1), the other provisions of the general law of contract apply even to the Government contract.

Effect of a valid contract with Government

As soon as a contract is executed with the Government in accordance with Article 299, the whole law of contract as contained in the Indian Contract Act, 1872 comes into operation. In India, the remedy for the breach of a contract with Government is simply a suit for damages.

Earlier the writ of mandamus could not be issued for the enforcement of contractual obligations but the Supreme Court in its pronouncement in *Gujarat State Financial Corporation v. Lotus Hotels*, 1983 3 SCC 379, has taken a new stand and held that the writ of mandamus can be issued against the Government or its instrumentality for the enforcement of contractual obligations. The Court ruled that it cannot be contended that the Government can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages and cannot compel specific performance of the contract through mandamus.

Suit against State in Torts

A tort is a civil wrong arising out of breach of a civil duty or breach of non-contractual obligation and the only remedy for which is damages. The essential requirement for the tort is breach of duty towards people in general. Although tort is a civil wrong, yet it would be wrong to think that all civil wrongs are torts. A civil wrong which arises out of the breach of contract cannot be put in the category of tort as it is different from a civil wrong arising out of the breach of duty towards public in general. When the responsibility of the act of one person fall

Examples of Public Corporation

Life Insurance Corporation, Food Corporation of India (FCI), Oil and Natural Gas Corporation (ONGC), Air India, State Bank of India, Reserve Bank of India, Employees State Insurance Corporation, Central Warehousing Corporation, Damodar Valley Corporation, National Textile Corporation, Industrial Finance Corporation of India (IFCI), Tourism Corporation of India, Minerals and Metals Trading Corporation (MMTC) etc are some of the examples of Public Corporations.

The principal benefits of the Public Corporation as an organizational device are its freedom from government regulations and controls and its high degree of operating and financial flexibility. In this form, there is a balance between the autonomy and flexibility enjoyed by private enterprise and the responsibility to the public as represented by elected members and legislators. However, this form, in its turn, has given rise to other problems, namely the difficulty of reconciling autonomy of the corporation with public accountability. The public corporation (statutory corporation) is a body having an entity separate and independent from the Government. It is not a department or organ of the Government. Consequently, its employees are not regarded as Government servants and therefore they are not entitled to the protection of Article 311 of the Constitution. It is to be also noted that a public corporation is included within the meaning of 'State' under Article 12 and therefore the fundamental rights can be enforced against it. Public corporations are included with the meaning of 'other authorities' and therefore it is subject to the writ jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution.

CHAP 5 : LAW OF TORTS

INTRODUCTION TO LAW OF TORTS

The word 'tort' is derived from the Latin word tortum which means wrong. It means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. It is a civil wrong for which the law provides a remedy. In general term, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. For examples, intentional torts such as battery, defamation, and invasion of privacy and intentional torts such as negligence.

Broadly speaking, public wrongs are the violations of 'public law and hence amount to be offences against the State, while private wrongs are the breaches of private law, i.e., wrongs against individuals. Public wrongs or crimes are those wrongs which are made punishable under the penal law which belong to the public law group.

Section 2(m) of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

Salmond defines it as "a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation

The definition of tort given by various experts are given below:

Winfield and jolowicz – Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

Salmond and hueston – A tort is a civil wrong for which the remedy is a common action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other mere equitable obligation.

Sir Frederick Pollock – Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including reference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person

Elements of Tort

A civil wrong.

This civil wrong is not a breach of contract or breach of trust

This wrong is redressible by an action for unliquidated damages

Damage and Damages

Damage means the legal loss or violation of legal right, i.e infringement of legal right. Damages means monetary, pecuniary compensation or compensation in terms of money. Further, the damages may be

Liquidated and Unliquidated Damages.

Liquidated and Unliquidated Damages Liquidated Damages means Pre-determined or fixed compensation for some loss. Example – in case of breach of contract the damages are known i.e pre-determined by parties. Unliquidated Damages refers to damages which are not predetermined or decided by the parties, they are not known beforehand.

(A) Liability against Civil Wrong (In general)

Civil Wrong

Civil wrong refers to those, which satisfies the condition of liabilities and are remedied by law, when someone loses money due to the negligence of another, this is known as a civil wrong. Damage to property or reputation, failure to fulfil contractual duties, physical or mental harm, etc. are all examples of wrongful losses. The victim of a civil wrong has the right to sue the offending party in order to recover damages for the harm suffered. It includes Tort, Breach of Contract, Breach of Trust and Breach of Equitable Obligation.

General Conditions of Liability for a Tort

Wrongful act

The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above mentioned interests, and protected by law. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation

Legal damages

It is not every damage that is a damage in the eye of the law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie. Also, where there is infringement of a legal right, an action lies even though no damage may have been caused. As was stated in *Ashby v. White*, (1703) 2 Ld. Raym. 938 legal damage is neither identical with actual damage nor is it necessarily pecuniary.

Legal remedy

The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Selfhelp is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land.

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. Injuria means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights.

Gloucester Grammar School Case, 1410

Injuria Sine Damnum

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort. Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an "absolute" private right of an individual, there is an injuria and the plaintiff's action will succeed even if there is no Damnum or damages. An absolute right is one, the violation of which is actionable per se, i.e., without the proof of any damage. Injuria sine Damnum covers such cases and action lies when the right is violated even though no damage has occurred. Thus the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

Ashby V White, 1703

Mens Rea

Mens Rea or guilty mind creates liability on the principle that mere act of the person is not enough to create his liability. The General principle lies in the maxim “**actus non facit reum nisi mens sit rea**” i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. It is not so easy to make such generalization about liability in tort.

Mens rea can be interpreted into two ways –

- ✓ **Fault/ state of mind when relevant:** Many branches of law of torts like assault, battery, false imprisonment, deceit, malicious prosecution and conspiracy, the state of mind of other person is taken into account to ascertain his liability. Defendant's conduct may be innocent and the act done might be due to an accident. That all should be taken into account.
- ✓ **Liability without fault:** There are cases wherein the mental state of the doer stands irrelevant and the liability still falls on the shoulder of the doer even if that act was done without any wrongful intentions or malice. So, liability under law of torts may also be fixed even if mens rea is not present
- ✓

(B) Strict or Absolute Liability

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant's part. In other words, the defendant is held liable without fault. These cases fall under the following categories:

- (i) **Liability for Inevitable Accident** – Such liability arises in cases where damage is done by the escape of dangerous substances brought or kept by anyone upon his land. Such cases are where a man is made by law an insurer of other against the result of his activities.
- (ii) **Liability for Inevitable Mistake** – Such cases are where a person interferes with the property or reputation of another.
- (iii) **Vicarious Liability for Wrongs committed by others** – Responsibility in such cases is imputed by law on grounds of social policy or expediency. These case involve liability of master for the acts of his servant

Rule in Rylands v. Fletcher

The rule in Rylands v. Fletcher (1868) L.R. 3 H.L. 330 is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: “If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage.”

The facts of this case were as follows: B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursts through the shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did

not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, prima facie answerable for all the damage which is the natural consequence of its escape."

The following exceptions to the rule of strict liability have been introduced in course of time, some of them being inherent in the judgment itself in Ryland v. Fletcher:

(i) Damage due to Natural Use of the Land

In Ryland v. Fletcher water collected in the reservoir in such large quantity, was held to be nonnatural use of land. Keeping water for ordinary domestic purpose is 'natural use'. Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land

(ii) Consent of the plaintiff Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in Ryland v. Fletcher does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

(iv) Statutory Authority Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care. Thus, in Green v. Chelsea Water Works Co. (1894) 70 L.T. 547 the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

(iii) Act of Third Party If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable. Thus, in Box v. Jubh (1879) 4 Ex. D. 76, the overflow from the defendant's reservoir was caused by the blocking of a drain by stranger, the defendant was held not liable. But if the act of the stranger, is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care prevent the damage. Failure on his part to avoid such damage will make him liable

(v) Act of God If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility,

(vi) Escape due to plaintiff's own Default Damage by escape due to the plaintiff's own default was considered to be good defence in Rylands v. Fletcher itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property,

Applicability of the rule in Rylands v. Fletcher in cases of enterprises engaged in a hazardous or inherently dangerous industry

The Supreme Court has discussed the applicability of the rule of Rylands v. Fletcher in the case of M.C. Mehta v. Union of India and Others (1987) 1. Comp. L.J. p. 99 S.C. while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

“We have to evolve new principle and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that, in any other foreign country”.

On the question of the nature of liability for a hazardous enterprise the court while noting that the above rule as developed in England recognizes certain limitations and responsibilities recorded it's final view as follows: “

We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results

(C) Vicarious Liability

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is vicariously liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This is known as vicarious liability in tort. Principle of Liability A person may be liable in respect of wrongful acts or omissions of another in ways as given under:

1. By ratification – having ratified through particular law, act or statute
2. By relation – through standing of one person to another by the relation they share
3. By abetment – having abetted any tortious act committed by others.

Essential elements of Vicarious Liability

In case of a master servant relationship, master is liable for the act of servant if following requirements are met with:

- ✚ There must be an existing relationship between master and servant
- ✚ Servant has committed some tortious act
- ✚ This tortious act must be done during the course of employment

Types of vicarious liability

Principal and Agent

Qui facit per alium facit per se – he who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same. In Lloyd v. Grace, Smith & Co. (1912) A.C. 716, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.

Partners

For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several. In *Hamlyn v. Houston & Co.* (1903) 1 K.B. 81, one of the two partners bribed the plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.

Master and Servant

[Authority by relation] A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several. In such cases (1) liability of a person is independent of his own wrongful intention or negligence (2) liability is joint as well as several (3) In case of vicarious liability, the liability arises because of the relationship between the principal and the wrongdoer but in case of absolute or strict liability the liability arises out of the wrong itself.

Employer and Independent Contractor

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors. A servant is a person who is employed by another (the employer) to perform services in connection with the affairs of the employer, and over whom the employer has control in the performance of these services. An independent contractor is one who works for another but who is not controlled by that other in his conduct in the performance of that work.

Employer and Independent Contractor

Where Employer is Liable for the acts of Independent Contractor

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

- When employer authorizes him to commit a tort.
- In torts of strict liability
- Negligence of independent contractor

Where Employer is not Liable for the acts of an Independent Contractor

An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor. In *Philips v. Britannia Hygienic Laundry Co.* (1923), the owner of lorry was held not liable when a third-party's vehicle was damaged, in consequence of the negligent repair of his lorry by a garage proprietor.

Liability for the acts of Servants/Employees

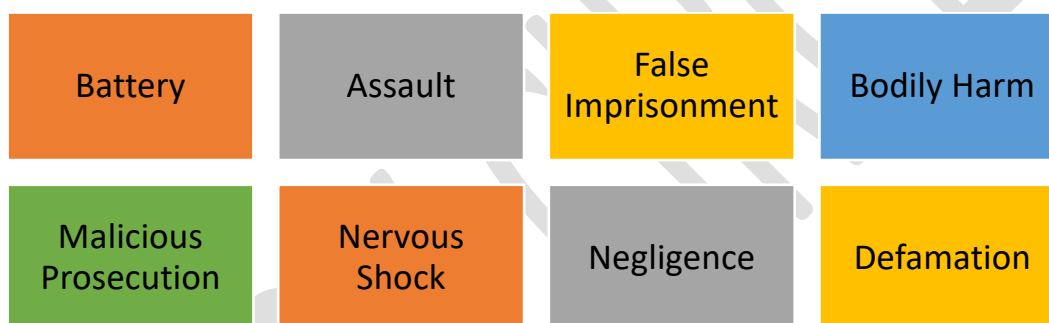
An employer is liable whenever his servant commits a tort in the course of his employment. An act is deemed to be done in the course of employment if it is either: (i) a wrongful act authorized by the employer, or (ii) a wrongful and unauthorized mode of doing some act authorized by the employer.

Vicarious Liability of the State

(a) The Position in England At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

(b) The Position in India Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India. When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function it could claim immunity from the tortious liability, otherwise not. Generally, the activities of commercial nature or those which can be carried out by the private individual are termed as non-sovereign functions.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM



Battery

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary:

- (i) use of force, however, trivial it may be without the plaintiff's consent, and
- (ii) without any lawful justification.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established.

Bodily Harm

A wilful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.

False Imprisonment

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body. What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. It is a serious violation of a person's right and liberty whether being confined within the four walls or by being prevented from leaving place where he is. If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

Malicious Prosecution

Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.

Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard. Causing of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow

Defamation

Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another. It is defined as follows:

"Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person.

" Defamation may be classified into two heads: Libel and Slander.

Libel is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema films both the photographic part of it and the speech which is synchronized with it amount to tort.

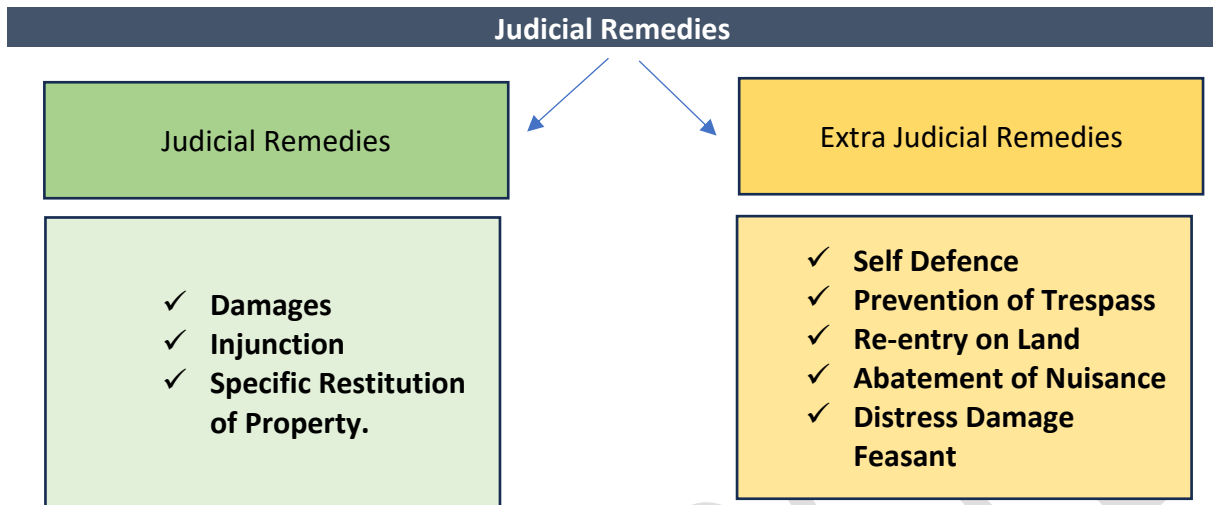
Slander is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures. Generally, the punishment for libel is more severe than for slander. Defamation is tort as well as a crime in India. In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code

Negligence

Negligence means inadvertence or carelessness. Negligence refers to the situation when a person might be innocent but has failed to act in reasonable manner. Negligence has become an independent tort with the changes in technology and regulatory environment. Negligence in treatment of patients is an important example of Tort of Negligence.

Negligence has been defined by Winfield "Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. The

Consumer Protection Act has also been developed and provides for the unliquidated damages in cases of Negligence.



Damages

When a plaintiff's right is violated by the defendant, the court will grant the plaintiff damages, which are compensation for such infringement of the right for the loss they have suffered. Only those damages can be recovered which are directly the result of the act of defendant. It is based on the legal maxim, *In jure non remota causa sed proxima spectator* which means law considers the direct or immediate cause and not the remote one. Damages are the primary judicial remedy served in torts.

Injunction

Injunction is an order of the Court redirecting commission, omission or amendments to an act. It orders a person to do an act, to not to do an act or correct his wrongful act. It is done entirely upon the discretion of the Court. It can be prohibitory, mandatory, interim or perpetual in nature.

Specific Restitution of Property

This is the third kind of judicial remedy in which a court may direct for in case of any breach of rights. Restitution is the process of returning property to its rightful owner. A person is entitled to the restitution of his property when it has been unfairly taken away from him. Wrongly dispossession of certain property invokes this remedy.

Extra Judicial Remedies

(a) Self Defence It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

(b) Prevention of Trespass An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

(c) Re-entry on Land A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) Re-caption of Goods It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

(e) Abatement of Nuisance The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it. Thus, he may cut overhanging branches as spreading roots from his neighbour's trees, but (i) upon giving notice; (ii) by choosing the least mischievous method; (iii) avoiding unnecessary damage.

(f) Distress Damage Feasant An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage.

Consumer Protection Act and liabilities of torts

The Consumer Protection Act has widened the scope and provides more protection to the consumer as compared to Old Act which can be seen from the definition of the term 'Consumer' and 'Unfair Trade Practice'. The New Act has introduced the new concept of unfair contracts which includes those contracts whose terms and conditions are in favour of the manufacturer or service provider and are against the interest of the consumer. This concept would help to keep check on the business including banks and e-commerce sites that take advantage of their dominance in the market. The other significant addition that has taken place in 2019 is establishment of Central Consumer Protection Authority (CCPA) to regulate, protect and enforce the interest of the consumer and matters related to unfair trade practice. Ministry of Consumer Affairs, Food and Public Distribution, Government of India, in exercise of the powers conferred has enacted the various rules including Consumer Protection (E-Commerce) Rules, 2020.

Liability of a Corporate Entity/Company in Torts

Corporates contribute significantly in the growth and economic activities of any country. The quantum of business companies are engaged in are comparably complex than the proprietors. Therefore, the companies are exposed to the risk under Law of Torts. However, the companies are not natural persons therefore, liability has to be fastened after considering the lifting of corporate veil. In general, the companies are responsible for the wrongs committed by the employees. The liabilities of the companies are fastened on the basis of principle in legal maxim "Qui facit alium facit per se" which means He who acts through another, acts through himself

CHAP 6: CIVIL PROCEDURE CODE

AIM AND SCOPE OF CIVIL PROCEDURE CODE, 1908 [C.P.C.]

the company secretary and the secretarial staff of a company need to be familiar with the essentials of the basic procedure laws of the country

while the specific corporate, industrial, taxation, property and urban land laws have direct relevance for the efficient performance of the duties and responsibilities of the company secretary, the procedural law provides the parameters for the pursuance of legal action

it is therefore, necessary to keep in view the requirement of the procedural law

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction.

The Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law the latter prevails over the former.

Where the special law is silent on a particular matter the Code applies, but consistent with the special enactment.

SCHEME OF THE CODE

first part contains 158 sections

second part contains 51 orders which in turn contains several rules

SOME IMPORTANT TERMS

■ Cause of Action

“Cause of action” means every fact that it would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Under Order 2, Rule 2, of the Civil Procedure Code it means all the essential facts constituting the rights and its infringement. It means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement.

■ Judgement

“Judgement” as defined in Section 2(9) of the Civil Procedure Code means the statement given by the Judge of the grounds of a decree or order. Thus a judgement must set out the grounds and reasons for the Judge to have arrived at the decision. In other words, a “judgement” is the decision of a Court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination (State of Tamilnadu v. S. Thangaval, AIR (1997) S.C. 2283).

■ Decree

“Decree” is defined in Section 2(2) of the Code as:

- (i) the formal expression of an adjudication which, so far as regards the Court expressing it
- (ii) conclusively
- (iii) determines the rights of the parties
- (iv) with regard to all or any of the matters in controversy
- (v) in the suit and may be either preliminary (i.e., when further proceedings have to be taken before disposal of the suit) or final.

The decree shall be deemed to include the rejection of a plaint and the determination of any question within section 144 (Application for restitution) of the Code.

But decree does not include:

- (a) any adjudication from which an appeal lies as an appeal from an Order, or
- (b) any order of dismissal for default.

Essentials of a decree are:

There must be formal expression of adjudication.

There must be a conclusive determination of the rights of parties.

The determination must be with regard to matters in controversy.

The adjudication should have been given in the suit.

▪ Decree-holder

“Decree-holder” means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)]

Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

▪ Judgement-debtor

“Judgement-debtor” means any person against whom a decree has been passed or an order capable of execution has been made. [Section 2(10)]

▪ Order

“Order” as set out in Section 2(14) of the Code means the formal expression of any decision of a Civil Court which is not a decree.

APPEALS FROM ORDER

According to Section 104 of the Code, no appeal lies against orders other than what is expressly provided in the Code or any other law for the time being in force. Under the Code appealable orders are:

- (i) an order under Section 35A, i.e., for compensatory costs in respect of false or vexatious claims within pecuniary jurisdiction of the Court, but only for the limited ground that no order should have been made, or that such order should have been made for a lesser amount.
- (ii) an order under Section 91 or Section 92 refusing leave to institute a suit under Section 91 (Public nuisances and other wrongful acts affecting the public) or Section 92 (alleged breach of trust created for public purposes of a charitable or religious nature).

- (iii) an order under Section 95, i.e., compensation for obtaining arrest attachment or injunction on insufficient grounds.
- (iv) an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree. The definition does not include legal representative of a deceased judgement-debtor

STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

Section 10 provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

However, the pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.

To prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue, Section 10 is enacted. The purpose is also to avoid conflict of decision. It is really intended to give effect to the rule of res judicata. The institution of second suit is not barred by Section 10. It merely says that the trial cannot be proceeded with.

A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same colour combination etc. as that of plaintiff company. A subsequent suit was instituted in different Court by the defendant company against the plaintiff company with same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as issue involved in two suits was totally identical (*M/s. Wings Pharmaceuticals (P) Ltd. and another v. M/s. Swan Pharmaceuticals and others*, AIR 1999 Pat. 96).

Essential conditions for stay of suits:

The matter must be two suits instituted at different times

The matter in issue in the latter suit should be directly and substantially in issue in the earlier suit

Such suit should be between the same parties

Each earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court

RES JUDICATA

Section 11 of the Civil Procedure Code deals with the doctrine of Res Judicata. According to this provision of no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit (i.e., suit previously decided) either between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and finally decided by such Court. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

In short, this principle applies where an issue which has been raised in a subsequent suit was directly and substantially in issue in a former suit between the same parties and was heard and decided finally. Findings incidentally recorded do not operate as res judicata (*Madhvi Amma Bhawani Amma v. Kunjikutty P.M. Pillai*, AIR 2000 SC 2301).

Supreme Court in *Gouri Naidu v. Thandrothu Bodemma and others*, AIR 1997 SC 808, held that the law is well settled that even if erroneous, an inter party judgement binds the parties if the court of competent jurisdiction has decided

the lis. Thus, a decision that a gift made by a coparceners is invalid under Hindu Law between coparceners, binds the parties when the same question is in issue in a subsequent suit between the same parties for partition.

A consent or compromise decree is not a decision by Court. It is an acceptance of something to which the parties had agreed. The Court does not decide anything. The compromise decree merely has the seal of the Court on the agreement of the parties. As such, the principle of res judicata does not generally apply to a consent or compromise decree. But when the court on the facts proved comes to a conclusion that the parties intended that the consent decree should have the effect of deciding the question finally, the principle of res judicata may apply to it.

JURISDICTION OF COURTS AND VENUE OF SUITS

Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or a commission. If no such limit is imposed or defined, the jurisdiction is said to be unlimited.

A limitation on jurisdiction of a Civil Court may be of four kinds. These are as follows:-

Jurisdiction over the subject matter	Place of suing or territorial jurisdiction	Jurisdiction over persons	Pecuniary jurisdiction depending on pecuniary value of the suit
The jurisdiction to try certain matters by certain Court is limited by statute; Example: a small cause court can try suits for money due under a promissory note or a suit for price of work done.	A territorial limit of jurisdiction for each court is fixed by the Government. Thus, it can try matters falling within the territorial limits of its jurisdiction.	All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country except a foreign State, its ruler or its representative except with the consent of Central Government.	Section 6 of the Code of Civil Procedure, 1908 deals with Pecuniary jurisdiction and lays down that save in so far as is otherwise expressly provided Courts shall only have jurisdiction over suits the amount or value of which does not exceed the pecuniary limits of any of its ordinary jurisdiction. There is no limit on pecuniary jurisdiction of High Courts and District Courts

Jurisdiction may be further classified into following categories depending upon their powers:

Original Jurisdiction : A Court tries and decides suits filed before it

Appellate Jurisdiction : A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.

Criminal and appellate Jurisdiction : The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

PLACE OF SUING (TERRITORIAL)

Section 15 lays down that every suit shall be instituted in the Court of the lowest grade competent to try it.

According to Section 16, subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

for recovery of immovable property with or without rent or profits

for partition of immovable property

for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property

for the determination of any other right to or interest in immovable property

for compensation for wrong to immovable property

for the recovery of movable property actually distrained or attachment

It has also been provided by a proviso that where relief could be obtained through personal obedience of the defendant such suit to obtain relief for compensation or respecting immovable property can be instituted either in a local Court within whose local limits of jurisdiction the property is situated or in the Court within whose local limits of jurisdiction the defendant voluntarily resides or carries on business or personally works for gain.

According to the Explanation, “property” means property situated in India.

- Where immovable property is situated within the jurisdiction of different Courts: Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated provided the value of the entire claim is cognizable by such Court. (Section 17)
- Where local limits of jurisdiction of Courts are uncertain: Where jurisdiction is alleged to be uncertain as within the local limits of the jurisdiction of which of two or more Courts, any immovable property is situated, then any of the said Courts may proceed to entertain the suit after having recorded a statement to the effect that it is satisfied that there is ground for such alleged uncertainty. (Section 18)
- Where wrong done to the person or to movable property: Where a suit is for compensation for wrong done Law relating to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the Courts. (Section 19)
- Other suits: Subject to the limitations provided by Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within local limits of whose jurisdiction the defendant, or each of the defendants (where there are more than one defendant) actually and voluntarily resides or carries on business or personally works for gain or where such defendants actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the Court is obtained or the defendant(s) who do not reside or carry on business or personally work for gain at such place acquiesce in such institution or, where the cause of action, wholly or in part, arises. (Section 20).

In the case of a body corporate or company it shall be deemed to carry on business at its sole or principal office in India, or in case of any cause of action arising at any other place, if it has a subordinate office, at such place.

SET-OFF, COUNTER-CLAIM AND EQUITABLE SET-OFF

▪ Set-off

Order VIII, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Under Order VIII Rule 6 where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary jurisdiction of the Court and where both parties fill the same character as in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

▪ Effect of Set-off

Under clause (2) the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

▪ Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order VIII, Rule 6A)

▪ Equitable set-off

Sometimes, the defendant is permitted to claim set-off in respect of an unascertained sum of money where the claim arises out of the same transaction, or transactions which can be considered as one transaction, or where there is knowledge on both sides of an existing debt due to one party and a credit by the other party found on and trusting to such debt as a means of discharging it. Generally the suits emerge from cross-demands in the same

transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross-suit.

In India distinction between legal and equitable set-off is recognised. Order VIII, Rule 6 contains provisions as to legal set-off. Order VIII, Rule 6A recognises the counter-claim by the defendant. Still an equitable set-off can be claimed independently of the Code.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS (ORDER XXXIX)

Temporary injunction

The Court may grant temporary injunction to restrain any such act (as set out below) or make such other order for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit; where it is proved by affidavit or otherwise:

- a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree
- b) the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors
- c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages.

Interlocutory orders

Power to order interim sale

The Court may, on the application of any party to a suit order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgement in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to be sold at once. (Rule 6)

DETENTION, PRESERVATION, INSPECTION ETC. OF SUBJECT-MATTER OF SUIT

The Court may, on application of any party to a suit, and on such terms as it thinks fit:

make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein

for all or any of the purposes as in (a) above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit

for all or any of the purposes as in (a) above authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)

Application for such order to be after notice –

An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.



An application by the defendant for such an order may be made at any time after appearance



Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-

named party, with or without security subject to further direction of the Court. [Rule (10)]

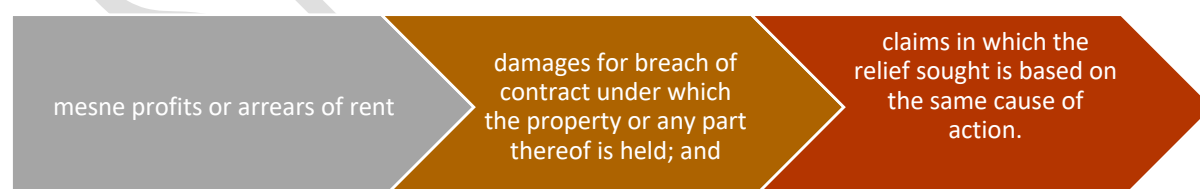
In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security etc. as it may think fit.

INSTITUTION OF SUIT (ORDER IV)

Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are –

A suit for breach of contract may also be instituted where the cause of action arises that is, where the contract was made or where the breach was committed. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property or any property of it is situate. Claim for recovery of any immovable property could be for:



Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Misjoinder of Parties –

Where more than one person(s) joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of 'misjoinder of parties'. To avoid such misjoinder, two factors are essential viz.,

the right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants

- there is a common question of law or fact.

The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

Misjoinder of Causes of Action -

If the plaintiffs are not jointly interested in all the causes of action there is misjoinder of causes of action.

All objections regarding misjoinder of parties or of cause of action should be taken at the first hearing of the suit and before the settlement of causes unless the ground for objections had subsequently arisen.

Presentation of plaint :

according to order 4, of CPC , every suit shall be instituted by presentation of plaint

Service of summons

according to order 5, when a suit has duly been instituted , a summons may be issued to the defendant by the court

Filing of written statement, set off and counter claims:

according to order 8, the defendant shall within 30 days from the date of service of summons on him, present a written statement to his defence. This is subject to the proviso to said rule , which may allow to file within 120 days on payment of costs

Appearances of parties :

according to order 9 , the parties should appear on the day fixed by summons

Examinations of parties :

order 10, the court examines the parties to the court

Framing of issues :

the court frames the issues according to order 14

Hearings :

the court hears the parties according to order 18

Judgement :

the court pronounces the decree according to order 20.

DELIVERY OF SUMMONS BY COURT

When the suit has been duly instituted, the Court issues an order (known as summons) to the defendant to appear and answer the claim and to file the written statement of his defence if any within a period of 30 days from the date of service of summons. No summons is to be issued when the defendant has appeared at the presentation of plaint and admitted the plaintiff's claim.

The ordinary mode of service of summons, i.e., direct service is by delivery or tendering a copy of it signed by the judge or competent officer of the Court to

the person summoned either personally or to his agent or any adult male or female member of his family, against signature obtained in acknowledgement of the services.

Order 5, Rule 9 substituted by the Code of Civil Procedure (Amendment) Act, 2002 provides that –

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means to transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court. Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(3) Where the defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply.

(4) When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to

him, the Court issuing the summons shall declare that the summons had been duly served on the defendant

Defence

The defendant has to file a written statement of his defence within a period of thirty days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days. Provision though negatively worded is procedural. It does not deal with power of Court or provide consequences of non-extension of time. The provision can therefore be read as directory. (Shaikh Salim Haji Abdul Khayumsab v. Kumar & Ors, AIR 2006 SC 398.)

In the case of disputes covered under the Commercial Courts Act, 2015 if the defendant fails to file the written statement within a period of 30 days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but within 120 days from the date of service of summons and on expiry of the said period, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.

Where the defendant bases his defence upon a document or relies upon any document in his possession in support of his defence or claim for set-off or counter claim, he has to enter such document in a list and produce it in Court while presenting his written statement and deliver the document and a copy thereof to be filed within the written statement.

Appearance of parties and consequence of non-appearance

If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed (O.9, R. 3 and 4). If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed ex-parte. In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment. Where the hearing of the suit is adjourned exparte and the defendant appears at or before such hearing and assigns a good cause for his previous nonappearance, the

defendant may be heard in answer to the suit on such terms as to costs or otherwise. The defendant is not precluded from taking part in the proceedings even though he may not be allowed to file a written statement. If the plaintiff is absent and the defendant is present at the hearing of the suit, the Court shall make an order for the dismissal of the suit, unless the defendant admits the claim of the plaintiff or a part thereof in which case the Court shall pass a decree in favour of the plaintiff in accordance with the admission of the defendant and shall dismiss the suit to the extent of the remainder (O.9, R.8). In any case in which a decree is passed ex-parte against a defendant he may apply for setting aside the decree on the ground that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and the Court shall set aside the decree on such terms as to costs payment into Court or otherwise as it deems proper and shall appoint a day for proceeding with the suit (O.9, R.13).

A defendant has four remedies available if an ex-parte decree is passed against him:

He may file an appeal against the ex-parte decree under Section 96 of the C.P.C.

He may file an application for review of the judgement. (O.47, R.1)

He may apply for setting aside the ex-parte decree.

A suit can also be filed to set aside an ex-parte decree obtained by fraud but no suit shall lie for nonservice of summons.

DISCOVERY AND INTERROGATORIES AND PRODUCTION OF DOCUMENTS**▪ Discovery by interrogations**

Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties. But interrogatories will not be allowed for the following purposes:

- (i) for obtaining discovery of facts which relates exclusively to the evidence of the adversary's case or title.
- (ii) to interrogate any confidential communications between the adversary and his counsel.
- (iii) to obtain disclosures injurious to public interests.
- (iv) Interrogatories that are of a 'fishing' nature, i.e., which do not relate to some definite and existing state of circumstances but are resorted to in a speculative manner to discover something which may help a party making the interrogatories.

▪ Admission by parties

"Admission" means that one party accepts the case of the other party in whole or in part to be true. Admission may be either in pleadings or by answers to interrogatories, by agreement of the parties or admission by notice.

▪ Hearing of the suit

The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a case the defendant has a right to begin (O.18, R.1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning has an option to produce his evidence on those issues or reserve it by way of an answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence. Care must be taken that no part of the evidence should be produced on those issues for which the plaintiff reserves a right to produce evidence after the defence has closed his evidence, otherwise the plaintiff shall lose his right of reserving evidence (O.18, R.3).

▪ Affidavit

An affidavit is a written statement of the deponent on oath duly affirmed before any Court or Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public. An affidavit can be used in the following cases:

- (i) the Court may at any time of its own motion or on application of any party order that any fact may be proved by affidavits (Section 30).
- (ii) the Court may at any time order that the affidavit of any witness may be read at the hearing unless either party bona fide desires to cross-examine him and he can be produced (O.19, R.1).
- (iii) upon application by a party, evidence of a witness may be given on affidavit, but the court may at the instance of either party, order the deponent to attend the court for cross-examination unless he is exempted from personal appearance. Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications. (O.19, R.2&3).

▪ Judgement

The Court after the case has been heard shall pronounce judgement in an open court either at once or on some future day as may be fixed by the court for that purpose of which due notice shall be given to the parties or their pleaders (Order XX, Rule 1). The proper object of a judgement is to support by the most cogent reasons that suggest themselves final conclusion at which the judge has conscientiously arrived.

If the judgement is not pronounced at once every endeavour shall be made by the Court to pronounce the judgement within a period of 30 days from the date on which the hearing of the case was concluded. However, if it is not practicable to do so on the ground of exceptional and extra ordinary circumstances of the case, the Court must fix a future day which should not be a day beyond sixty days for the pronouncement of the judgement giving due notice of the day so fixed to the concerned parties. In *Kanhaiyalal v. Anup Kumar*, AIR 2003 SC 689, where the High Court pronounced the judgment after two years and six months, the judgment was set aside by the Supreme Court observing that it would not be proper for a Court to sit tied over the matter for such a long period.

APPEAL

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute (Rangoon Botatoung Company v. The Collector, Rangoon, 39 I.A. 197). There are four kinds of appeals provided under the Civil Procedure Code:

Appeals from original decrees

These appeals may be preferred in the Court superior to the Court passing the decree. An appeal may lie from an original decree passed ex parte. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law. No appeal lies in any suit of the nature cognizable by Courts of small causes when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees.

Second appeal

As per Section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law. Under this Section, an appeal may lie from an appellate decree passed ex parte.

The memorandum of appeal must precisely state the substantial question of law involved in the appeal. If the High Court is satisfied that a substantial question of law is involved, such question shall be formulated by it and the appeal is to be heard on the question so formulated. The respondent is allowed to argue that the case does not involve such question. The High Court is empowered to hear the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question.

As a general rule the second appeal is on questions of law alone (Section 100). The Privy Council in *Durga Choudharain v. Jawaher Singh*, (1891) 18 Cal. 23 P.C., observed that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Appeal from orders

These appeals would lie only from the following orders on grounds of defect or irregularity in law –

- (i) an order under Section 35A of the Code allowing special costs, and order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92,
- (ii) an order under Section 95 for compensation for obtaining attachment or injunction on insufficient ground,
- (iii) an order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.
- (iv) appealable orders as set out under Order 43, R.1. However no appeal shall lie from following orders – a) any order specified in clause (a) and b) from any order passed in appeal under Section 100.

Appeals to the Supreme Court

These appeals would lie in the following cases:

- ✓ from any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted under Section 112 by the Supreme Court itself,
- ✓ from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,
- ✓ from any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary. But the appellate court has a discretion to allow additional evidence in the following circumstances:

- ✚ When the lower court has refused to admit evidence which ought to have been admitted.
- ✚ When the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.
- ✚ for any other substantial cause.

but in all such cases the appellate court shall record its reasons for admission of additional evidence. The essential factors to be stated in an appellate judgement are (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled (O.41, R.31). The judgement shall be signed and dated by the judge or judges concurring therein.

Reference to High Court

Subject to such conditions as may be prescribed, at any time before judgement a court in which a suit has been instituted may state a case and refer the same for opinion of the High Court and the High Court may make such order thereon as it thinks fit. (Section 113. Also refer to Rule 1 of Order 46).

Example In a particular matter, the District court intends to state a case for opinion of High Court. It may refer the same for the opinion under Section 113 of CPC.

Review

The right of review has been conferred by Section 114 and Order 47 Rule 1 of the Code. It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the court which passed the decree or made the order on any of the grounds as mentioned in Order 47 Rule 1, namely –

- (i) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
- (ii) on account of some mistake or error apparent on the face of the record, or
- (iii) for any other sufficient reason, and

The Court may make such order thereon as it thinks fit

Example X, aggrieved by the order against him passed by District Court. He may file a review application in the same court for the review of that particular order.

Revision

Section 115 deals with revision. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –

- (i) to have exercised a jurisdiction not vested in it by law, or
- (ii) to have failed to exercise a jurisdiction so vested, or
- (iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity, The High Court may make such order as it thinks fit.

Provided that the High Court shall not vary or reverse any order made or any order deciding an issue in the course of a suit or proceeding except where the order, if it had been made in favour of the party applying for revision would have finally disposed off the suit or other proceedings.

The High Court shall not vary or reverse any decree or order against which an appeal lies either to the High Court or any Court subordinate thereto.

SUITS BY OR AGAINST A CORPORATION

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Service of summons Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:

- (a) on the secretary or any director or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business.

Power of the Court to require personal attendance

The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

SUITS BY OR AGAINST MINORS AND LUNATICS

A minor is a person (i) who has not completed the age of 18 years and (ii) for whose person or property a guardian has been appointed by a Court, or whose property is under a Court of Wards, the age of majority is completed at the age of 21 years.

A suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority. However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit.

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree.

When minor attains majority

When the minor plaintiff attains majority he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next friend and for leave to proceed in his own name and the title of the suit will be corrected. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit on repayment of the costs incurred by the defendant or opposite party etc. (For details see Rules 12 and 13 - Order 32)

Suits by or against persons of unsound mind

Order 32, Rule 15 states that all the provisions of rule 1 to 14, applicable to minors except for rule 2A shall be applicable to a person of unsound mind or lunatics. If a person before or during the pendency of the suit are found to be of unsound mind. It shall also be applicable to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

SUMMARY Proceedings/PROCEDURE A trial in summary way is a trial in which issues are to be resolved quickly by applying the speedy procedure. Sections 260-265 of the Code of Criminal Procedure, 1908 provides the provisions relating to summary trials. It facilitate the parties to seek justice for minor offenses in a shorter time.

A Chief Judicial Magistrate or Metropolitan Magistrate and any Magistrate of the first class specially empowered in this behalf by the High Court may try a suit in a summary way. The following offences may be tried in a summary way:

- ❖ offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years
- ❖ theft where the value of the property stolen does not exceed two thousand rupees
- ❖ receiving or retaining stolen property, where the value of the property does not exceed two thousand rupees
- ❖ assisting in the concealment or disposal of stolen property where the value of such property does not exceed two thousand rupees
- ❖ offences under sections 454 and 456 of the Indian Penal Code relating to Lurking house-trespass or house-breaking
- ❖ insult with intent to provoke a breach of the peace and criminal intimidation punishable with imprisonment for a term which may extend to two years, or with fine, or with both
- ❖ abetment of any of the foregoing offences
- ❖ an attempt to commit any of the foregoing offences, when such attempt is an offence
- ❖ any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871.

However, if in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate can recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by this Civil Procedure Code.

The High Court may confer on any Magistrate of the second class, power to try summarily any offence punishable only with fine or with imprisonment for a term not exceeding six months with or without fine, and any abetment of or attempt to commit any such offence.

Institution of summary suits Such suit may be instituted by presenting a plaint containing the following essentials:

- (1) a specific averment to the effect that the suit is filed under this order;
- (2) that no relief which does not fall within the ambit of this rule has been claimed;
- (3) the inscription immediately below the number of the suit in the title of the suit that the suit is being established under Order 37 of the CPC. Order 37,

Rule 1, sub rule 2 provides that subject to the provisions of sub-rule 1, the Order applies to the following classes of suits, namely:—

- a) suits upon bills of exchange, hundies and promissory notes;
- b) in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—
 - (i) on a written contract, or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Summary Judgment

One of the significant amendments which has been brought into the CPC by the Commercial Courts Act, 2015 is the insertion of Order 13A for summary judgment. Order 13A of the Commercial Courts Act, 2015 provides that disputes which are recognized as commercial dispute under the Act, can be disposed off by the commercial court established under the Act without a full-

fledged trial. Previously, suits which had more or less a clear outcome based on merits would still have to go through the entire procedure enumerated under the CPC before the case could be disposed.

The technicalities led to inordinate delays for the parties concerned and also clogged the entire docket. The amendment is on similar lines to summary suits provided in the CPC with the primary difference that application for summary judgment can be in respect of any relief in a commercial dispute while summary suits relate to such relief relating to liquidated demand or fixed sum of debt.

Under mechanism as provided under Order XIII-A, the application for summary judgment can be made by either party after the service of summons to the defendant and before the framing of issues. Upon consideration and satisfaction of the Court, a summary judgment may be given that (a) the plaintiff/defendant has no real prospect of succeeding on the claim/defence, as the case may be; and (b) there is no other compelling reason as to why the claim should not be disposed of before the recording of oral evidence.

Saving of inherent powers of Court.

Section 151 of the Civil Procedure Code says 'Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'

Though it does not confer any specific power to the Courts, it is one of the most used sections of the Code in litigations. Any situation that is not covered under the Code can be brought under this Section. The scope of Section 151 CPC has been explained by the Supreme Court in the case *K.K. Velusamy v. N. Palanisamy* (2011) 11 SCC 275 as follows:

(a) Section 151 CPC is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any

particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court. Powers of Civil Courts and their exercise by Tribunals
Tribunals are quasi-judicial authorities established by law. Generally, they are established for speedy disposal of cases and possesses expertise on certain subject matters. These tribunals are empowered with certain powers of Civil Procedure in order to effectively discharge the functions assigned to them.

COMMERCIAL COURTS ACT, 2015

Introduction The Government of India introduced the

'The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015' (Commercial Courts Act, 2015 for short) to reduce the burden on judiciary with respect to commercial disputes. This not only unburdened the judiciary but also enable prospective foreign investors to gain more trust over their investments in Indian market. Its main emphasis is on Commercial disputes which are special in nature since they affect the economy of a nation, directly or indirectly. To expedite the process of disposal of cases of large economic value or commercial cases, the Commercial Courts Act, 2015 (the Act) was introduced.

It is an Act to provide for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.

The Commercial Courts Act, 2015 came into force on 23rd October, 2015. It enables speedy redressal of cases holding large economic value.

Commercial Courts

According to Section 3 of the Act, the State Government may with the consultation of respective High Court constitute the constitute Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act.

State Government, after consultation with the High Court may

1. specify pecuniary value which shall not be less than three lakh rupees or such higher value. [Section 3(1A)]
2. extend, alter, and reduce the jurisdiction of such court within local limits. [Section 3(2)]
3. appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of such Courts.

Jurisdiction

According to Section 6 of the Act, the Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction by State Government with the assistance of concerned High Court.

According to Section 7 of the Act, all suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court.

According to Section 10 of the Act, in case of matters of international commercial arbitration pertaining to Arbitration and Conciliation Act, 1996 the matters shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court. In matters of arbitration other than international commercial arbitration under Arbitration and Conciliation Act, 1996 that have been filed on the original side of the High Court, matters shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

Determination of Specified Value

The Specified Value of the subject-matter of the commercial dispute in a suit, appeal or application shall be determined by

In case of recovery of money – the value should include interest accrued so far, upto the date of filing of application or suit.

In case of Movable Property or right in it – the value shall be computed taking into account market value of the movable property as on the date of filing of the suit or application.

In case of immovable Property or right in it - the value shall be computed taking into account market value of the immovable property as on the date of filing of the suit or application.

In case of other intangible right - the value shall be computed taking into account estimated market value of such right by plaintiff as on the date of filing of the suit or application.

Pre-Institution Mediation and Settlement

The very purpose of this Act was to resolve the commercial disputes without bringing them to the court of law through mediation. Prior to approaching a commercial court for dispute commercial in nature, the Act requires that parties attempt to settle their issues through mediation. The Central Government may, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 for the purposes of pre-institution mediation.

Time Period

The process of pre-litigation mediation shall be completed within a period of three months from the date of application made. It can be extended for a further period of two months with the consent of the parties.

Award/Settlement

The award or settlement of pre-litigation mediation shall be in writing and signed by the parties to the dispute and the mediator. The award shall have the same status and effect as of an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996.

Appeals

Any person aggrieved by the judgment or order of a Commercial Court shall within sixty days of such judgment may file an appeal - I If he is aggrieved by the judgment of Commercial court below District Judge, he may appeal to the Commercial Appellate Court.

I If he is aggrieved by the judgment of Commercial court at District Judge or Commercial Division of a High Court, he may appeal to the Commercial Appellate Division of that High Court All the appeals filed shall be disposed of within a period of six month from the date of filing.

CHAP 7 : Laws relating to Crime and its Procedure

INTRODUCTION

Crime is a social phenomenon. It is a wrong committed by an individual in a society. Wrong may be ethical or legal. Wrong should be legal wrong for coming into the definition. Crime is any act which is not legal and done or committed by a person. Law regulates the social interest, arbitrates conflicting claims and demands. The security of persons and property which is essential function for a State which is achieved through the instrumentality of criminal law. Crime being a relative conception is an act defined by State as a crime. The concept of crime changes from time to time and as per the society. For determination of crime there is no fixed rule. Crime is what the law says it is.C

CRIMINAL OFFENCE VS. CIVIL WRONG

- The difference between a criminal offence and a civil wrong is that while the former is considered a wrong against the society because of their grave nature, a civil wrong is a wrong done to an individual. It is believed that serious crimes threaten the very existence of an orderly society, and therefore, if such a crime is committed, it is committed against the whole society.
- It should be kept in mind that what is criminal, illegal or unlawful may still be a socially acceptable practice. It is also likely that all that a society considers as reprehensible is not criminal in the eyes of law. The divergence of criminal law, however, with the moral and cultural standards of society cannot be too great because governments in framing and amending criminal laws cannot be ignorant of the societal standards.
- In India, the base of the crime and punitive provision has been laid down in Indian Penal Code, 1860. In this Code the definition of crime has not been attempted or defined but according to section 40 the word 'Offence' denotes a thing made punishable by the Indian Penal Code, 1860 (IPC).
- The meaning of offence under chapter IV (General Exceptions), VA (Criminal Conspiracy) and sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 118, 119 and 120, 187, 194, 195, 203, 211, 213, 214, 221,

222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word “offence” denotes a thing punishable under Indian Penal Code, or under any special or local law.

- In sections 141, 176, 177, 201, 202, 212, 216 and 441, the word “offence” has the same meaning when the thing punishable under the special or local law is punishable with imprisonment for a term of six months or upwards, whether with or without fine.

INDIAN PENAL CODE

The Indian Penal Code (IPC) is a colonial legislation which was retained as the main penal law of the country even after India became independent in 1947. The Indian Penal Code was passed in the year 1860 but it came into force on 1st January, 1862, and it applies to the whole of India.

The Indian Penal Code, 1860 is a substantive law of crimes. It defines acts which constitute an offence and lays down punishment for the same. It lays down certain principles of criminal law. The procedural law through which the IPC is implemented is the Criminal Procedure Code, 1973. IPC consists of 23 chapters and 511 sections. It has two parts - General Principles and Defences & Specific Offences.

CODE OF CRIMINAL PROCEDURE

The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure. Company Secretaries and the secretarial profession would have relatively less to do with the Code of Criminal Procedure than with other procedural laws, except for safeguarding against incurring of liability for criminal offences by Directors, Secretary, Manager or other Principal Officer under different corporate and industrial laws. Nevertheless, it is necessary that company secretaries and other secretarial staff should be familiar with some of the relevant features of the Criminal Procedure Code. It is an Act to consolidate and amend the law relating to the procedure to be followed in apprehending the criminals, investigating the criminal cases and their trial before the Criminal Courts. It is an adjective law but also contains provisions of substantive nature (e.g. Chapters VIII, IX, X and XI).

Its object is to provide a machinery for determining the guilt of and imposing punishment on offenders under the substantive criminal law, for example, the Indian Penal Code (IPC). The two Codes are to be read together. The Cr. P. C.

also provides machinery for punishment of offences under some other Acts. Cr.PC consists of 37 chapters and 484 sections.

STAGES OF CRIME

The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, it involves four important stages, viz.



1. Criminal Intention

Criminal intention is the first stage in the commission of offence. Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose. Law does not as a rule punish individuals for their evil thoughts or criminal intentions. The criminal court does not punish a man for mere guilty intention because it is very difficult for the prosecution to prove the guilty intention of a man.

Intention means doing any act with one's will, desire, voluntariness, malafides and for some purpose. In the IPC, all these varied expressions find place in the various sections of the IPC. Intention can also be imputed under the law.

2. Preparation

Preparation means to arrange necessary measures for commission of intended criminal act. Preparation itself is not punishable as it is difficult to prove that necessary preparations were made for commission of the offence. But in certain exceptional cases mere preparation is also punishable. Under the IPC, mere preparation to commit few offences is punishable as they are considered to be grave offences. Some of them are as follows:

- (i) Preparation to wage war against the Government (section 122).
- (ii) Preparation for counterfeiting of coins or Government Stamps (sections 233 to 235, 255 and 257).
- (iii) Making preparation to commit dacoity (section 399).

3. Attempt

Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. Section 511 of the IPC does not give any definition of 'attempt' but simply provides for punishment for attempting to commit an offence. Attempt means the direct movement towards commission of a crime after necessary preparations have been made. When a person wants to commit a crime, he firstly forms an intention, then makes some preparation and finally does something for achieving the object; if he succeeds in his object he is guilty of completed offence otherwise only for making an attempt. It should be noted that an act amounts to an attempt to commit a particular offence is a question of fact depending on the nature of crime and steps necessary to take in order to commit it. The act constituting attempt must be proximate to the intended result. Under the IPC, the sections on attempt can be divided into four broad categories:

- (i) Those sections in which the commission of an offence and the attempt to commit are dealt within the same section, the extent of the punishment being the same for both the offence as also the attempt. The examples of this category are those offences against the State such as waging or attempting to wage war against the Government of India, assaulting or attempting to assault the President or Governor with intent to compel or restrain the exercise of lawful power, sedition, a public servant accepting or attempting to accept gratification, using or attempting to use evidence knowing it to be false, dacoity etc.
- (ii) Those offences in which the attempt to commit specific offences are dealt side by side with the offences themselves, but separately, and separate punishments have been provided for the attempt other than that provided for the offences which have been completed. The examples of this category are attempt to commit an offence punishable with death or imprisonment for life including robbery, murder etc.
- (iii) Attempt to commit suicide specifically provided under section 309 IPC. However, according to section 115 of the Mental Healthcare Act, 2017, notwithstanding anything contained in section 309 of IPC, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and

punished under IPC. The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

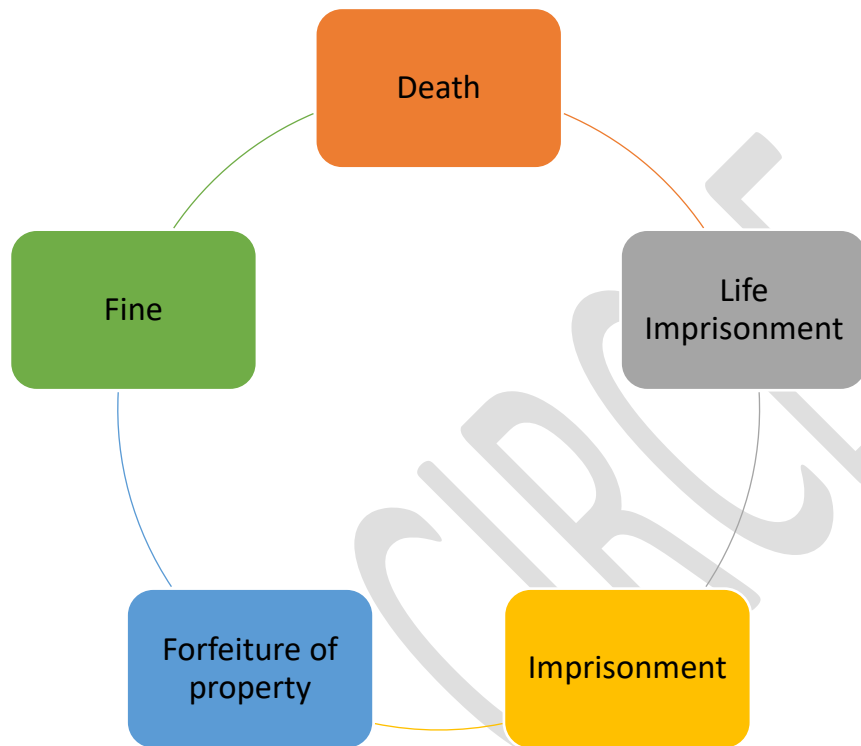
- (iv) The fourth category relates to the attempt to commit offences for which no specific punishment has been provided in the IPC. Such attempts are covered under section 511. This section of the IPC provides that whoever attempts to commit an offence punishable by IPC with imprisonment for life or imprisonment, or cause such an offence to be committed, and in such attempt does any act towards commission of the offence, shall, where no express provision is made by IPC for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

4. Commission of Crime or Accomplishment

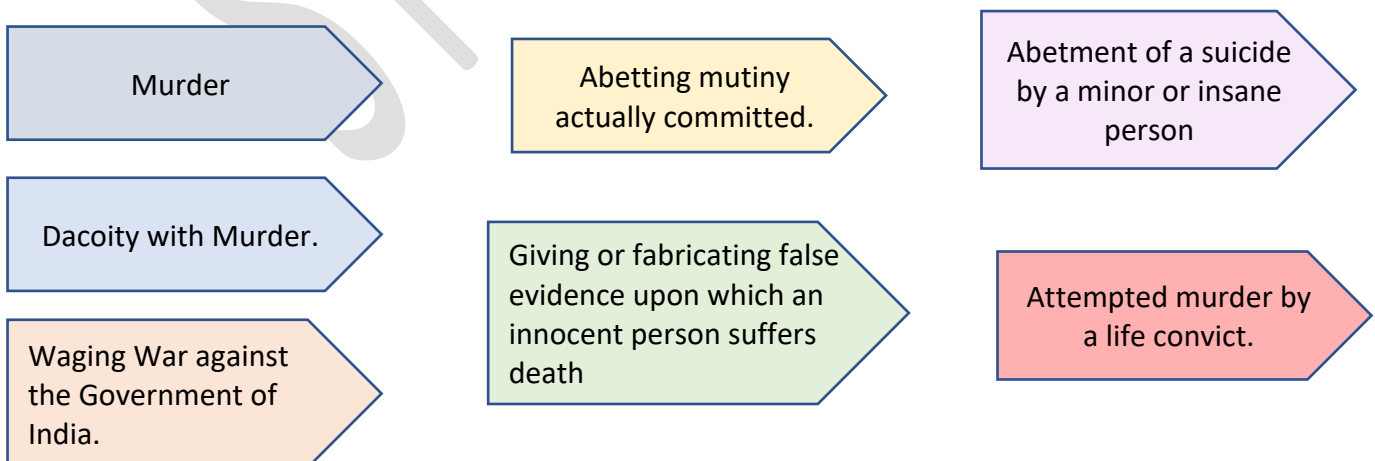
The last stage in the commission of crime is its accomplishment. If the accused succeeds in his attempt, the result is the commission of crime and he will be guilty of the offence. If his attempt is unsuccessful, he will be guilty for an attempt only. If the offence is complete, the offender will be tried and punished under the specific provisions of the IPC.

TYPES OF PUNISHMENTS

Punishments:- The punishments to which offenders are liable under the provisions of IPC are:



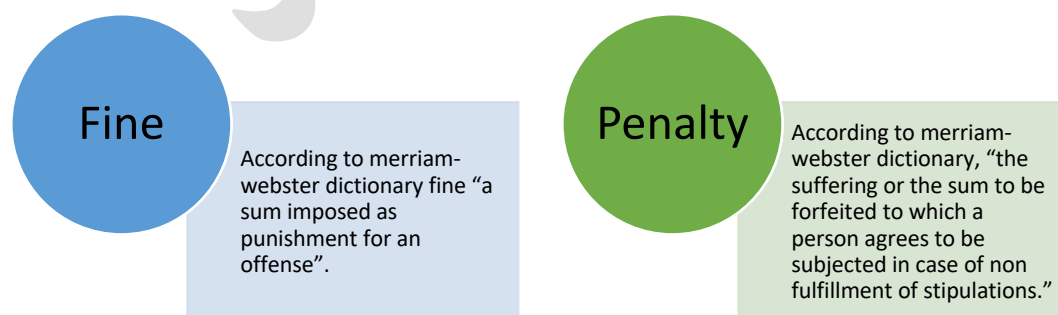
- a. **Death :-** A death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The Supreme Court has ruled that death sentence ought to be imposed only in the 'rarest of rare cases'. The IPC provides for capital punishment for the following offences:



The capital punishment is awarded only in two categories of offences, namely treason and murder. In either of the cases, when the court decides that death penalty is the appropriate sentence to be imposed in the light of the gravity of matter and consequences of the offence committed and the absence of mitigating factors, then the court under the provisions of section 354(3), CrPC has to give special reasons as to why the court came to this conclusion.

- b. **Life Imprisonment :-** Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.
- c. **Imprisonment:-** Imprisonment which is of two descriptions namely –
 - (i) Rigorous Imprisonment, that is hard labour
 - (ii) Simple Imprisonment
- d. **Forfeiture of property:-** Forfeiture is the divestiture of specific property without compensation in consequence of some default or act forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions. The courts are empowered to forfeit property of the guilty under section 126 and section 127 of the IPC.
- e. **Fine:-** Fine is forfeiture of money by way of penalty. It should be imposed individually and not collectively. When court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence.

DIFFERENCE BETWEEN FINE AND PENALTY



ELEMENTS OF CRIME: MENS REA AND ACTUS REUS

The basic function of criminal law is to punish the offender and to deter the incidence of crime in the society. A criminal act must contain the following elements:

<i>Elements of Crime</i>		
Human Being	Mens rea	Actus reus

1. **Human Being** – The first requirement for commission of crime is that the act must be committed by a human being. The human being must be under legal obligation to act in particular manner and be physically and mentally fit for conviction in case he has not acted in accordance with the legal obligation. Only a human being under legal obligation and capable of being punished can be the proper subject of criminal law.
2. **Mens rea** – The basic principle of criminal liability is embodied in the legal maxim ‘actus non facit reum, nisi mens sit rea’. It means ‘the act alone does not amount to guilt; the act must be accompanied by a guilty mind’. The intention and the act must both concur to constitute the crime. Mens rea is defined as the mental element necessary to constitute criminal liability. It is the attitude of mind which accompanies and directs the conduct which results in the ‘actus reus’. The act is judged not from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the act. ‘Mens rea’ is judged from the external conduct of the wrong-doer by applying objective standards.

<i>Types of Mens rea</i>		
Intention	Negligence	Recklessness

Intention
• Intention is defined as ‘the purpose or design with which an act is done’. Intention indicates the position of mind, condition of someone at particular time of commission of offence and also will of the accused to see effects of his unlawful conduct. Criminal intention does not mean only the specific intention but it includes the generic intention as well.

Negligence
• Negligence is the second form of mens rea. Negligence is not taking care, where there is a duty to take care. Negligence or carelessness indicates a state of mind where there is absence of a desire to cause a particular consequence. The standard of care established by law is that of a reasonable man in identical circumstances. What amounts to reasonable care differs from thing to thing depending situation of each case. In criminal law, the negligent conduct amounts to mens rea.

Recklessness
• Recklessness occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk. It is a total disregard for the consequences of one’s own actions. Recklessness is a form of mens rea. The word ‘mens rea’ as such is not used in the Indian Penal Code, 1860, but the idea underlying in it is seen in the entire Code. Generally, in the IPC, every offence is defined with precision embodying the necessary mens rea in express words.

Exceptions to MENS REA :

There are many exceptional cases where mens rea is not required in criminal law. Some of them are as follows:

a. Where a statute imposes liability, the presence or absence of a guilty mind is irrelevant :

The classical view of that 'no mens rea, no crime' has long been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishment even where the offences have been defined to exclude mens rea. Many laws passed in the interest of public safety and social welfare imposes absolute liability. This is so in matters concerning public health, food, drugs, etc.

There is absolute liability (mens rea is not essential) in the licensing of shops, hotels, restaurants and chemists establishments. The same is true of cases under the Motor Vehicles Act and the Arms Act, offences against the State like waging of war, sedition etc.

b. Where it is difficult to prove mens rea and penalties are petty fines.

In such petty cases, speedy disposal of cases is necessary and the proving of mens rea is not easy. An accused may be fined even without any proof of mens rea.

c. In interest of public safety

In the interest of public safety, strict liability is imposed and whether a person causes public nuisance with a guilty mind or without guilty mind, he is punished.

d. Violation without knowledge

If a person violates a law even without the knowledge of the existence of the law, it can still be said that he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the law and hence did not intend to violate it is no defense and he would be liable as if he was aware of the law. This follows from the maxim Ignorantia juris non excusat means which means Ignorance of the law is no excuse.

3. Actus Reus (act or omission) - The third essential element of crime is Actus Reus. A human being and an evil intent are not enough to constitute a crime for one cannot know the intentions of a man. Actus Reus means overt act or unlawful commission must be done in carrying

out a plan with the guilty intention. Actus Reus is defined as a result of voluntary human conduct which law prohibits. It is the doing of some act by the person to be held liable. An 'act' is a willed movement of body. A man may be held fully liable even when he has taken no part in the actual commission of the crime.

COGNIZABLE AND NON-COGNIZABLE OFFENCES

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. [Section 2(c)]

"Non-cognizable offence" means an offence for which, and "non cognizable" case means a case in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer. [Section 2(l)]

Case Law

An opportunity of hearing must be given to the opposite party before granting anticipatory bail (State of Assam v. R.K. Krishna Kumar AIR 1998 SC 144).

Difference between Cognizable and Non-Cognizable Offences

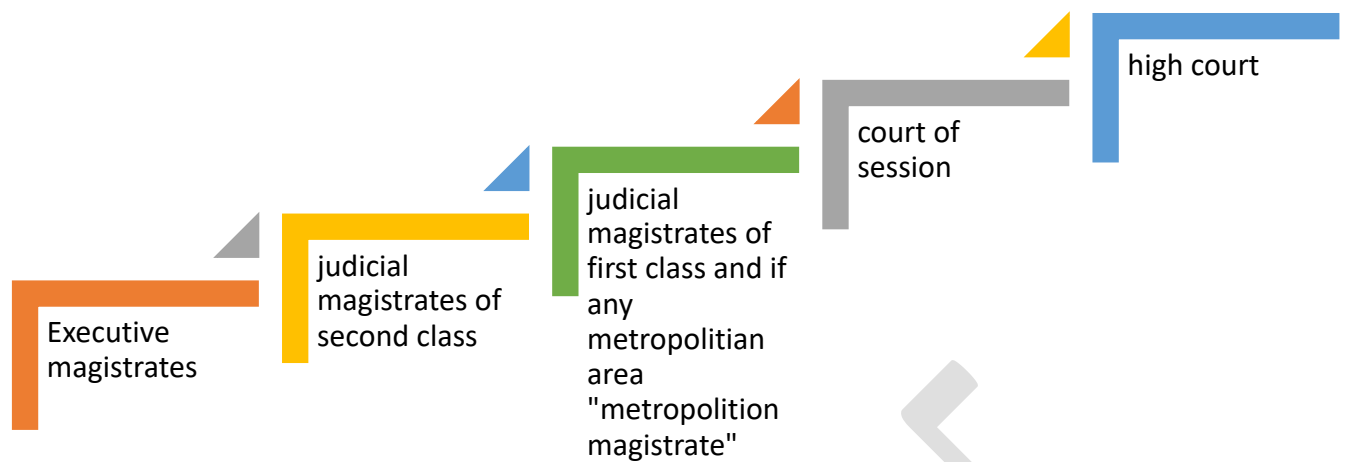
Basis of Difference	Cognizable Offence	Non-Cognizable Offence
WARRANT	Warrant is necessary in case of Cognizable offence	Warrant is not necessary in case of Non-Cognizable Offences.
NATURE OF OFFENCE	Nature of offence is serious in cognizable offence	Nature is not much serious in case of Non-Cognizable Offences.

INFORMATION OF CASES	Generally, Information relating to the cognizable offence, should be reduced to writing and be read over to the informant, if given orally. Information, whether given in writing or reduced to writing as aforesaid, should be signed by the person giving it.	The substance of the Information given should be entered in a book to be kept by such officer and refer the informant to the Magistrate. Police officer should not investigate a non-cognizable case without the order of a concerned Magistrate.
EXAMPLES	Rioting, Murder, Being a thug, Voluntarily causing grievous hurt etc.	Giving or fabricating false evidence in a judicial proceeding, Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding, Voluntarily causing hurt, Assault, Cheating, Forgery etc.

CLASSES OF CRIMINAL COURTS

Section 6 of the Criminal Procedure Code, 1973, enumerates the classes of criminal courts that are mandated in every state.

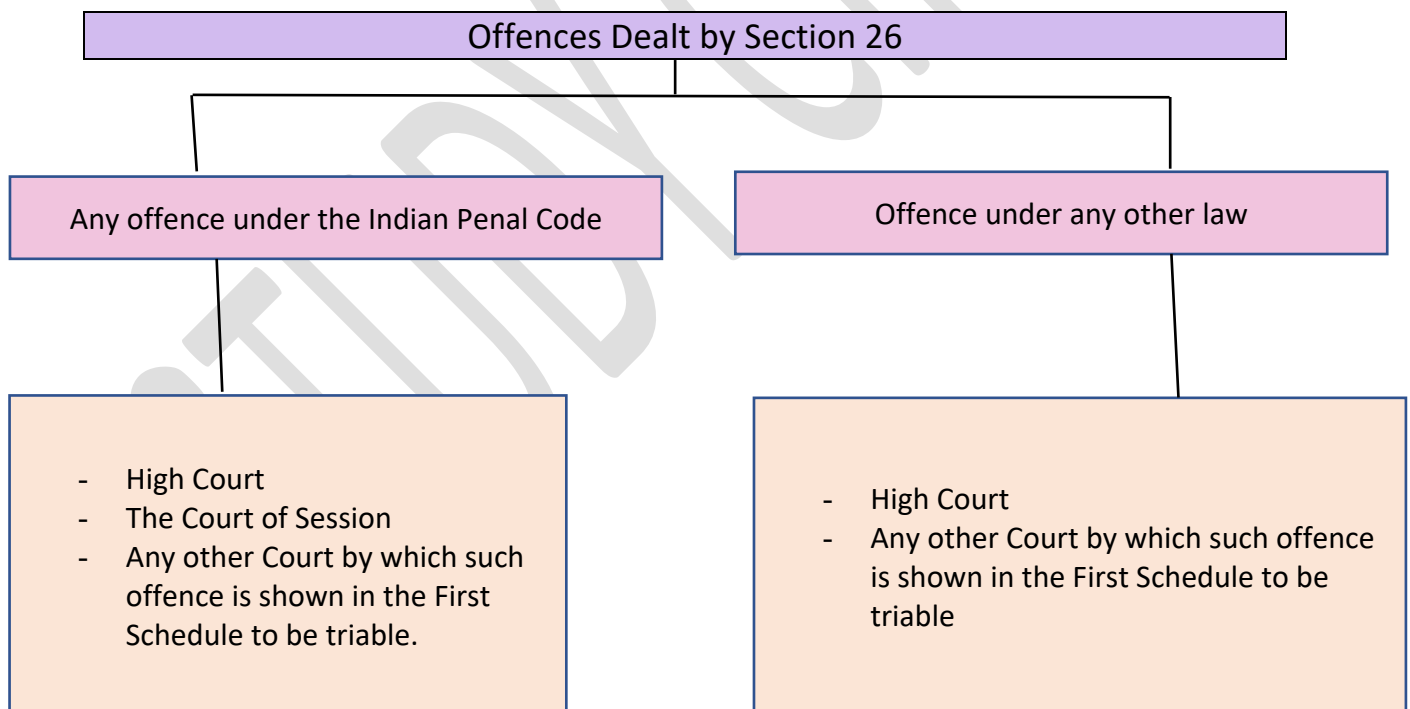
Following are the different classes of criminal courts:



POWER OF COURTS

Courts by which offence triable :

Chapter III (Section 26 to 35) of the Criminal Procedure Code, 1973, deals with power of Courts. One of such power is to try offences. Offences are divided into two categories:



SENTENCING POWER OF DIFFERENT COURTS

Supreme Court	Any sentence authorised by the law
High Court	Any sentence authorised by the law u/s. 28(1) Cr. PC
Session Judge, Additional Session Judge	Any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court u/s. 28(2) Cr. PC
Assistant Session Judge	Any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years u/s. 28(3) Cr. PC
Chief Judicial Magistrate, Chief Metropolitan Magistrate	Any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years u/s. 29(1)(4) Cr. PC
Judicial Magistrate First Class, Metropolitan Magistrate	Any sentence of imprisonment for a term not exceeding three years or of a fine not exceeding ten thousand rupees, or of both u/s. 29(2) Cr. PC Judicial Magistrate First Class, Metropolitan Magistrate
Judicial Magistrate Second Class	Any sentence of imprisonment for a term not exceeding one year, or of fine not exceeding five thousand rupees, or of both u/s. 29(3) Cr. PC
Special Judicial Magistrate	Any sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees, or of both u/s. 29(2) Cr. PC Any sentence of imprisonment for a term not exceeding One year or of fine not exceeding five thousand rupees, or of both u/s. 29(3) Cr. PC Special Judicial Magistrate

ARREST OF PERSONS

The word “arrest” consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal

offence. Section 41 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant.

1. Arrest by Police Officer without warrant :

Section 41 of the Criminal Procedure Code, 1973 states that, any police officer may without an order from a Magistrate and without a warrant, arrest any person –

who commits, in the presence of a police officer, a cognizable offence

who has been proclaimed as an offender either under Cr. P.C. or by order of the State Government

who being a released convict, commits a breach of any rule made under section 356(5)

in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing

who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody

who is reasonably suspected of being a deserter from any of the Armed Forces of the Union

for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issues the requisition.

2. Arrest on refusal to give name and residence :

Section 42 of Cr. P.C. provides that if any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours if his true name and address cannot be ascertained or fails to execute a bond or furnish sufficient sureties. In that event he shall be forwarded to the nearest Magistrate having jurisdiction.

3. Arrest by a private person :

Section 43 of Cr. P.C. provides that a private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender.

4. Arrest by Magistrate :

Under Section 44 (1) of Cr. P.C., the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody. Under section 44(2) of Cr. P. C., the Magistrate has power to arrest a person for which he is competent and has also been authorised to issue a warrant.

5. Exceptions for Armed Forces :

Section 45 of Cr. P.C. protects members of Armed Forces from arrest where they do something in discharge of their official duties. They could be arrested only after obtaining the consent of the Central Government.

SUMMONS AND WARRANTS UNDER Cr.P.C.

The general processes to compel appearance are:

1. Summons (Section 61)
2. Warrants (Section 70)

SUMMONS : A summons is issued either for appearance or for producing a documenter thing which may be issued to an accused person or witness.

Essentials of Summons :

it should be writing

it should be in duplicate

it should be signed by presiding officer of such court or by such officer as is authorised by high court

it contains seals of court

the summons should be clear and specific in its terms as to the title of the court, the place at which the day and the time of the day and when the attendance of the person summoned is required.

Services of Summons :

Summon to be served to a person : as per Section 62, a summon to be served by a police officer/ an officer of court/ other public servant if practicable to be served personally.

Summon on corporation : as per Section 63, the secretary, local manager or other principal officer of the corporation

Summon if concerned person is not found : as per Section 65, summon can be served by the male adult of the family if the concerned person is not found

If no one is found at home or household : as per Section 65, if no one is found at household, affix the duplicate copy of the summon to the conspicuous part of the home or household where the summoned person ordinarily reside

Summon in case of government employee : a summon shall ordinarily sent to head office in which such person is employed

Warrant of Arrest

Every warrant of arrest issued by a Court under this Cr. P.C. shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed (Section 70).

The requisites of a warrant are as follows:

It must be in writing.

It must bear the name and designation of the person who is to execute it;

It must give full name and description of the person to be arrested;

It must state the offence charged;

It must be signed by the presiding officer;

It must be sealed.

Such warrant is only for production of a person before the concerned Court and not before the police officer. Under Section 76, the police officer or other person executing the warrant of arrest shall (subject to the provisions of Section 71 as to security) bring the person arrested before the Court without unnecessary delay provided that such delay shall not in any case exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

SEARCHES

Search Warrant

A warrant can be issued in following cases :

where the court has reason to believe that the person has summoned to produce any document or other thing will not produce it

where such document or other thing is not known to the court to be in the possession of any person

where a general inception or search is necessary. However a search warrant must be general or restricted in its scope as to any place or part thereof

Security for keeping the peace and for good behavior

Court of session or court of a magistrate of a first class when convicts a person and is of opinion that it is necessary to take security of such person for keeping the peace order him to execute the bond for such period, not exceeding three years.

The offences specified under sub-section (2) are as follows :

Any offences punishable under chapter 8 of Indian Penal Code 1860

Any offences which consists of or includes, an assault or using criminal force or committing mischief

Any offence of criminal intimidation

Any other offence which caused, or was intended or known to be likely to cause a breach of a peace

Security for keeping peace in other cases :

When an executive magistrate receives information that any person is likely to:

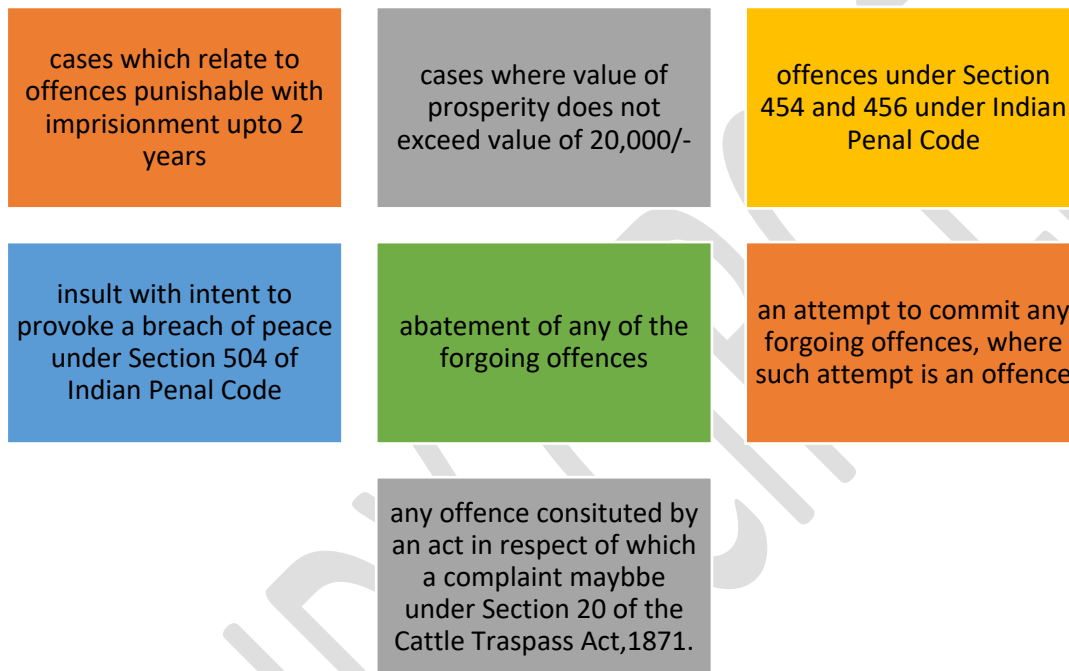
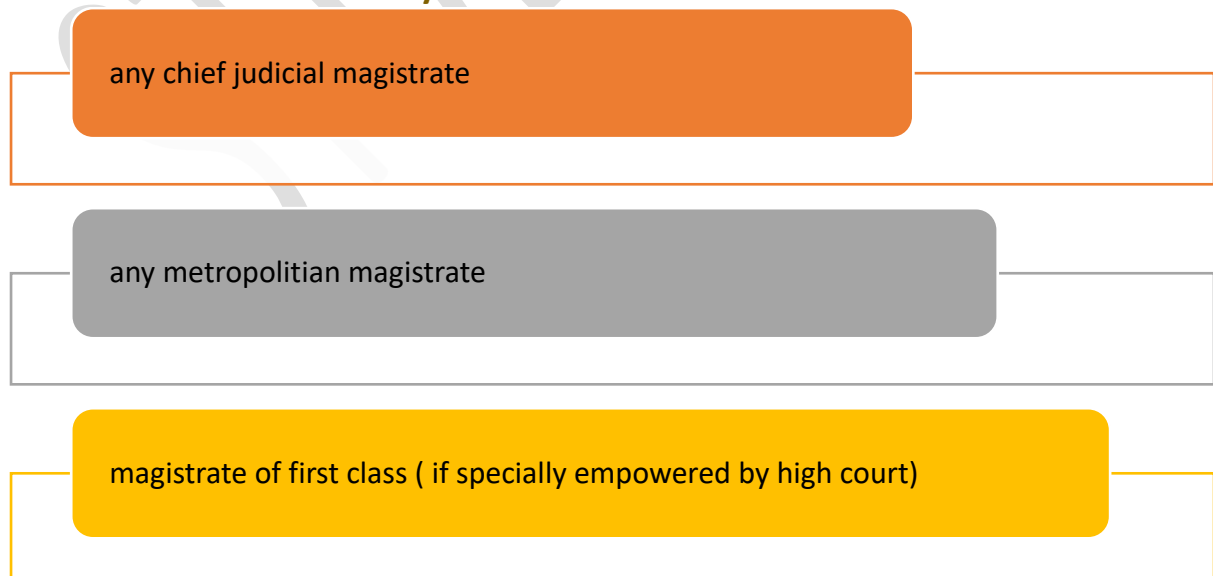
Commit a breach of peace

Disturb the public tranquility

Do any wrongful act that may probably occasion a breach of peace, or disturb the public tranquility, he may require to show such person cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as a magistrate deem fit

SUMMARY TRIALS

Summary trial is a speedy trial by dispensing with formalities or delay in proceedings. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years.

Cases which can undergo summary trials :**Who can conduct Summary Trials?**

COMPOUNDING OF OFFENCES

Section 320 of the Cr.PC enumerates the provisions related to compounding of offences. Compounding means settlement of offence committed by a person. The settlement must be with the consent of the court of law. There may be the times when parties to a suit do not want to continue further proceedings in the court and they want to settle it out of the court amicably, then the compounding comes into picture. In such case, future proceedings do not take place in the court.

Compoundable offence and its authority :

Section 320(2) list of the offences which are punishable under the sections of the Indian Penal Code can be compounded only with the permission of the court. Few examples are provided herewith.

Section of IPC	Name of the offence	Who can compound the offence
Section 325, 337, 338 IPC)	Voluntarily causing grievous hurt.	To whom hurt has been caused
Section 357 IPC	Assault or criminal force in attempting to confine a person.	The person assaulted or to whom the force was used
Section 381 IPC	Theft, by clerk or servant of property in possession of master.	The owner of the property stolen.
Section 406, 408 IPC	Criminal breach of trust.	The owner of the property on which a breach of trust has occurred.
Section 418 IPC	Cheating with knowledge that wrongful loss may ensue to a person whose interest offender is bound to protect.	The person who has been cheated.
Section 420 IPC	Cheating and dishonestly inducing delivery of property.	The person who has been cheated.

BAIL

Bail means the release of the accused from the custody and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

Chapter XXXIII of the Cr. P.C. deals with Provisions as to Bail and Bonds.

*Types of Bails***Regular Bail**

- A bail granted after the offence is committed

Interim Bail

- A bail given during pendency of application.

Anticipatory Bail

- A bail given when a person has apprehension that he may be arrested on an accusation of having committed a non-bailable offence

1. Bail in cases of Bailable offences (Section 436)

According to section 436, if a person accused of an offence other than non-bailable offence (i.e. Bailable Offence) is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and he is prepared to give bail, such person shall be released on bail.

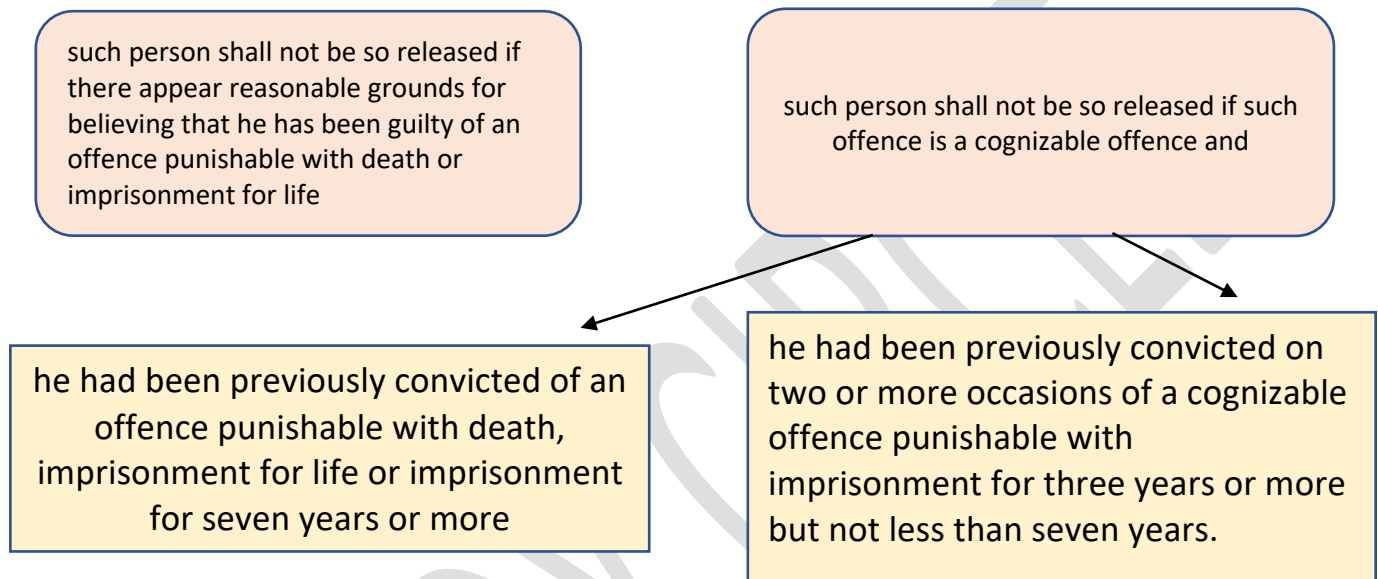
Further, if such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance.

Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of above.

However, where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446 of Cr. P. C.

2. Bail in cases of Non-Bailable Offences (Section 437)

When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court (other than the High Court or Court of session), he may be released on bail but subject to:



However, the Court may direct that a person referred to in clause (a) or clause (b) above be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm.

Further, the Court may also direct that a person referred to in clause (b) above be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

The bail may also be cancelled.

If, in a case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

3. Bail to require accused to appear before next appellate Court

Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply which is related to the procedure for forfeiting the bail bond.(Section 437A)

4. Anticipatory Bail (Section 438)

When a person has reason to believe that he may be arrested on an accusation of non-bailable offence, he may apply to the High Court or the Court of Session for a necessary direction and that Court may, direct that in the event of such arrest, he shall be released on bail.

When the High Court or the Court of Session grants bail under section 438(1), it may include such conditions, as it may think fit, including:

a condition that the person shall make himself available for interrogation by a police officer as and when required

a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

a condition that the person shall not leave India without the previous permission of the Court

such other condition as may be imposed under section 437(3), as if the bail were granted under that section.

CONTINUING OFFENCES

Continuing offence means an offence which is committed for a very long period. It is neither clearly defined in the Indian Penal Code or Cr.PC. Whether the offence is continuing one or not, it clearly depends on its nature.

The offence which is happening and continuing again and again comes in the category of continuing offence.

Section 472 of Cr. PC mentioned the term Continuing offence and states that in the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

OFFENCES AGAINST PROPERTY

**1. Theft (Section 378)**

Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

The essentials elements of theft are:

There should an intention to dishonestly take the property.

The property should be movable property.

The property should be taken out of the possession without that person's consent.

The property should be moved in order to take that property.

2. Extortion (Section 383)

Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

The essentials elements of theft are:

There should be an intention to put any person in fear of any injury.

By that fear of injury, dishonestly induces the person so put in fear to deliver any property, or valuable security or anything signed or sealed which may be converted into a valuable security.

3. Robbery (Section 390)

As per Section 390 of IPC, in all robbery there is either theft or extortion.

When theft is robbery. — Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death

When extortion is robbery. — Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted. The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Punishment for Robbery -

Section 392 of IPC provides the punishment for robbery and states that whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for attempt of Robbery -

As per section 393 of IPC, whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

4. Dacoity (Section 391)

When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

The essential elements of Dacoity are:

There should be at least five persons by active participation or aiding.

They will commit robbery or its attempt.

Every person whether committing or aiding is said to commit dacoity.

5. Criminal misappropriation of property

Section 403 and 404 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property.

Dishonest misappropriation of property

The definition of criminal misappropriation has not been provided by the provisions. The section directly provides the punishment for dishonest misappropriation or converts to his own use any movable property.

Section 403 states whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential ingredients of Dishonest Misappropriation of Property

- There should be misappropriation or conversion of property
- The misappropriation or conversion should be dishonest
- The property should be movable property

Dishonest misappropriation of property possessed by deceased person at the time of his death (Section 404)

Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's death, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

6. Criminal breach of trust

Section 405 to 409 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Illustration 1: A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

Illustration 2: A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

The gist of the offence of criminal breach of trust as defined under section 405 of the Indian Penal Code, 1860 is 'dishonest misappropriation' or 'conversion to own use', another person's property.

Essential Ingredients of Criminal Breach of Trust

The essential ingredients of the offence of criminal breach of trust are as under:

The accused must be entrusted with the property or with dominion over it

The person so entrusted must use that property

The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,

(i) of any direction of law prescribing the mode in which such trust is to be discharged

(ii) of any legal contract made touching the discharge of such trust.

Punishment for criminal breach of trust. (Section 406)

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for Criminal Breach of Trust in other cases

There are different punishment for Criminal Breach of Trust depending upon situation.

7. Cheating (Section 415 to 420)

Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating. In most of the offences relating to property the accused merely get possession of thing in question, but in case of cheating he obtains possession as well as the property in it.

Section 415 provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation. — A dishonest concealment of facts is a deception within the meaning of this section.

Illustration 1 :

•A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats

Illustration 2:

•A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

Illustration 3:

•A, by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

Illustration 4:

•A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

Main Ingredients of Cheating:

The main ingredients of cheating are as under:

1. Deception of any person.
2. (a) Fraudulently or dishonestly inducing that person:
 - (i) to deliver any property to any person
 - (ii) to consent that any person shall retain any property

(b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Cheating by personation

As per section 416 a person is said to “cheat by personation” if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation. — The offence is committed whether the individual personated is a real or imaginary person.

Illustration 1:

- A cheats by pretending to be a certain rich banker of the same name. A cheats by personation

Illustration 2:

- A cheats by pretending to be B, a person who is deceased. A cheats by personation

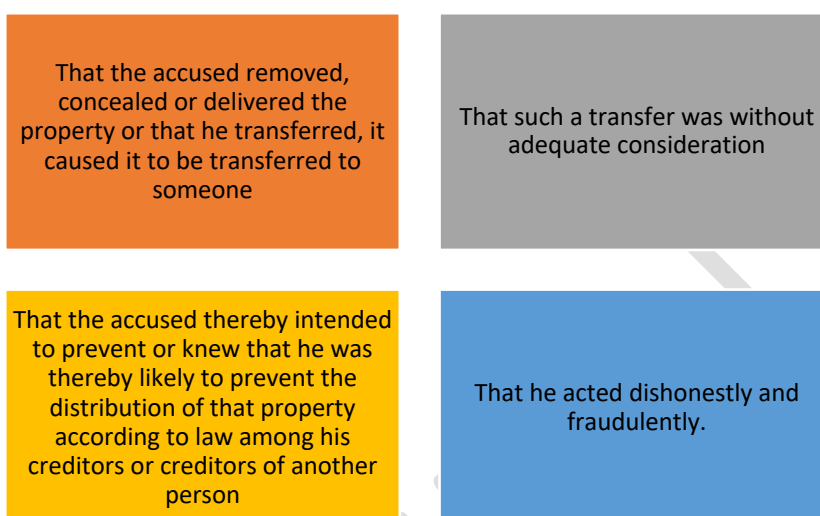
8. Fraudulent Deeds and Dispositions of Property

Fraudulent Deeds and Dispositions of Property are covered under section 421 to 424 of the Indian Penal Code, 1860. These sections deal with fraudulent conveyances referred to in section 53 of the Transfer of Property Act and the Presidency-towns and Provincial Insolvency Acts.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors :

Section 421 of the Indian Penal Code provides that whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential ingredient of Section 421: (case Ramautar Chaukhany v. Hari Ram Todi)



This section specifically refers to frauds connected with insolvency. The offence under it consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors. It applies to movable as well as immovable properties. In view of this section, the property of a debtor cannot be distributed according to law except after the provisions of the relevant enactments have been complied with.

Dishonestly or fraudulently preventing debt being available for creditors:

Section 422 of the Indian Penal Code provides that whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration

Section 423 of the Indian Penal Code provides that whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

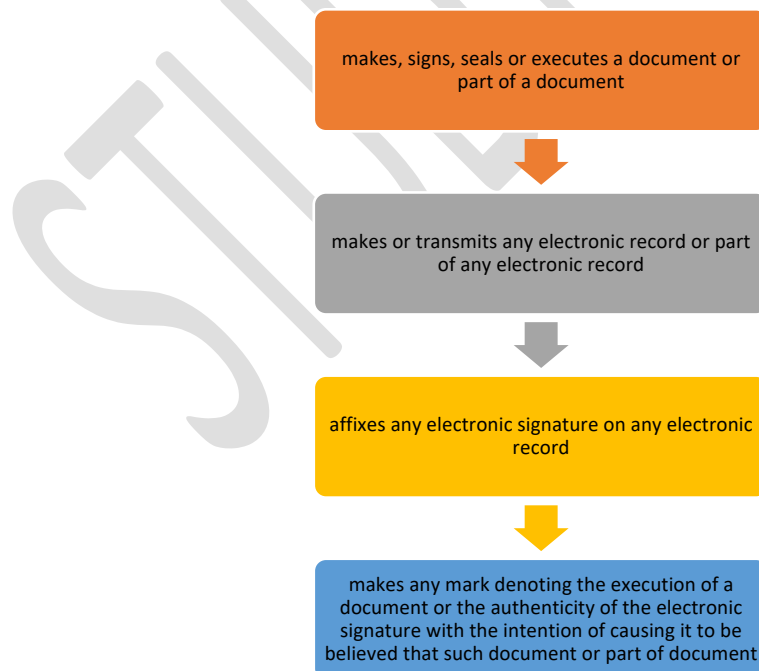
OFFENCES RELATING TO DOCUMENTS AND PROPERTY MARKS

Forgery (Section 463)

Forgery is defined under section 463 of the Indian Penal Code, 1860 and the punishment for it is prescribed under section 465. According to Section 463, whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. Section 465 provides the punishment for forgery and states that whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The making of a false document or false electronic record is defined under section 464 of the Indian Penal Code, 1860.

Section 464 enumerates the provisions related to the false statement. As per section, A person is said to make a false document or false electronic record—

First. – Who dishonestly or fraudulently—



Secondly. –

Who without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration

Thirdly. –

Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

DEFAMATION

Section 499 provides that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1–	Explanation 2–	Explanation 3–	Explanation 4–
•It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.	•It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.	•An imputation in the form of an alternative or expressed ironically, may amount to defamation	•No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Punishment for defamation

According to section 500 whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both. According to Lord Macaulay, who had a major role in drafting of the Indian Penal Code, the essence of offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.

Kinds of Defamation

The wrong of defamation is of two kinds- libel and slander.

In libel, the defamatory statement is made in some permanent and visible form, such as writing, printing or pictures.

In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds. The ambit of 'publish' is very wide.

The publication of defamatory matter means that it is communicated to some person other than the person about whom it is addressed.

CHAP 8 : Law relating to Evidence

REGULATORY FRAMEWORK

The Indian Evidence Act, 1872

INTRODUCTION

The task of drafting a suitable code for Evidence Law came upon the shoulders of Sir James Fitz James Stephens, which he completed and culminated into what we know today as Indian Evidence Act, 1872. In 1868, a commission was setup to frame a draft code and 39 sections were included in the code.

The code was termed as irrelevant to India and was dropped out. In the year of 1870, a new bill containing 163 sections in a form different for the present Evidence Act of 1872 was prepared by James Stephen which he recasted and ultimately Indian Evidence Act, 1872 was passed. After the partition, the act applied to both the nation, India and Pakistan except the territory of Jammu & Kashmir. It has 11 Chapters and 167 sections and came into force on 1st September 1872 and applies to all over India except the state of Jammu & Kashmir.

The “Law of Evidence” may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as “Law of Evidence”.

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence.

The Act extends to the whole of India and applies to all judicial proceedings in or before any Court, including Court-martial (other than the Court-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

Extension	Indian Evidence Act, 1872 extends to the whole of India.
Applicability	(i) All Judicial proceedings in the court or before the court. (ii) Court Martials
Non-applicability	(i) Court-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act (ii) Affidavits presented to any Court or officer. (iii) To proceedings before an arbitrator.

JUDICIAL PROCEEDINGS

The Indian Evidence Act, 1872 does not define the term “judicial proceedings” but it is defined under Section 2(i) of the Criminal Procedure Code as “a proceeding in the course of which evidence is or may be legally taken on oath”. However, the proceedings under the Income Tax are not “judicial proceedings” for the purpose of Indian Evidence Act, 1872. That apart, the Act is also not applicable to the proceedings before an arbitrator.

An affidavit is a declaration sworn or affirmed before a person competent to administer an oath. Thus, an affidavit per se does not become evidence in the suits but it can become evidence only by consent of the party or if specifically authorised by any provision of the law.

Meaning of Evidence as per Interpretation clause of Indian Evidence, Act, 1872	
Type of definition	The section uses the words “means and includes”. It includes two type of evidences i.e. Oral Evidence and Documentary Evidence.
Oral Evidence i.e. Statements	(i) All statements which the Court permits or requires to be made before it (ii) The statements are to be made by witnesses (iii) The statements should be related to a matter of fact under inquiry
Documentary Evidence	All the documents (including electronic records) produced for the inspection of the Court.

The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

Evidence under Section 3 of the Indian Evidence Act, 1872 may be either oral or personal (i.e. all statements which the Court permits or requires to be made before it by witnesses, and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue. There must be an open and visible connection between the principal fact and the evidentially facts. Facts which form part of the same transaction, though not in issue, place or at different times and places.

It may be noted that as per amendment made in year 2000 in the definition of "Evidence" under Section 3, for the words "all documents produced for the inspection of the Court", the words "all documents including electronic records produced for the inspection of the Court"

In general the rules of evidence are same in civil and criminal proceedings but there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, specially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt.

Example

In civil cases, the principle "mere preponderance of probability" is sufficient basis of a decision. But in criminal cases, the principle "beyond all reasonable doubt" is required for taking decision.

DIFFERENT TYPES OF EVIDENCE

Proof of facts by oral evidence:

Section 59 provides that all facts, except the contents of documents or electronic records, may be proved by oral evidence. Further, section 60 mandates, Oral evidence must, in all cases whatever, be direct.

Proof of contents of document:

Section 61 states that the contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the Court. Secondary evidence inter-alia includes certified copies, copies made from the original by mechanical processes, copies made from or compared, counterparts of documents as against the parties who did not execute them, oral accounts of the contents of a document. Section 64 states that documents must be proved by primary evidence except in the cases provided. Section 65 provides that the Secondary evidence may be given of the existence, condition, or contents of a document in the given cases

Evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of section 65B which provides for law relating to Admissibility of electronic records.

SCHEME OF THE ACT, RELEVANCY & ADMISSIBILITY

The Act is divided into three parts:

PART 1

- relevancy of facts : chapter 1 containing Section 1 to 4 deals with preliminary points and relevancy of facts is dealt with in chapter 2 containing Section 5 to 55

PART 2

- on proff chapter 3 - 6 containing Section 56 to 100

PART 3

- production and effect of evidence chapter 7 - 9 containing Section 101 to 167

Relevancy of Facts: Sections 6 to 55 of the Act deal with relevancy of facts. A fact is also known as Factum Probandum or a fact that proves. The question arises what then the term “fact” signifies?

Fact

According to Section 3, “fact” means and includes:

- (a) anything, state of things, or relation of things capable of being perceived by the senses
- (b) any mental condition of which any person is conscious. Thus facts are classified into physical and psychological facts.

Illustrations

- (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
- (b) That a man heard or saw something, is a fact.
- (c) That a man said certain words, is a fact.
- (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at the specified time conscious of a particular sensation, is a fact.
- (e) That a man has a certain reputation, is a fact.

Illustrations (a), (b) and (c), are the examples of physical facts whereas the illustrations (d) and (e) are the examples of psychological facts.

Evidence may be given of facts in issue and relevant facts.

According to Section 5, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

The Explanation appended to Section 5, however, makes it clear that this section shall not enable any person to give evidence of a fact to which he is disentitled to prove by any provision of the law.

Illustrations

- (a) A is tried for the murder of B by beating him with a club with the intention of causing his death. At A's trial the following facts are in issue:-
 - A's beating B with the club
 - A's causing B's death by such beating
 - A's intention to cause B's death.
- (b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not

enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure. It is evident that only facts in issue and relevant facts may be given in evidence. To understand the relevancy it is necessary to know the meanings of the few terms.

These terms are defined in Section 3. It is explained as follows:-

▪ **Relevant Fact**

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. (Section 3) Where in a case direct evidence is not available to prove a fact in issue then it may be proved by any circumstantial evidence and in such a case every piece of circumstantial evidence would be an instance of a “relevant fact”

▪ **Logical relevancy and legal relevancy**

A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probably the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. Relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Of course every fact legally relevant will be found to be logically relevant; but every fact logically relevant is not necessarily relevant under the Act as common sense or logical relevancy is wider than legal relevancy. A judge might in ordinary transaction, take one fact as evidence of another and act upon it himself, when in Court, he may rule that it was legally irrelevant. And he may exclude facts, although logically relevant, if they appear to him too remote to be really material to the issue.

Under Indian Evidence Act, 1872, Legal relevancy is to be considered as against logical relevancy

▪ **Legal relevancy and admissibility**

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on the grounds of public policy, or on some other ground. Similarly every admissible fact is not necessarily relevant. The tenth Chapter of the Act makes a number of facts receivable in evidence, but these facts are not “relevant” under the second Chapter which alone defines relevancy.

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be relevant yet not admissible.

▪ Facts in issue

According to Section 3 the expression “facts in issue” means and includes—any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration

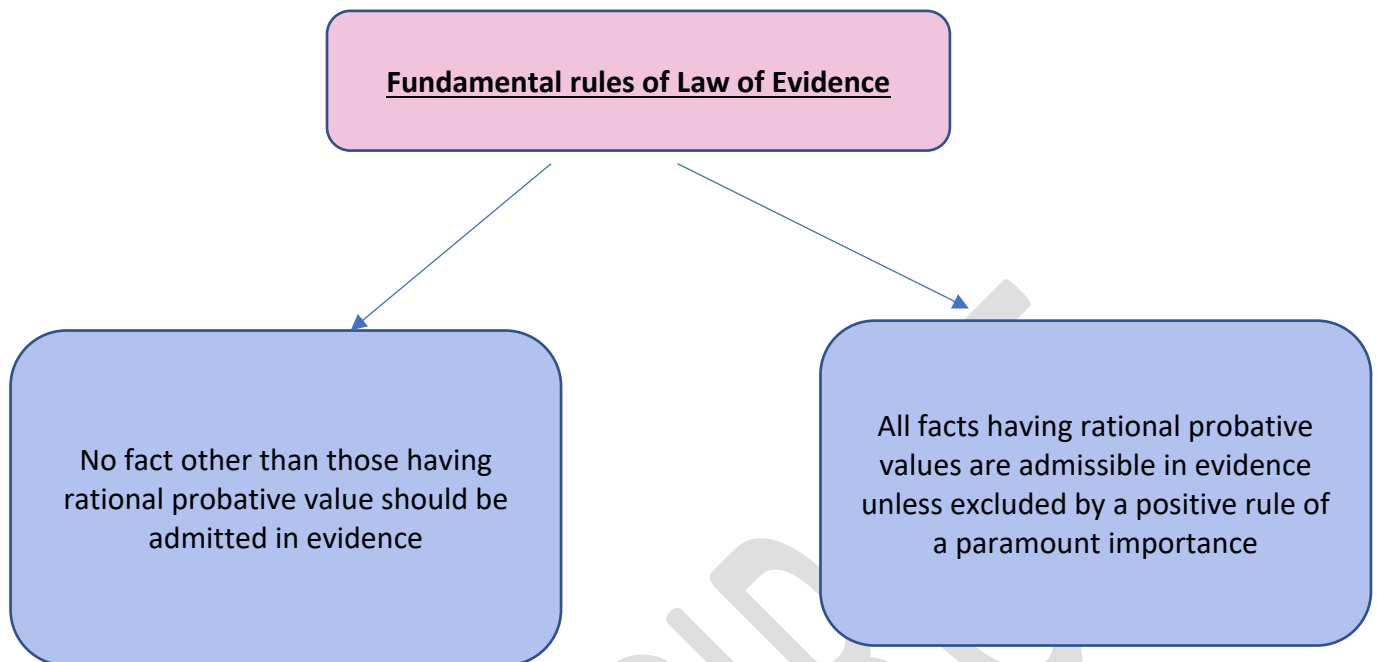
A is accused of the murder of B. At his trial the following facts may be in issue:

- that A caused B’s death
- that A intended to cause B’s death
- that A had received grave and sudden provocation from B
- that A at the time of doing the act which caused B’s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

A fact in issue is called as the principal fact to be proved or factum probandum and the relevant fact the evidentiary fact or factum probans from which the principal fact follows. The fact which constitute the right or liability called “fact in issue” and in a particular case the question of determining the “facts in issue” depends upon the rule of the substantive law which defines the rights and liabilities claimed.

Facts in issue and issues of fact

Under Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary in the case. These are called issues of fact but the subject matter of an issue of fact is always a fact in issue. Thus when described in the context of Civil Procedure Code, it is an ‘issue of fact’ and when described in the language of Evidence Act it is a ‘fact in issue’. Thus as discussed above, distinction between facts in issue and relevant facts is of fundamental importance.



RELEVANCY OF FACTS CONNECTED WITH THE FACT TO BE PROVEN

The facts coming under this category are as follows:

- A. res gestae or facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.**

Section 6 embodies the rule of admission of evidence relating to what is commonly known as res gestae. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence. The obvious ground for admission of such evidence is the spontaneity and immediacy of the act or declaration in question.

- B. facts constituting the occasion, or effect of, or opportunity or state of things (section 7)**

According to section 7, Facts which are the occasion, cause or effect of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant. This section makes occasion, cause, effect and opportunity as relevant.

C. Motive, preparation and previous or subsequent conduct.

According to Section 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive means which moves a person to act in a particular way. It is different from intention. The substantive law is rarely concerned with motive, but the existence of a motive, from the point of view of evidence would be a relevant fact, in every criminal case. That is the first step in every investigation. Motive is a psychological fact and the accused's motive, will have to be proved by circumstantial evidence. When the question is as to whether a person did a particular act, the fact that he made preparations to do it, would certainly be relevant for the purpose of showing that he did it.

The Section makes the conduct of certain persons relevant. Conduct means behaviour. The conduct of the parties is relevant. The conduct to be relevant must be closely connected with the suit, proceeding, a fact in issue or a relevant fact, i.e., if the Court believes such conduct to exist, it must assist the Court in coming to a conclusion on the matter in controversy. It must influence the decision. If these conditions are satisfied it is immaterial whether the conduct was previous to or subsequent to the happening of the fact in issue.

D. facts necessary to explain or introduce relevant facts.

According to Section 9, such facts are -

1. which are necessary to explain or introduce a fact in issue or relevant fact, or
2. which support or rebut an inference suggested by a fact in issue or relevant fact, or
3. which establish the identity of a person or thing whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or
4. which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts which establish the identity of an accused person are relevant under Section 9.

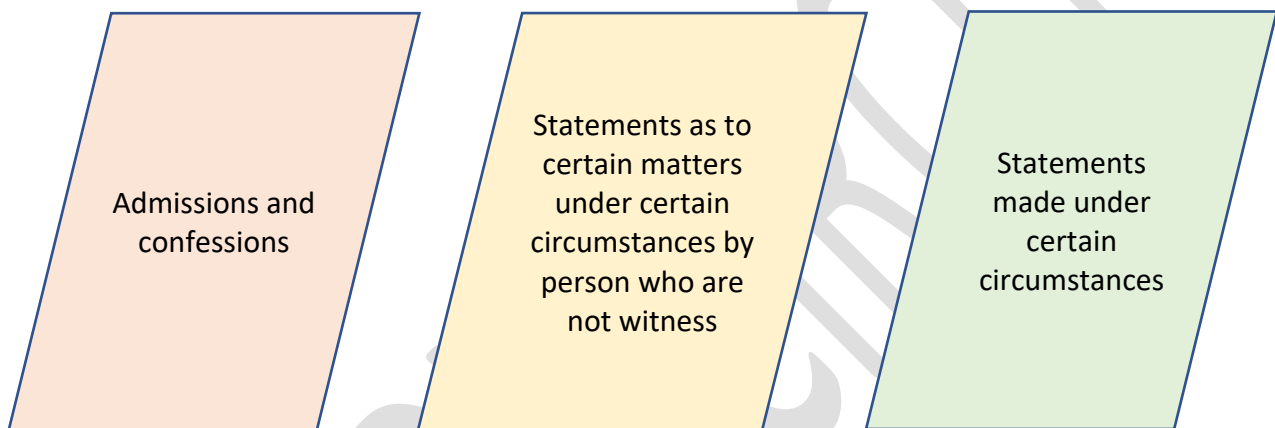
illustrations

1. The question is, whether a given document is the will of A.
The state of A's property and of his family at the date of the alleged will may be relevant facts.
2. A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

STATEMENTS ABOUT THE FACTS TO BE PROVE

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are :



(I) Admissions And Confessions

Sections 17 to 31 lay down the exceptions to the general rule known as “admissions” and “confessions”.

▪ **admissions**

An admission is defined in Section 17 as a statement, oral or documentary or *contained in electronic form* which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances mentioned under Sections 18 to 20. Thus, whether a statement amounts to an admission or not depends upon the question whether it was made by any of the persons and in any of the circumstances described in Sections 18-20 and whether it suggests an inference as to a fact in issue or a relevant fact in the case. Thus admission may be verbal or contained in documents as maps, bills, receipts, letters, books etc.

(However, the word 'statement' has not been defined in the Act. Therefore the ordinary dictionary meaning is to be followed which is "something that is stated.")

An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter (Section 18) or by a "reference" (Section 20).

An admission must be clear, precise, not vague or ambiguous. In ***Basant singh v. Janky singh, (1967) 1 sCr 1,***

The Supreme Court held:

"(1) Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admission. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. However, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true.

(2) All the statements made in the plaint are admissible as evidence. The Court is, however, not bound to accept all the statements as correct. The Court may accept some of the statements and reject the rest."

▪ **Confessions**

Sections 24 to 30 deal with confessions. However, the Act does not define a confession but includes in it admissions of which it is a species. Thus confessions are special form of admissions. Whereas every confession must be an admission but every admission may not amount to a confession. Sections 27 to 30 deal with confessions which the Court will take into account. A confession is relevant as an admission unless it is made:

Person in Authority by inducement, threat or promise	to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused
Police Officer	to a Police Officer

In custody of police officer without the presence of magistrate	to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.

Thus, a statement made by an accused person if it is an admission, is admissible in evidence. The confession is evidence only against its maker and against another person who is being jointly tried with him for an offence. Section 30 is an exception to the general rule that confession is only an evidence against the confessor and not against the others. The confession made in front of magistrate recorded is admissible against its maker is also admissible against co-accused under Section 30.

Confessions vs. admissions

A confession, however, is received in evidence for the same reason as an admission, and like an admission it must be considered as a whole. Further, there can be an admission either in a civil or a criminal proceedings, whereas there can be a confession only in criminal proceedings. An admission need not be voluntary to be relevant, though it may affect its weight; but a confession to be relevant, must be voluntary. There can be relevant admission made by an agent or even a stranger, but, a confession to be relevant must be made by the accused himself. A confession of a co-accused is not strictly relevant, though it may be taken into consideration, under Section 30 in special circumstances. Confessions are classified as:

(a) Judicial

(b) extra-judicial. Judicial confessions are those made before a Court or recorded by a Magistrate under Section 164 of the Criminal Procedure Code after following the prescribed procedure such as warning the accused that he need not to make the confession and that if he made it, it would be used against him. Extra-judicial confessions are those which are made either to the police or to any person other than Judges and Magistrates as such.

An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence. It will have to be proved just like any other fact. The value of the evidence depends upon the truthfulness of the witness to whom it is made.

(ii) Statements by persons who cannot be called as witnesses

Certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

1. That the statement must relate to a fact in issue or relevant fact,
2. That the statement must fall under any of following categories:
 - a. the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;
 - b. statement made in the course of business;
 - c. Statement which is against the interest of the maker;
 - d. a statement giving the opinion as to the public right or custom or matters of general interest;
 - e. a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;
 - f. a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belong;
 - g. a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;
 - h. a statement made by a number of persons expressing their feelings or impression
 - i. evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same as in the first proceeding.

(iii) statements made under special circumstances

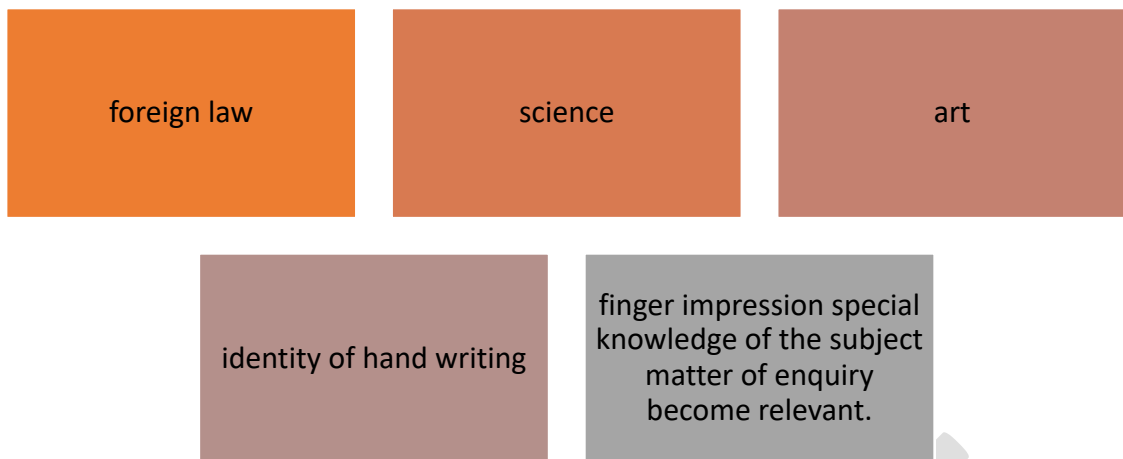
The following statements become relevant on account of their having been made under special circumstances:

1. Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a person with liability; (Section 34)
2. Entries made in public or official records or an electronic record made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; (Section 35)
3. Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; (Section 36)
4. Statement as to fact of public nature contained in certain Acts or notification; (Section 37)
5. Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

OPINION OF THIRD PERSON WHEN RELEVANT

The general rule is that opinion of a witness on a question whether of fact or law, is irrelevant. However, there are some exceptions to this general rule. These are:

- (i) **opinions of experts. (section 45):** *As a general rule the opinion of a witness on a question whether of fact, or of law, is irrelevant. Witness has to state the facts which he has seen, heard or perceived, and noted the conclusion, form of observations. The functions of drawing inferences from facts is a judicial function and must be performed by the Court. However, to this general rule, there are some exceptions as indicated in Section 45. Opinions of experts are relevant upon a point of:*



illustrations :

- a. The question is, whether the death of A was caused by poison.

Example : The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

- b. The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

Example : The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant. Similarly the opinions of experts on typewritten documents as to whether a given document is typed on a particular typewriter is relevant.

- (ii) **Opinion of Examiner of Electronic Evidence (Section 45A):** When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000, is a relevant fact.

Explanation.— For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

(iii) ***facts which support or are inconsistent with the opinions of experts are also made relevant. (section 46):*** The Facts which are not otherwise relevant becomes relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

(iv) ***others:*** In addition to the opinions of experts, opinion of any other person is also relevant in the following cases:

Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question; (Section 47)

Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate; (Section 47A)

Opinion as to the existence of any general right or custom if the person giving the opinion is likely to be aware of the existence of such right or custom; (Section 48)

Opinion as to usages etc. words and terms used in particular districts, if the person has special means of knowledge on the subject; (Section 49)

Opinion expressed by conduct as the existence of any relationship by persons having special means of knowledge on the subject. (Section 50)

WITNESS

■ Who may testify

All persons shall be competent to testify (Give evidence) unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions,

by tender years

disease, whether of body or mind

extreme old age

any other cause of the same kind.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

- **Witness unable to communicate**

A witness who is unable to speak may give his evidence in any other manner. The requirement is that he should make it intelligible such as by writing or by signs. However, such writing must be written and the signs made in open Court. The evidence so given shall be deemed to be oral evidence. Also, if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video graphed.

- **Spouse as witness**

In civil proceedings, the spouse of the parties is a competent witness. They may testify in favour or in against. In criminal proceedings against any person, the spouse may give evidence. However, these provisions are subject section 122 of the Evidence Act, 1872.

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN (PRIVILEGED COMMUNICATIONS)

There are some facts of which evidence cannot be given though they are relevant, such as facts coming under Sections 122, 123, 126 and 127, where evidence is prohibited under those Sections. They are also referred to as 'privileged communications'

TYPES OF PRIVILEGED COMMUNICATIONS	
Evidence of a judge or magistrate in regard to certain matters (section 121)	Official communications; (Section 124)
Communications during marriage; (Section 122)	Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime; (Section 125)
Affairs of State; (Section 123)	Professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 126 and 129). This is not absolute and may waived by the clients.

A witness though compellable to give evidence is privileged in respect of particular matters within the limits of which he is not bound to answer questions while giving evidence. These are based on public policy.

EVIDENCES OF JUDGES AND MAGISTRATES :

Under Section 121 of the Act, no Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; He may be examined as to other matters which occurred in his presence whilst he was so acting.

COMMUNICATION DURING MARRIAGE :

Under Section 122 of the Act, communication between the husband and the wife during marriage is privileged and its disclosure cannot be enforced. This provision is based on the principle of domestic peace and confidence between the married couple. The Section contains two parts; the first part deals with the privilege of the witness while the second part of the Section deals with the privilege of the husband or wife of the witness.

EVIDENCE AS TO AFFAIRS OF STATE :

Section 123 applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 123, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

PROFFESIONAL COMMUNICATIONS :

Section 126 to 129 deal with the professional communications between a legal adviser and a client, which are protected from disclosure. A client cannot be compelled and a legal adviser cannot be allowed without the express consent of his client to disclose oral or documentary communications passing between them in professional confidence. The rule is founded on the impossibility of conducting legal business without professional assistance and securing full and unreserved communication between the two. Under Sections 126 and 127 neither a legal adviser i.e. a barrister, attorney, pleader or vakil (Section 126) nor his interpreter, clerk or servant (Section 128) can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any document with which any such person has become acquainted in the course and for the purpose of such In general it is not open to a party to test the credit or impeach the "truthfulness of a witness offered by him. But the Court can in its discretion allow a party to cross examine his witness" if the witness unexpectedly turns hostile. (Section 154)

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

As discussed above, all facts (except two Sections 56 and 58) which are neither admitted nor are subject to judicial notice must be proved.

The Act divides the subject of proof into two parts:

- (a) proof of facts other than the contents of documents
- (b) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section 59) which must in all cases be “direct” (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.

Thus, the two broad rules regarding oral evidence are:

all facts except the contents of documents may be proved by oral evidence

oral evidence must in all cases be “direct”.

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

▪ **Direct evidence**

In Section 60 of the Evidence Act, expression “oral evidence” has an altogether different meaning. It is used in the sense of “original evidence” as distinguished from “hearsay” evidence and it is not used in contradiction to “circumstantial” or “presumptive evidence”. According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay. Since the evidence as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

▪ **Documentary evidence**

A “*document*” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence. Section 61 provides that the contents of a document must be proved either by primary or by secondary evidence.

▪ **Primary evidence**

“*Primary evidence*” means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

▪ Secondary evidence

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, “secondary evidence” means and includes;

certified copies given under the provisions hereafter contained;

copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

copies made from or compared with the original;

counterparts of documents as against the parties who did not execute them

oral accounts of the contents of a document given by some person who has himself seen it.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

▪ Circumstantial evidence

In English law the expression direct evidence is used to signify evidence relating to the ‘fact in issue’ (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to “relevant fact” (*facta probandum*). However, under Section 60 of the Evidence Act, the expression “direct evidence” has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is “direct” evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

BURDEN OF PROOF

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

IMPROPER ADDMISSION & REJECTION OF EVIDENCE

The improper admission or rejection of evidence is not a ground for start of a new trial or reversal of any decision. But the court should of the view that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

PRESUMPTIONS

The Act recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved.

THREE CATEGORIES OF PRESUMPTIONS		
Presumptions of law, it is a rule of law that a particular interference shall be drawn by a court from particular circumstances	Presumptions of a fact , it is a rule of law that a fact should be doubtful maybe interfered from a fact which is proved	Mixed presumptions , they consider mainly certain inferences between the presumptions of law and presumptions of fact

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms “conclusive proof”, “shall presume” and “may presume”. The term “conclusive proof” specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term “shall presume” indicates rebuttable presumptions of law; the term “may presume” indicates presumptions of fact.

ESTOPPEL

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115). However, there is no estoppel against the Statute. Where the Statute prescribes a particular way of doing something, it has to be done in that manner only. Other relevant are Sections 116 and 117.

Principle of Estoppel

- a. Estoppel is based on the maxim '*allegans contraria non est audiendus*' i.e. a person alleging contrary facts should not be heard. The principles of estoppel covers one kind of facts. It says that man cannot approbate and reprobate, or that a man cannot blow hot and cold, or that a man shall not say one thing at one time and later on say a different thing.
- b. The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it (*Sorat Chunder v. Gopal Chunder*).
- c. Estoppel is a rule of evidence and does not give rise to a cause of action. Estoppel by record results from the judgement of a competent Court (Section 40, 41). It was laid down by the Privy Council in *Mohori Bibee v. Dharmodas Ghosh*, (1930) 30 Cal. 530 PC, that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.
- d. In *Biju Patnaik University of Tech. Orissa v. Sairam College*, AIR 2010 (NOC) 691 (Orissa), one private university permitted to conduct special examination of students prosecuting studies under one time approval

policy. After inspection, 67 students were permitted to appear in the examination and their results declared. However, university declined to issue degree certificates to the students on the ground that they had to appear for further examination for another condensed course as per syllabus of university. It was held that once students appeared in an examination and their results declared, the university is estopped from taking decision withholding degree certificate after declaration of results.

Different kinds of Estoppel

estoppel by attestation	
estoppel by contract	
constuructive estoppel	
estoppel by election	
equitable estoppel	
estoppel by neglience	
estoppel by silence	

ELECTRONIC EVIDENCE (E-EVIDENCE)

- **Legal framework for electronic evidence**
 - a. Under Section 65A of the Evidence Act, the contents of electronic records have to be proved as evidence in accordance with the requirements of Section 65B. Both Sections 65A and 65B were inserted through the Indian Evidence (Amendment) Act, 2000, and form part of Chapter V of the Evidence Act, which deals with documentary evidence. In *Anvar P.V. vs.*

P.K.Basheer & Ors. on 18 September, 2014, Supreme Court, it was clarified that as Section 65B begins with a non-obstante clause, it forms a complete code for the admissibility of electronic evidence.

- b. Under Section 65B(1), any information contained in an electronic record, which has been stored, recorded or copied as a computer output, shall also be deemed as a 'document' – and shall be admissible as evidence without further proof or production of the originals, if the conditions mentioned are satisfied. Section 65B(2) lays down the criteria that must be satisfied for the information to be categorized as a 'computer output.'
- c. What gave rise to conflicting interpretations is the provision in Section 65B(4), which states that if the electronic evidence is to be used in any judicial proceeding, a certificate shall have to be produced which identifies the electronic record, and gives particulars of the device involved in the production of the electronic record. This certificate shall have to be signed by a person occupying a responsible official position in relation to the operation of the relevant device, or from a person who is in the management of the relevant activities involved. This signature shall be evidence of the authenticity of the certificate. Section 65B(4) also mentions that the contents of the certificate should be stated "to the best of the knowledge and belief of the person stating it."
- d. A confusion had arisen as to whether a certificate under Section 65B(4) would have to be obtained even when an original copy of the electronic record is produced as evidence. Another issue that arose was whether it was mandatory to comply with the provisions of Section 65B(4) or can the requirement to obtain a certificate be dispensed with. The case below has clarified the position.

▪ **Analysis of supreme court decision in *Arjun v. Kailash***

In *Arjun v. Kailash*, Supreme Court, the Court had to adjudicate on an election petition which challenged the election of a candidate from Jalna-101 Legislative Assembly Constituency, on the ground that the nomination papers were filed after the stipulated deadline. The Respondents wished to rely on video camera recordings to prove that the candidate had filed his nomination after the stipulated deadline. The Election Commission produced CDs which contained a copy of the video camera recordings, in accordance with the direction given by the High Court. However, the necessary certificates were not produced in accordance with Section 65B(4) by the Election Commission, despite multiple requests made by the Petitioner.

During the cross examination, an officer of the Election Commission testified that the video camera recordings were authentic. Based on this testimony, the

High Court admitted the evidence of the video recordings even though the certificate in accordance with Section 65B (4) had not been produced. The High Court held that it was satisfied that there was “substantial compliance” with Section 65B, as a competent officer had testified that the video recordings were authentic.

In this scenario, the Supreme Court had to interpret Section 65B(4) for determining the following issues:

- I Whether a certificate under Section 65B(4) must be produced even when an original record of the electronic evidence is available, or does it have to be given only when a secondary record of the electronic evidence is produced?
- I Whether compliance with Section 65B(4) is mandatory even in a situation when it is not possible to obtain the certificate from the competent entity?

It was noted that Section 65B(1) differentiates between the ‘original’ electronic record, which is contained in the computer in which the information is first stored – and the secondary copies that are made from the primary electronic record. For instance, in the present case, the original electronic record would be the computer of the Election Commission in which the video footage is first stored. The CDs where the content of the video recording is copied shall constitute the secondary copies of the electronic record. It was held that a certificate under Section 65B(4) shall have to be obtained only when the secondary copies of the electronic record are produced before the Court. Production of a certificate shall not be necessary when the original electronic record is produced. The original electronic record can be adduced directly as evidence if the owner of the computer/tablet/mobile phone steps into the witness box and establishes that the device where the information is first stored is owned/operated by him. If the “computer” where the electronic record was first stored happens to be part of a “computer network” or “computer system” (as defined under the Information Technology Act, 2000), and it is not possible to bring such a network/system physically to the Court, then secondary copies can be produced along with the certificate stipulated by Section 65B(4).

It was also agreed that with the view taken in *Anvar v. Basheer* – which held that Section 65B is a complete code in itself for the admissibility of electronic evidence and shall not be affected by other provisions of the Evidence Act. *Anvar v. Basheer* also held that – “...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the

Evidence Act.” Justice Nariman clarified that this dictum should be read by omitting the words “under Section 62 of the Evidence Act.” This is because Section 65B is a complete code for electronic evidence and shall supersede other provisions such as Section 62.

It was implied here that it is not necessary to refer to Section 62, as Section 65B(1) itself distinguishes between the original electronic record and the secondary copies of the electronic record.

CHAP 9: LAW RELATING TO SPECIFIC RELIEF

INTRODUCTION

- ✚ The law relating to specific relief in India is provided in the Specific Relief Act of
- ✚ 1963. The Specific Relief Act, 1963 was enacted to define and amend the law relating
- ✚ to certain kinds of specific relief.
- ✚ The expression 'specific relief' means a relief in specie. It is a remedy which aims at
- ✚ the exact fulfillment of an obligation.
- ✚ The Specific Relief Act, 1963 is not exhaustive. It does not consolidate the whole law
- ✚ on the subject. As the Preamble would indicate, it is an Act to define and amend the
- ✚ law relating to certain kinds of specific relief.
- ✚ There are other kinds of specific remedy provided for by other enactments

Transfer of Property Act deals with the specific remedies available to a mortgagor or mortgagee; the Partnership Act deals with the specific remedies like dissolution and accounts as between partners.

Under the Specific Relief Act, 1963, remedies have been divided as specific relief (Sections 5-35) and preventive relief (Sections 36-42). These are:

Recovering possession of property (Sections 5-8)

Specific performance of contracts (Sections 9-25)

Rectification of Instruments (Section 26)

Rescission of contracts (Sections 27-30)

Cancellation of Instruments (Section 31-33)

Declaratory decrees (Sections 34-35)

Injunctions (Sections 36-42)

RECOVERING POSSESSION OF PROPERTY

Recovery of specific immovable property

- According to Section 5 of the Specific Relief Act, 1963 a person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908. Such a suit is a general suit and the plaintiff has to prove that he has a better title.

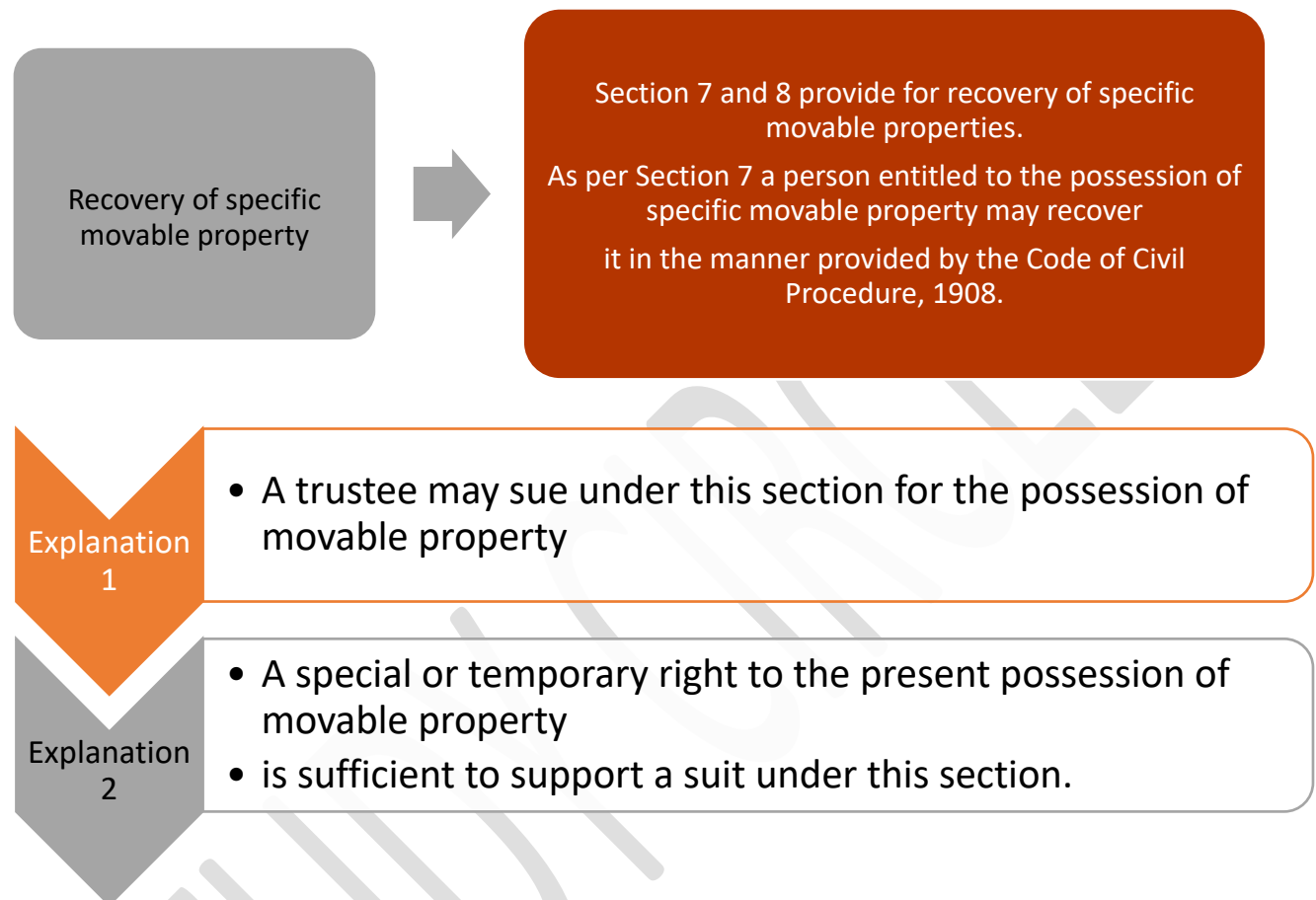
Suit by person dispossessed of immovable property

- Suit by person dispossessed of immovable property Section 6 provides that if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person through whom he has been in possession or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

No suit under section 6 shall be brought—

- (a) after the expiry of six months from the date of dispossession; or
- (b) against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under section 6, nor shall any review of any such order or decree be allowed. Section 6 shall not bar any person from suing to establish his title to such property and to recover possession thereof.



Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession

Section 8 provides that any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

when the thing claimed is held by the defendant as the agent or trustee of the plaintiff

when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed

when it would be extremely difficult to ascertain the actual damage caused by its loss

when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation.—Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) above, presume—

(a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;

(b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

SPECIFIC PERFORMANCE OF CONTRACTS

Relief by specific performance of contract is an equitable relief in cases of breach of contract.

Defences respecting suits for relief based on contract

According to section 9, where any relief is claimed in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. The contract in question should be valid and enforceable.

Specific performance in respect of contracts

As per section 10 of the Act, the specific performance of a contract shall be enforced by the court subject to the provisions contained in section 11(2), section 14 and section 16 of the Specific Relief Act, 1963.

Cases in which specific performance of contracts connected with trusts enforceable

Section 11 provides that except as otherwise provided in this Act, specific performance of a contract shall be enforced when the act agreed to be done is in the performance wholly or partly of a trust. A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Specific performance of part of contract

Section 12 deals with specific performance of a part of a contract. Sub-section (1) lays down the general principle that except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract. Sub-sections (2)-(4) lay down the exceptions to this general rule as follows:

- (i) Sub-section 2 says that where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of the either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belongs to A and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made in goods or in money. A may be directed at the suit of B to convey to B the 98 bighas and to make compensation to him.

For not conveying the two remaining bighas; B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less the sum awarded as compensation for the deficiency.

- (ii) Sub-section 3 lays down that where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either

- (a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the party

(I) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement, and

(II) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage

sustained by him through the default of the defendant.

For example, A contracts to sell B a piece of land consisting of 100 bighas for Rs. 1,00,000. It turns out that only 50 bighas of land belong to A. 50 bighas are substantial part of the contract. A cannot demand specific performance of the contract but B can demand specific performance to get 50 bighas of land from A by paying the full consideration i.e. Rs. 1,00,000.

(iii) Sub-section 4 lays down that when a part of a contract which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

For the purposes of this section, a party to the contract shall be deemed to be unable to perform the whole of his part of it, if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance

RIGHTS OF PURCHASER OR LESSEE AGAINST PERSON WITH NO TITLE OR IMPERFECT TITLE

Section 13 lays down the rights of a purchaser or lessee against the seller or lessor with no title or imperfect title. It lays down that where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:—

if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest

where the concurrence of other person is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance

where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee

where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lesser in the property which is the subject-matter of the contract

Above provisions shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Contracts not specifically enforceable

Section 14 lays down the contracts which cannot be specifically enforced. The following contracts cannot be specifically enforced, namely:—

where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20

a contract, the performance of which involves the performance of a continuous duty which the court cannot survive

a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms

a contract which is in its nature determinable

POWER OF COURT TO ENGAGE EXPERTS

- Section 14A (1) provides that without prejudice to the generality of the provisions contained in the Code of Civil Procedure, 1908, in any suit under this Act, where the court considers it necessary to get expert opinion to assist it on any specific issue involved in the suit, it may engage one or more experts and direct to report to it on such issue and may secure attendance of the expert for providing evidence, including production of documents on the issue.
- Section 14A (2) lays down that the court may require or direct any person to give relevant information to the expert or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- As per Section 14A (3) the opinion or report given by the expert shall form part of the record of the suit; and the court, or with the permission of the court any of the parties to the suit, may examine the expert personally in open court on any of the matters referred to him or mentioned in his opinion or report, or as to his opinion or report, or as to the manner in which he has made the inspection.
- According to Section 14A (4) the expert shall be entitled to such fee, cost or expense as the court may fix, which shall be payable by the parties in such proportion, and at such time, as the court may direct.”

WHO MAY OBTAIN SPECIFIC PERFORMANCE

Section 15 lays down that the specific performance of a contract may be obtained by—

(a) any party thereto

(b) the representative in interest or the principal, of any party thereto

It may be noted that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party.

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled there under

- (d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainder man
- (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant
- (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach
- (fa) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.
- (g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation
- (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

UNFORCABLE CONTRACTS

Personal bars to relief

According to Section 16 Specific performance of a contract cannot be enforced in favour of a person—

- (a) who has obtained substituted performance of contract under section 20; or
- (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- (c) who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.—

For the purposes of clause (c) above,-

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

Contract to sell or let property by one who has no title, not specifically enforceable

As per Section 17, a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the property

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

The above provisions shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Non-enforcement except with variation

Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:—

(a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;

(b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;

(c) where the parties have, subsequently to the execution of the contract, varied its terms.

Relief against parties and persons claiming under them by subsequent title

Section 19 lays down that specific performance of a contract may be enforced against—

either party thereto

any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract

any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant

when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation

when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation

when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company. It may be noted that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Substituted performance of contracts, etc.

1. Section 20(1) lays down that without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872, and, except as otherwise agreed upon by the parties, where the contract is broken due to non performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.
2. According to section 20(2), No substituted performance of contract under above sub- section (1) shall be undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency. However, the party who suffers such breach shall not be entitled to recover the expenses and costs under subsection (1) unless he has got the contract performed through a third party or by his own agency.
3. Section 20(3) provides that where the party suffering breach of contract has got the contract performed through a third party or by his own

agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

4. Section 20 shall not prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

Special provisions for contract relating to infrastructure project

- Section 20A lays down Special provisions for contract relating to infrastructure project. According to section 20A(1), No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.
- As per Section 20A (2), the Central Government may, depending upon the requirement for development of infrastructure projects, and if it considers necessary or expedient to do so, by notification in the Official Gazette, amend the Schedule relating to any Category of projects or Infrastructure Sub-Sectors.
- Section 20A(3) provides that every notification issued under the Act by the Central Government shall be laid, as soon as may be after it is issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Special Courts

Section 20B empowers the State Government, in consultation with the Chief Justice of the High Court, shall designate, by notification published in the Official Gazette, one or more Civil Courts as Special Courts, within the local limits of the area to exercise jurisdiction and to try a suit under this Act in respect of contracts relating to infrastructure projects.

Expeditious disposal of suits

Section 20C states that notwithstanding anything contained in the Code of Civil Procedure, 1908, a suit filed under the provisions of this Act shall be disposed of by the court within a period of twelve months from the date of service of summons to the defendant:

The above stated period may be extended for a further period not exceeding six months in aggregate after recording reasons in writing for such extension by the court.

Power to award compensation in certain cases

Under section 21 of the Specific Relief Act, 1963, the Court is empowered to award compensation in certain cases. They are as follows:

- (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, in addition to, such performance.
- (2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.
- (3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
- (4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.
- (5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint. However, where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Even if the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

Power to grant relief for possession, partition, refund of earnest money, etc

Section 22 gives power to grant relief for possession, partition, refund of earnest money, etc.

Under section 22(1) any person suing for the specific performance of a contract for the

transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property in addition to such Performance

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed.

Where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

Liquidation of damages not a bar to specific performance

According to Section 23, a contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. When enforcing specific performance, the court shall not also decree payment of the sum so named in the contract.

Bar of suit for compensation for breach after dismissal of suit for specific performance

Section 24 provides that the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

RECTIFICATION OF INSTRUMENTS

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Section 26 of the Specific Relief Act, 1963 contains the law as to rectification of instruments.

Section 26 (1) provides that when, through fraud or a mutual mistake of the parties a contract or other instrument in writing not being the articles of association of a company to which the Companies Act, applies does not express their real intention, then

either party or his representative in interest may institute a suit to have the instrument rectified

the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified

a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument

If, in any suit in which a contract or other instrument is sought to be rectified, the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

Relief for the rectification of an instrument shall not be granted to any party under this section unless it has been specifically claimed. Where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

RESCISSION OF CONTRACTS (SECTIONS 27-30)

Section 27 deals with when rescission may be adjudged or refused

“Rescission” means putting an end to a contract which is still operative and making it null and void ab initio. It does not apply to void contracts.

Section 27(1) states that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:—

(a) where the contract is voidable or terminable by the plaintiff;

(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff

As per Section 27(2) the court may refuse to rescind the contract—

where the plaintiff has expressly or impliedly ratified the contract

where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made

where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value

where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract

The 'contract' in this section, in relation to the territories to which the Transfer of Property, 1882 does not extend, means a contract in writing.

Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed

Section 28(1) provides that where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

As per Section 28 (2), where a contract is rescinded under sub-section (1), the Court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of

possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract.

According to Section 28(3), if the purchase or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—
(a) the execution of a proper conveyance or lease by the vendor or lessor;
(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

Separate suit in respect of any relief which may be claimed shall not lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be. The costs of any proceedings under this section shall be in the discretion of the court.

Alternative prayer for rescission in suit for specific performance

Section 29 of the Act, provides that a plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Court may require parties rescinding to do equity

According to Section 30, on adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

Cancellation of Instruments (Sections 31-33)

Section 31 dealing with when cancellation may be ordered. Section 31(1) provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

As per Section 30(2), if the instrument has been registered under the Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer

shall note on the copy of the instrument contained in his books the fact of its cancellation.

What instruments may be partially cancelled

According to Section 32 of the Act, where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable

Section 33 provides that on adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require. Where a defendant successfully resists any suit on the ground—

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

Declaratory Decrees (Sections 34-35)

A declaratory decree is a decree whereby any right as to any property or the legal character of a person is judicially ascertained.

The Supreme Court in *State of Madhya Pradesh v. Mangilal Sharma*, 1997 (7) SCALE 783, held that a declaratory decree merely declares the right of the decree holder vis-a-vis the judgement debtor and does not in terms direct the judgement debtor to do or refrain from doing any particular act or thing. It cannot be executed as it only declares the rights of the decree-holder qua the judgement debtor and does not, in terms, direct him to do or refrain from doing any particular act or thing.

DISCRETION OF COURT AS TO DECLARATION OF STATUS OR RIGHT

Section 34 lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

It may be noted that court shall not make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Effect of declaration

According to Section 35 of the Act, a declaration made is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Preventive Relief (Sections 36-41)

Part III of the Specific Relief Act, 1963 grants specific relief called Preventive Relief i.e., preventing a party from doing that which he is under an obligation not to do.

Injunction: Preventive relief is granted at the discretion of the court by way of an injunction. An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases (when it is called a 'mandatory injunction') commanding active restitution of the former state of things.

Lord Halsbury defines injunction as "a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing".

The main difference between an injunction and specific performance is that the remedy in case of an injunction is generally directed to prevent the violation of a negative act and therefore deals not only with contracts but also with torts and many other subjects of purely equitable one, whereas specific performance is directed to compelling performance of an active duty. It is known as a "judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another is restrained from continuing or commencing such wrongful act. Injunction is the most ordinary form of preventive relief. For the effective administration of justice, this power to prevent and to restrain is absolutely necessary.

Characteristics of an injunction

An injunction has three characteristic features;

- (a) It is a judicial process.
- (b) The object of this judicial process is to restrain or to prevent.
- (c) The act restrained or prevented is a wrongful act. An injunction acts or operates always in personam.

If the wrongful act has already taken place, the injunction prevents its repetition. If it is merely threatened, the threat is prevented from being executed.

Injunctions Generally

As per Section 36 of the Act, preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Temporary and perpetual injunctions

Temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual Injunctions

Specific performance is decreed to compel the performance of an active duty, while injunction is decreed to prevent the violation of a negative duty.

Normally, the former deals with contracts, while the latter with torts and other subjects of equitable nature. If a contract is positive in its nature, it calls for the relief of specific performance, on the other hand, if it is negative in its nature, it calls for relief of injunction.

The principle governing the award of injunction as a mode of enforcement of contracts is similar to that of specific performance. This is clearly borne out by Section 38(2) of the Act.

Thus, the enforcement of a contract is governed by both specific relief and injunction. "The jurisdiction of equity to grant such injunction is substantially

coexistent with its jurisdiction to compel a specific performance". But still their fields of operation are separate from each other. While a promise to do is enforced by specific performance, a promise to forbear is enforced by injunction. Section 41(e) further provides that contract which will not be affirmatively enforced by a decree of specific performance, will not be negatively enforced by issuing an injunction.

Perpetual injunction when granted

According to Section 38, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:—

where the defendant is trustee of the property for the plaintiff



where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion



where the invasion is such that compensation in money would not afford adequate relief



where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Mandatory injunctions

As per Section 39 of the Act, when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Damages in lieu of, or in addition to, injunction

Section 40 dealing with damages in lieu of, or in addition to, injunction. It states that the plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages. Relief for damages shall not be granted unless the plaintiff has claimed such relief in his plaint. Where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

Injunction when refused

Section 41 gives a list of cases when injunction cannot be granted.

It says that an injunction cannot be granted –

- to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings
- to restrain any person from instituting or prosecuting any proceeding in a court not sub- ordinate to that from which the injunction is sought;
- to restrain any person from applying to any legislative body;
- to restrain any person from instituting or prosecuting any proceeding in a criminal matter
- to prevent the breach of a contract the performance of which would not be specifically enforced
- to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- to prevent a continuing breach in which the plaintiff has acquiesced;
- when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust
- if it would impede or delay the progress or completion of any infrastructure project or

- interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.
- when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court
- when the plaintiff has no personal interest in the matter.

Injunction to perform negative agreement

Section 42 of the Act provides that notwithstanding anything contained in section 41(e), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. It may be noted that the plaintiff has not failed to perform the contract so far as it is binding on him.

CHAP 10 : LAW RELATING TO LIMITATION

INTRODUCTION – LAW RELATING TO LIMITATION

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications. The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment. The Act extends to whole of India.

Case Law

Bombay Dying & Mfg. Co. Ltd. v. State of Bombay,

Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal.

COMPUTATION OF THE PERIOD OF LIMITATION FOR DIFFERENT TYPES OF SUITS

The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions. The Limitation Act prescribes the period of limitation in Articles in Schedule to the Act. In the Articles of the Schedule to the Limitation Act, Columns 1, 2, and 3 must be read together to give harmonious meaning and construction. The Schedule containing the table showing the relevant Articles prescribing limitation period for a specified suit and also time from which such period commences is given at the end of this Lesson. Format of the schedule to Limitation Act, 1963 Description of suit Period of Limitation Time from which period begins to run

BAR OF LIMITATION

Section 3 of the Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the Court not to proceed with such suits irrespective of the fact whether the plea of limitation has been set up in defence or not. The provisions of Section 3 are mandatory. The Court can suo motu take note of question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint.

It is a vital section upon which the whole limitation Act depends for its efficacy. The effect of Section 3 is not to deprive the Court of its jurisdiction. Therefore, decision of a Court allowing a suit which had been instituted after the period prescribed is not vitiated for want of jurisdiction. A decree passed in a time barred suit is not a nullity.

Noharlal Verma vs. District Cooperative Central Bank Limited, Jagdalpur

The Supreme Court observed that, if the statute stipulates a particular period of limitation, no concession or order would make an application barred by time to be within the limitation and the authority had no jurisdiction to consider such application on merits.

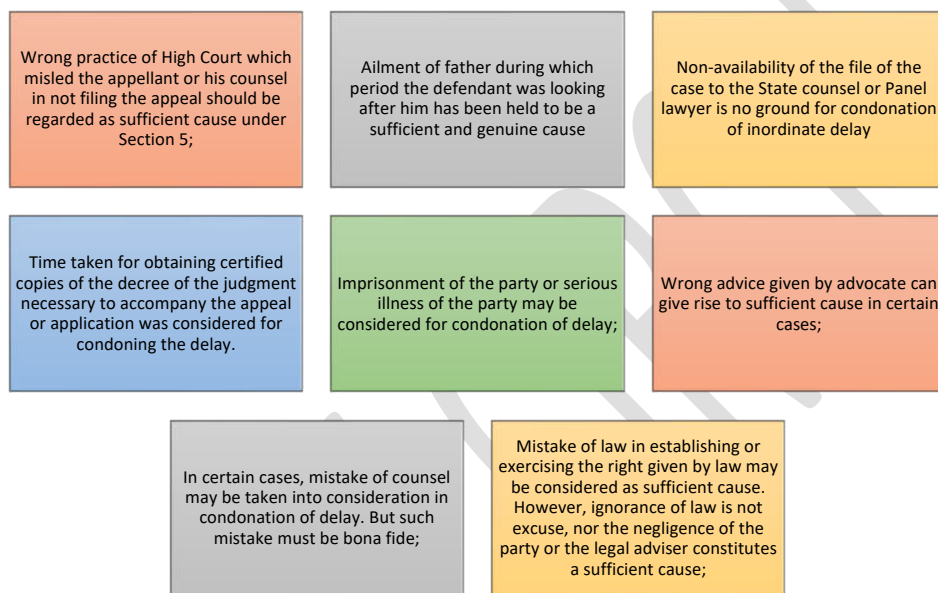
EXTENSION OF TIME IN CERTAIN CASES

Doctrine of sufficient cause

Section 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as doctrine of “sufficient cause” for condonation of delay which is embodied in Section 5 of the Limitation Act, 1963. may be admitted after the

prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. It is clarified by the explanation appended to Section 5 that the fact that the appellant or applicant was misled by any order, practice or judgement of the High Court in ascertaining or computing the prescribed period may be a sufficient cause within the meaning of this section. Thus, the Court may admit an application or appeal even after the expiry of the specified period of limitation if it is satisfied with the applicant or the appellant, as the case may be as to sufficient cause for not making it within time.

What is sufficient cause and what is not may be explained by the following observations:

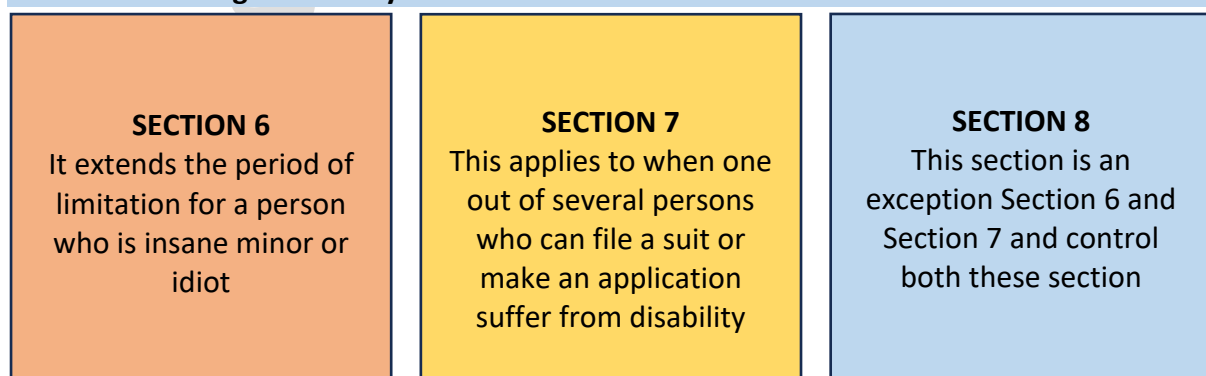


Case Law

Ramlal v. Rewa Coal Fields Ltd

the Supreme Court held that once the period of limitation expires then the appellant has to explain the delay made thereafter for day by day and if he is unable to explain the delay even for a single day, it would be deemed that the party did not have sufficient cause for delay. It is the Court's discretion to extend or not to extend the period of limitation even after the sufficient cause has been shown and other conditions are also specified. However, the Court should exercise its discretion judicially and not arbitrarily.

Persons under legal disability



Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. The combined effect of Sections 6 and 8 is that where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled to a fresh period of limitation from the attainment of his majority subject to the condition that in no case the period extended by Section 6 shall by virtue of Section 8 exceeds three years from cessation of disability, i.e., attainment of majority. Sections 6, 7 and 8 must be read together.

Section 7 is only an application of the principle in Section 6 to a joint-right inherited by a group of persons wherein some or all of whom are under the disability. The disability of all except one does not prevent the running of time, if the discharge can be given without the concurrence of the other. Otherwise the time will run only when the disability is removed

Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of three years after the cessation of disability. The Section applies to all suits except suits to enforce rights of pre-emption. The period of three years under Section 6 of this Act has to be counted, not from the date of attainment of majority by the person under disability, but from the date of cessation of minority or disability.

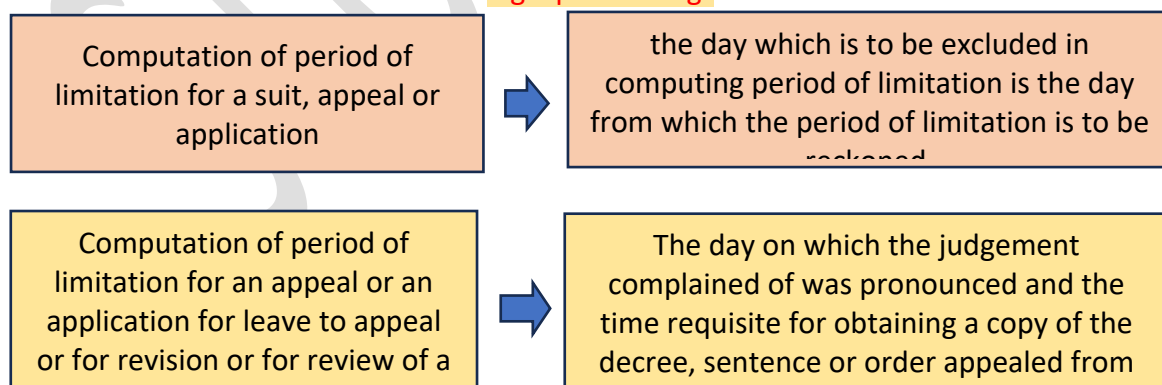
CONTINUOUS RUNNING OF TIME (SEC 9)

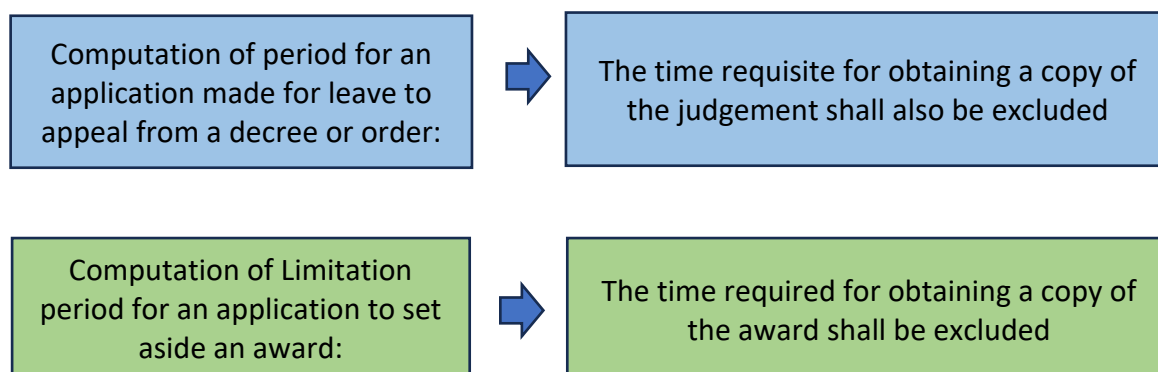
According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues. The rule of this Section is based on the English dictum. "Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event". Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running.

COMPUTATION OF PERIOD OF LIMITATION (SEC 12)

Exclusion of certain days or exclusion of time in legal proceedings While computing Period of Limitation certain day/days are to be excluded.

Section 12 prescribes the time which shall be excluded in computing the time of limitation in legal proceedings.



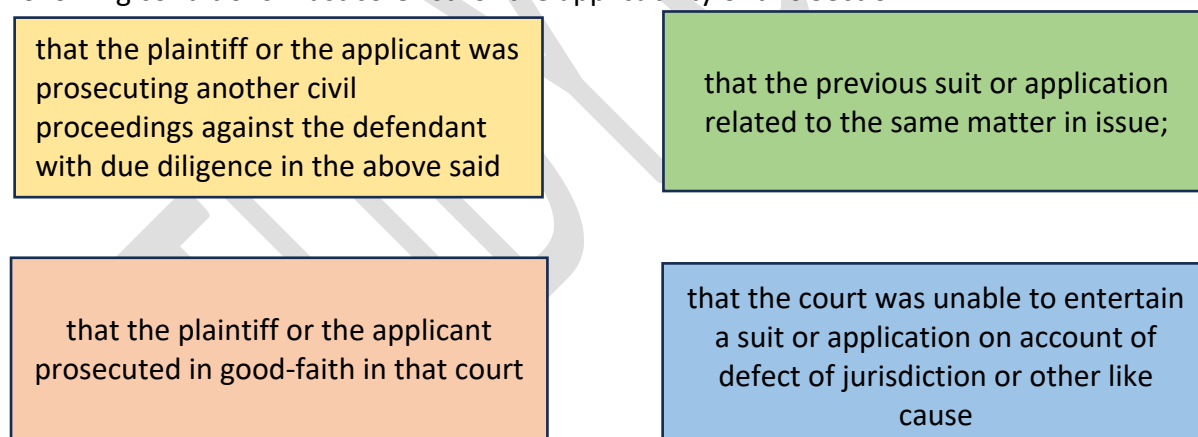


Exclusion of time during which leave to sue or appeal as a pauper is applied for (Sec 13)

In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.

Exclusion of time bona fide taken in a court without jurisdiction (Section 14)

The relief to a person is given by Section 14 of the Act when the period of limitation is over, because another civil proceedings relating to the matter in issue had been initiated in a court which is unable to entertain it, by lack of jurisdiction or by any other like cause. The following conditions must co-exist for the applicability of this Section:



Exclusion of time in certain other cases

- (a) When a suit or application for the execution of a decree has been stayed by an injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded. [Section 15(1)].
- (b) The time required to obtain the sanction or consent of the Govt. required, or a notice period shall also be excluded in case of suits. [Section 15(2)].
- (c) In a suit or an application for execution of a decree by any receiver or interim receiver or any liquidator, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of their appointment shall be excluded. [Section 15(3)].

(d) The time during which a proceeding to set aside the sale has been prosecuted shall be excluded in case of a suit for possession by a purchaser at a sale in execution of a decree. [Section 15(4)].

(e) The time during which the defendant has been absent from India and from the territories outside India administered by the Central Government, shall also be excluded. [Section 15(5)].

(f) In case of death of a person before the right to institute a suit accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application.

The same rule applies in case if defendant dies. [Sections 16(1) and (2)]. However, the above rule does not apply to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office. [Section 16(3)].

Where the suit or application is based upon the fraud or mistake of the defendant or respondent or his agent or in other cases as mentioned in Section 17, the period of limitation shall not begin to run until the plaintiff or applicant has discovered fraud or mistake or could with reasonable diligence have discovered it or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production.

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION (SEC 18)

Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18:

There must be an admission or acknowledgement

Such acknowledgement must be in respect of any property or right

It must be made before the expiry of period of limitation

It must be in writing and signed by the party against whom such property or rights is

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY (SEC 19)

As per Section 19 of the Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The proviso says that, save in the case of payment of interest made before the 1st day of January, 1928 an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.

According to the explanation appended to this Section:

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) 'debt' does not include money payable under a decree or order of a court for the purpose of this Section.

Thus, according to this section a fresh period of limitation becomes available to the creditor when part-payment of debt is made by the debtor before the expiration of the period of limitation.

COMPUTATION OF TIME MENTIONED IN INSTRUMENTS

All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian Calendar. (Section 24).

ACQUISITION OF OWNERSHIP BY POSSESSION

[Section 25 applies to acquisition of easements](#). It provides that the right to access and use of light or air, way, watercourse, use of water, or any other easement which have been peaceably enjoyed without interruption and for twenty years (thirty years if property belongs to Government) shall be absolute and indefeasible. Such period of twenty years shall be a period ending within two years next before the institution of the suit.

LIMITATION AND WRITS UNDER THE CONSTITUTION

The subject of limitation is dealt with in entry 13, List III of the Constitution of India. The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended Statute. The Statute of Limitation is not unconstitutional since it applies to right of action in future. It is a shield and not a weapon of offence

CHAP 11 : LAW RELATING TO ARBITRATION, MEDIATION AND CONCILIATION

INTRODUCTION

The history of the law of arbitration in India commences with (erstwhile Civil procedure Code) Act VIII of 1859 which codified the procedure of Civil Courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. These provisions were in operation when the Indian Contract Act, 1872, came into force which permitted settlement of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882 but not much change was brought about by the law relating to arbitration proceedings. It was in the year 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matter submitted to the arbitration was the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency town. Then came the Code of Civil Procedure of 1908. Schedule II to the said Code contained the provisions relating to the law of arbitration which extended to the other parts of British India.

The Civil Justice Committee in 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., the Arbitration Act of 1940. This Act as its preamble indicated was a consolidating and amending Act and was an exhaustive code insofar as the law relating to arbitration is concerned. Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or it may be arbitration in a suit.

With the passage of time, the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective. Besides, arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms.

Arbitration and Conciliation Act, 1996

With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called Arbitration and Conciliation Act, 1996 has been passed. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration. The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

Types of Arbitration

1. Ad hoc Arbitration - This is a type of arbitration that is not handled by a formal organisation rather the number of arbitrators, mode of selection, and how the arbitration will be conducted, may be decided by the parties. The procedural aspects should also be decided by the parties.

2. Domestic Arbitration - The arbitration in which the disputes are subject to Indian laws and the cause of action is entirely based in India are called Domestic arbitration.

3. International Arbitration - It is an arbitration relating to disputes where at least one of the parties is:

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.

4. Institutional arbitration - In Institutional arbitration, the matter is to be administered by established arbitration institutions.

Essentials of Arbitral Process

- 1. Seat of Arbitration** – The parties are free to select any location as the arbitration's seat.
- 2. Venue of Arbitration** – The Venue or location, for the sessions of the arbitral proceedings may be decided by the parties.
- 3. Arbitral Institution** – The parties may select the arbitral institution for conducting the proceedings. The rules of such arbitration institution will apply to proceedings.
- 4. Law** – The parties may by agreement choose any law .
- 5. Language** – The parties may also agree on the language of the arbitration proceedings.
- 6. Number of arbitrators** – The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, Failing the determination, the arbitral tribunal shall consist of a sole arbitrator.
- 7. Cost** – The Court or arbitral tribunal have the discretion to determine the cost which includes the decision as to:
 - (a) whether costs are payable by one party to another;
 - (b) the amount of such costs; and
 - (c) when such costs are to be paid.

Arbitrator

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. But “arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties

Arbitration Agreement

“Arbitration agreement” means an agreement referred to in Section 7 [Section 2(1)(b)]. Under Section 7, the Arbitration agreement has been defined to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not

1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. An arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if it is contained in, a document signed by the parties
4. An exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement
5. An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
6. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

International Commercial Arbitration

International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

an individual who is a national of, or habitually resident in, any country other than India
a body corporate which is incorporated in any country other than India;
an association or a body of individuals whose central management and control is exercised in any country other than India
the Government of a foreign country. [Section 2(1)(f)]

Arbitration agreement

INTRODUCTION

- 1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
- 2) The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
- 3) The parties repose confidence in the judgment of the arbitrator and show their Willingness to abide by his decision.

4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

ARBITRATION AGREEMENT

1) Under Section 7, the 'Arbitration' agreement" has been defined to mean an agreement by parties to submit the arbitration or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3) An arbitration agreement shall be in writing in the following manner:

- a. a document signed by the parties, or
- b. an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement, or
- c. an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.

4) Thus, arbitration agreement stands on the same footing as any other agreement. It is binding upon the parties unless it is influenced by fraud or coercion or undue influence, etc.

5) As per Section 7, one of the essential ingredients of an arbitration agreement is that such an agreement should be in writing. An oral arbitration agreement is not recognised as an arbitration agreement according to this Section.

6) In a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the arbitration clause is a part of the contract.

APPOINTMENT OF ARBITRATORS

- a) Arbitrator could be of any nationality.
- b) Three arbitrators- each party to appoint its own arbitrator, and the two appointed arbitrators to appoint a third arbitrator (presiding arbitrator)
- c) If, within 30 days, the parties fail to appoint their arbitrators, or the two appointed arbitrators fail to agree on the third arbitrator, the arbitrator shall be appointed by the Chief Justice or any person or institution designated by him at the request of a party.

Case law

The Supreme Court in Hindustan Petroleum Corporation Ltd. v. M/s Pink City Midway Petroleum has held that the jurisdiction of Civil Court is barred after an application is made for arbitration under the Act.

In *Mahesh Kumar v. Rajasthan State Road Corporation*, the Rajasthan High Court has held that mere existence of arbitration clause in agreement does not bar jurisdiction of Civil Court automatically. The objection of a party to the jurisdiction of the arbitrator must be raised not later than the submission of its first statement of defense on the substance of the dispute

CONCLUSION

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration.

Provisions for obtaining interim relief from Court, when there exists arbitration agreement among parties.

INTRODUCTION

- 1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
- 2) The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
- 3) The parties repose confidence in the judgment of the arbitrator and show their Willingness to abide by his decision.
- 4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

INTERIM RELIEF

- Section 9(1) states that a party may, before, or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36, apply to a court,
 - i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
 - ii. for an interim measure of protection in respect of any of the following matters, namely,
 - a. the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
 - b. securing the amount in dispute in the arbitration;
 - c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any part) or authorising any samples to be taken or any observation to be made, or experiment to be

tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

d. interim injunction or the appointment of a receiver; e. such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

- Further Sec 9(2) states that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under subsection (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
- Under Sec 9(3) once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

CONCLUSION

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration.

Arbitration proceedings

INTRODUCTION

1. Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
2. The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
3. The parties repose confidence in the judgment of the arbitrator and show their Willingness to abide by his decision.
4. The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

ARBITRATION PROCEEDINGS

- 1) Sec 18:
- 2) Sec 19: Determination of rules of arbitral procedure
 - a) The arbitral Tribunal is not bound by the code of civil procedure, 1908 or Indian evidence Act, 1872
 - b) The parties are free to agree on a procedure to be followed by the arbitral Tribunal in conducting its proceedings.

- c) If the parties do not agree to the procedure, it will be determined by the Arbitral Tribunal.
 - d) The Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.
- 3) Sec 20: The parties are free to agree on the place of arbitration and if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal.
- 4) Sec 21: Commencement of arbitral proceedings is
 - a) The Act states that the arbitral proceedings commence on the date on which request for that dispute to be referred to arbitration is received by the respondent
 - b) No time limit has been prescribed, but where the arbitrator is guilty of undue delay, his proceedings can be put to stop
- 5) Sec 22: Language
 - a) There is freedom to parties to agree, upon the language or languages to be used in arbitral proceedings.
 - b) The language of arbitration is generally English.
- 6) Sec 23: Statement of claim and defense
 - a) The claimant should submit statement of claims, Points of issue and relief or remedy sought.
 - b) The respondent shall state his defense in respect of these particulars.
 - c) All relevant documents must be submitted Two obligations on arbitral Tribunal Treat both parties with equality Full opportunity
 - d) Such claim or defense can be amended or supplemented at any time.
- 7) Sec 24: Hearings and written procedure.
 - a) There is no restriction upon the parties to agree for oral hearings or for conducting the proceedings on the basis of documents.
 - b) The parties shall be given sufficient advance notice of any hearing and of any meeting of arbitral Tribunal for the purpose of inspection of goods, documents or others.
 - c) All info received from one party must be communicated to the other party.
- 8) Sec 25: Power to terminate / continue the proceedings.
 - a) If the claimant fails to communicate his statement of claim without giving sufficient cause, within the agreed period, the arbitrator can terminate the proceedings.
 - b) If the respondent fails to communicate his statement of defense, the proceedings continue.
 - c) If a party fails to appear, fails to produce evidence, ex-parte proceedings will apply.

9) Sec 26-27: Assistance

- a) The arbitrator Tribunal can appoint an expert to report to it on some specific issue.
- b) The arbitral Tribunal can also apply to Court for assistance for taking evidence.
- c) Decision of the Arbitral Tribunal shall be made by majority of members.
- d) The Tribunal shall decide the dispute in good faith so as to do justice to all parties.

CONCLUSION

Arbitration Award: An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.

Fast Track Procedure.**INTRODUCTION**

- 1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
- 2) The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
- 3) The parties repose confidence in the judgment of the arbitrator and show their Willingness to abide by his decision.
- 4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

Fast Track Procedure

- **Section 29B(1)** provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub- section (3).
- **Section 29B (2)** states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
- **Section 29B (3)** says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1)

- a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
- b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;
- c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
- d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

- **Section 29B(4)** states that the award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

- **Section 29B(5)** provides that if the award is not made within the period specified in subsection (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

- **Section 29B (6)** says that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

CONCLUSION

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration.

Termination of Arbitral Proceedings Sec 32

INTRODUCTION

1. Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
2. The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
3. The parties repose confidence in the judgment of the arbitrator and show their Willingness to abide by his decision.
4. The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

TERMINATION OF ARBITRAL PROCEEDINGS

- **As per section 32 (1)** the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
- **Under section 32 (2)** the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where,
 - a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in, obtaining a final settlement of the dispute,
 - b) the parties agree on the termination of the proceedings, or
 - c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- **Section 32(3)** says that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. This is subject to the provisions of Sections 33 and 34(4) of the Act.

CONCLUSION

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration.

Challenge procedure

INTRODUCTION

- a) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
- b) The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
- c) The parties repose confidence in the judgment of the arbitrator and show their willingness to abide by his decision.
- d) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal

CHALLENGE PROCEDURE.

Section 13 of the Act contains detailed provisions regarding challenge procedure.

1. The parties are free to agree on a procedure for challenging an arbitrator.
 2. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.
- Parties at liberty to challenge Successful challenge Unsuccessful challenge Stay in the proceedings Proceedings continue Award can be passed Challenging

party can make application to set aside the award. Challenge within 15 days
 Constitution of tribunal Becoming aware Award set aside, Court decides
 whether arbitrator is entitled to fees or not

3. Failing any agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral Tribunal or after becoming aware of any circumstances, send a written statement of the reasons for the challenge to the arbitral Tribunal.

4. The Tribunal shall decide on the challenge unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge.

5. It is also provided that where an award is set aside on an application made, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

6. If challenge is not successful, Tribunal will continue with the matter and make an award.

CONCLUSION

Failure or impossibility to act as an arbitrator The mandate of an arbitrator shall terminate, if he becomes de jure or de facto unable to Perform his functions, or fails to act without undue delay due to some other reasons.

Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate. Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court.

Define 'Court' and explain features Arbitral award

INTRODUCTION

1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.

2) The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.

3) The parties repose confidence in the judgment of the arbitrator and show their willingness to abide by his decision.

4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

COURT

"Court" Means the Principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the

arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court or any Court of Small Causes.

FEATURES OF ARBITRAL AWARD

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral Tribunal. However, the signature of majority of the members of the Tribunal is sufficient if the reason for any omitted signature is stated.
3. The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
 - a) Where the arbitration agreement expressly provides that no reasons are to be given, or
 - b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the dispute and the arbitral Tribunal has recorded the settlement in the form of an arbitral award on agreed terms.

The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves analysis of the dispute to reach a logical conclusion. Award can be divided into four parts i.e. general, findings of fact, submissions of the parties and conclusions of the Tribunal. General Findings of fact Submissions of the Parties Conclusion



The Tribunal should explain its view of the evidence and reasons of its conclusions.

- The preamble of the award may contain reference to the arbitration agreement, constitution of the Tribunal, procedure adopted by the Tribunal etc
- The second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of the Tribunal.
- The points at issue may be divided into two heads i.e. issue of fact and issue of law.

4. The award should be dated i.e. the date of making of the award should be mentioned in the award.

5. Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral Tribunal is under obligation to state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.

6. The arbitral Tribunal may include in the sum for which award is made, interest up to the date of award and also a direction regarding future interest.

7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.

8. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

CONCLUSION

Interim Award :

The arbitral Tribunal can make an interim award on any matter with respect to which it may make a final award

Additional award

1. Sub-section (4) of Section 33 contains provisions for making additional award. It provides that unless otherwise agreed by the parties, a party with notice to the other party may request the Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

2. Such request may be made within 30 days from the receipt of the arbitral award.

3. If the arbitral Tribunal considers the above request reasonable, the Tribunal shall make the additional arbitral award within 60 days of the request. 4. The time period of 60 days may be extended by the Tribunal if necessary.

Enforcement of award

If the time for making an application to set aside the award has expired or the application has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as it were a decree of the Court.

Arbitral award under the Arbitration and conciliation Act, 1996

INTRODUCTION

1. Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
2. The settlement of dispute is arrived by the judgments of the third person (or more persons) that are called Arbitrators.
3. The parties repose confidence in the judgment of the arbitrator and show their willingness to abide by his decision.
4. The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

GROUND FOR SETTING A SIDE OF AN ARBITRAL AWARD.

- 1) Setting a side of an arbitral award means cancellation of arbitral award.
- 2) The parties can approach the Court for setting aside the award.
- 3) An application has to be made for setting aside an arbitral award.
- 4) The grounds on which the award may be challenged before the Court are
 - a. Incapacity of a person/party
 - b. Invalidity of the arbitration agreement
 - c. Party applying was not given proper notice of the appointment of the arbitrator, or of the arbitral proceedings or otherwise was unable to present his case.
 - d. Award not in accordance with the terms of submission to arbitration in regard to the dispute.
 - e. Arbitral Tribunal not properly constituted of the arbitral proceedings was not in accordance with the agreement of the parties.
 - f. Subject matter of the dispute not capable of settlement by arbitration under the law for the time being in force.
 - g. Award being in conflict with the public policy of India. An award could be in conflict with public policy if it is induced or affected by fraud or corruption or violates confidentiality or admissibility of evidence in other proceedings.

CONCLUSION

- 1) There is a time limit for making an application for setting aside an arbitral award.

- 2) The application cannot be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award.
- 3) The period of 3 months could be extended to a maximum of 30 days by the Court on giving a sufficient cause.

International commercial Arbitration

INTRODUCTION

- 1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.
- 2) The settlement of dispute is arrived by the judgment of the third person (or more persons) who are called Arbitrators.
- 3) The parties repose confidence in the judgment of the arbitrator and show their willingness to abide by his decision.
- 4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

INTERNATIONAL COMMERCIAL ARBITRATION

1. With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called Arbitration and Conciliation Act, 1996 has been passed.
2. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.
3. International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships whether contractual or not considered as commercial under the law in force in India and where at least one of the parties is:
 - (a) An individual who is a national of or habitual resident of, any country other than India.
 - (b) A body corporate which is incorporated in any country India.
 - (c) A company or an association or body of individuals whose central management and control is exercised in any country other than India.
 - (d) The Govt. of a foreign country.
4. The Act has been divided into four Parts and contains three Schedules. η
Part one deals with Arbitration
 - Part two deals with enforcement of certain Foreign Awards
 - Part three deals with conciliation
 - Part four contains supplementary provisions.

- Similarly schedule one contains provisions relating to convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- Schedule two deals with Protocol on Arbitration Clauses and
- Schedule three contains provisions relating to Execution of Foreign Arbitral Awards.

AWARDS MADE UNDER NEW YORK CONVENTION OR GENEVA CONVENTION

5. Any foreign award whether made under New York Convention or Geneva convention, which would be enforceable under the Act have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in India.

CASE LAW

In the case of Bharat Aluminum Co. VS. Kaiser Aluminum Technical Service, Inc on 7th September, 2012 the Supreme Court held that the Arbitration Act, 1996 has accepted the Territoriality principle which has been adopted in the UNCITRAL Model Law. A declaration was made that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996.

In the opinion of Supreme Court, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996

In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

CONCLUSION

In this case Hon'ble Supreme Court concluded that Part I of the Arbitration At, 199 is applicable only to all the arbitrations which take place within the territory of India.

Conciliation Proceedings

INTRODUCTION

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

- 1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.
- 2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.
- 3) If the other party rejects the invitation there will be no conciliation proceedings.
- 4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

NUMBER OF CONCILIATORS

- 1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.
- 2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

TERMINATION OF CONCILIATION PROCEEDINGS

- The conciliation proceedings shall be terminated:
 - By the signing of the settlement agreement or
 - By a written declaration of the conciliator, after consultation with the parties or
 - By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

CONCLUSION

Role of conciliator

- 1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- 2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances

surrounding the dispute, including any previous business practices between the parties.

3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore. (Section 67)

ADR (ALTERNATIVE DISPUTE RESOLUTION)

INTRODUCTION

There is a growing awareness that Courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

1) Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law.

2) The settlement of dispute is arrived by the judgment of the third person (or more persons) who are called Arbitrators.

3) The parties repose confidence in the judgment of the arbitrator and show their willingness to abide by his decision.

4) The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic Tribunal.

5) Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement.

6) Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

7) At present, ADR services are offered in India in very rudimentary form. There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

8) These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities.

9) The International Centre for Alternative Dispute Resolution (ICADR) is a unique Centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world.

10) The ICADR is a Society registered under Societies Registration Act, 1860; it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

CONCLUSION

Areas in which ADR works Almost all disputes including commercial, civil, labor and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

'Conciliation' and Mediation

INTRODUCTION

There is a growing awareness that Courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

'CONCILIATION' AND 'MEDIATION'

1. Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential

2. Solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

3. Basically, these processes can be successful only if the personality of the conciliator or the mediator is such that he is able to induce the parties to come to a settlement.
4. The Act gives a formal recognition to conciliation in India.
5. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust.
6. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

CONCLUSION

Arbitration and conciliation differ in some major ways: – In arbitration, the decision is known as arbitral award and is signed by the arbitral Tribunal members; while under conciliation, it is known as settlement and is signed by the parties concerned. – In arbitration, parties cannot appoint even number of arbitrators; while in conciliation, the number of conciliators can be even. Arbitrators can be appointed even before the dispute arises; while a conciliator is appointed only after the dispute has arisen.

Differences between Arbitration and Conciliation

INTRODUCTION

There is a growing awareness that Courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

Differences between Arbitration and Conciliation

Arbitration	Conciliation
Decision is known as arbitral award	Decision is known as settlement
Decision signed by the arbitral tribunal members	Decision signed by the parties concerned
Parties cannot appoint even number of arbitrators	The number of conciliators can be even.
Appointed even before the dispute arises	Appointed only after the dispute has arisen.

CONCLUSION

ARBITRATION

Power to terminate/continue the proceedings

1. Power to terminate: Subject to agreement between the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim within the agreed period, the arbitration proceedings shall be terminated by the arbitrator.

2. Power to continue the proceedings: Similarly, where the respondent fails to communicate his statement of defense within the predetermined period, the arbitrator shall continue the proceedings.

3. Thus, the general principles of ex party proceedings will apply to arbitration proceedings also.

CONCILIATION

Termination of conciliation proceedings

- The conciliation proceedings shall be terminated:
- By the signing of the settlement agreement or
- By a written declaration of the conciliator, after consultation with the parties or By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

CHAP 12 : IMPORTANT DEFINITIONS

1. Banker

“Banker” includes a bank and any person acting as a banker [“section 3 of the Negotiable Instruments Act defines a banker as including persons or a corporation or company acting as bankers”. [Section 2(1)]

2. Bill of Lading

“Bill of Lading” includes a ‘though ill lading’ but does not include a mate’s receipt. [“section 2 (4)]

A bill of lading is a receipt by the master of a ship for goods delivered to him for delivery to X or his assigns. Three copies are made, each signed by the master. One is kept by the Consignor of the goods, one by the master of the ship and one is forwarded to X, the consignee, who, on receipt of it, acquires property in the goods, It is a written evidence of a contract for the carriage and delivery of goods by sea, for certain freight.

When goods are delivered on board a ship, the receipt is given by the person in charge at that time. This receipt is known as the mate’s receipt. The shipper of the goods returns this receipt to the master before the ship leaves and receives from him bill of lading for the goods, signed by the master.

3. Conveyance

The term “conveyance” includes a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred inter vivos¹ and which is not otherwise specifically provided for by Schedule. It does not include a will. [Section 2(10)] Thus, all transfers of property whether movable or immovable, on sale (which are not otherwise specially provided for by the Schedule), are chargeable as conveyances. Transfers which are otherwise provided for in the Schedule are Composition Deed, Exchange of Property, Gift, Lease, Mortgage, Reconveyance, Release, Settlement, Transfer, Transfer of Lease and (Declaration of) Trust.

4. Instrument

“Section 2(14) defines an “instrument” to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The definition is an inclusive definition, and is not necessarily restricted to those documents which are specifically mentioned in the definition. Briefly stated, an instrument includes conveyances, leases, mortgages, promissory notes and wills, but not ordinary letters or memoranda or accounts.

Following instances may be noted:

An unsigned draft document is not a “instrument” (because it does not create or purport to create any right, etc.).

An entry in a register, containing the terms of hiring of machinery is an “instrument, where it is authenticated by the thumb impression of the hirer. (Reason is, that it purports to create, a liability etc.)

A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period and that it will be repaid with interest on the due date is an “instrument”. [These examples show, that the law looks to the substance and effect (or intended effect) of the text of the instrument and not the physical medium through which it is recorded.]

Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act. Ashok Kalam Capital Builders v. State & Anr., AIR 2010 (NOC) 736 (Del).

5. Executed / Execution

Under section 1(12), the words “executed” and “execution” (used with reference to Instruments), mean “signed” and “signature” respectively. Signature includes mark by an illiterate person. [Section 3(52), General Clauses Act, 1897] An instrument which is chargeable with stamp duty only on being “executed” is not liable to stamp duty until it is signed. The Collector can receive the stamp duty without penalty and certify an instrument as duly stamped, as from the date of execution. (Sections 37 and 40)

6. Impressed Stamp

According to “section 2(13), “impressed stamp” includes:

labels affixed and impressed by the proper officer

Stamps embossed or engraved on stamp paper.

The rules framed under the Act invariably prescribe to what documents impressed stamps are to be used. The term includes both a stamp impressed by the Collector and also a stamp embossed on stamp paper. Special adhesive

stamps are labels (*Ganga Devi v. State of Bihar*, 1 LR 45 Pat. 198). The instrument is duly stamped if it has been duly stamped at the time of execution and is admissible in evidence, though the stamp is subsequently removed or lost (*Mt. Mewa Kunwari v. Bourey*, AIR 1934).

7. Bill of Exchange

According to "Section 2(2), "bill of exchange" means a bill of exchange as defined in the Negotiable Instruments Act, 1881 and includes also a Hundi and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money. The Negotiable Instruments Act, defines a "bill of exchange" as an instrument in writing, containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

8. Bill of exchange payable on demand

Under section 2(3) of the stamp Act, a "bill of exchange on demand" includes:

an order for the payment of any sum of money by a bill of exchange or promissory note or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or in the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen

an order for the payment of any sum of money weekly, monthly or at any other said period

A letter of credit, that is to say, any instrument by which one person authorises any other person to give credit to the person in whose favour it is drawn.

It may be noted that a bill of exchange payable on demand includes even a letter of credit, as per above definition.

Thus, the definition in the Stamp Act includes many instruments which could not be classed as 'bills of exchange' within the definition given the Negotiable Instruments Act, 1881.

9. Cheque

Under “Section 2(7) of the Stamp Act, “cheque” means a bill of exchange drawn on specified banker, not expressed to be payable otherwise than on demand. This definition follows the definition given in the Negotiable Instruments Act, 1881. It should be mentioned that in India, cheques are no longer subject to stamp duty. Entry 21 in the Schedule levying duty on cheque was deleted by Act 5 of 1927.

10. Bond

Under Section 2(5), a “bond” includes –

- (a) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (b) any instrument attested by a witness not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- (c) Any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

The word “oblige” has been used in all sub-clauses in the definition. Therefore, no document can be a bond unless it is one which, by itself, creates the obligation to pay the money. The words “oblige himself to pay money” make it very clear, that the obligation is not a pre-existing one. Where the liability already exists it cannot be said that under a subsequent document (merely reproducing the nature of the obligation) an obligation has been created.

11. Chargeable

Under Section 2(6) “chargeable” as applied to an instrument executed or first executed after the commencement of the Act means chargeable under the Act and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed.

12. Lease

“Lease” means a lease of immovable property and includes also:

a patta	a kabuliyat or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property
any instrument by which tolls of any description are let	Any writing on an application for a lease intended to signify that the application is granted. [Section 2(16)]

Section 105 of the Transfer of Property Act defines lease as a transfer of a right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

A patta is an instrument given by the Collector of District or any other receiver of the revenue, to the cultivator, specifying the condition or conditions upon which the lands are to be held and the value or proportion of the produce to be paid therefore.

A Kabuliyat is executed by the lessee, accepting the terms of the lease and undertaking to abide by them. Although, it is not a lease under Section 105 of the Transfer of Property Act, it is expressly included in the definition for the purposes of the Stamp Act.

Toll is a tax paid for some liberty or privilege, such as for passage over a bridge, ferry, along a highway or for the sale of articles in a market or fair or the like. It does not include 'octroi' or 'chungi'.

13. Promissory Note

It means a promissory note as defined by the Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. [Section 2(22)]

Requisites of a promissory note as per the Negotiable Instruments Act, 1881 are the following:

the document must contain an unconditional undertaking to pay

the undertaking must be to pay money only

the money to be paid must be certain

it must be payable to or to the order of a certain person or to bearer

The document must be signed by the maker.

14. Receipt

“Receipt” includes any note, memorandum or writing:

whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received

whereby any other movable property is acknowledged to have been received in satisfaction of a debt

whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged

Which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person. [Section 2(23)]

A mere acknowledgement in writing of the receipt of immovable property will not attract Sub-clause (b). Under sub-clause (c), any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; for instance, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause. An ordinary cash memo issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money.

A letter acknowledging the receipt of money or cheque is a receipt. A document merely saying that the signatory has received a sum of Rs. 500 is a receipt.

15. Settlement

“Settlement” means any non-testamentary disposition, in writing, of movable or immovable property made:

in
consideration
of marriage

for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him

for any religious or charitable purpose; And includes an agreement in writing to make such disposition. [Section 2(24)] The definition of “settlement” excludes a will. A will is intended to operate only on death, while a settlement operates immediately.

16. Marketable Security

Under Section 2(16A), “marketable security” means a security of such a description as to be capable of being sold in stock market in India or in the United Kingdom.

17. Stamp

“Stamp” means any mark, seal or endorsement by any agency or person duly authorized by the State Government and includes an adhesive or impressed stamp for the purposes of duty chargeable under this Act. This definition of the stamp has been inserted by the Finance (No. 2) Act, 2004.

General principles governing levy of stamp duty

1. Duties on Instruments: The basic principle of the Indian stamp Act is that it levies the duty on the instruments and not on the transaction covered by the instruments.

2 Real nature on substance: The stamp duty on an instrument depends on the real nature on substance of the transactions recorded in the instruments and not on any title or description or nomenclature given by the parties who execute the instruments.

3. Valuation: Sufficiency of stamp duty leviable on a document must be determined by looking at the document and what is stated therein and not on any other evidence. The valuation for the purpose of stamp duty is also to be based on the value on the date instrument is executed and not with reference to subsequent changes.

4. Incidence of payment of duty and penalty: Stamp duty chargeable on an instrument should be determined with reference to law in force on the date of execution of the instrument but the levy of penalty is to be determined with reference to the law in force at the time of the presentation of the document in evidence.

5. Law relating to payment: Schedules specifying the rates of stamp duty form part of the statute and must be read together with it, if there is any inconsistency between the schedule and the stamp Act, the latter prevail.

EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY (SEVERAL INSTRUMENTS IN SINGLE TRANSACTION OF SALE, MORTGAGE OR SETTLEMENT)

Section 4 provides that, where in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction –

1. Only the principal instrument shall be chargeable with the duty prescribed for the conveyance, mortgage or settlement; and
2. Each of the other instruments shall be chargeable with a duty of one rupee (instead of the duty if any prescribed for the other instruments).
3. However, an exception to the above is added w.e.f. 01st July, 2021 in the form of below mentioned non- obstante clause. In the case of any issue, sale or transfer of securities, the instrument on which stamp-duty is chargeable under section 9A (for transactions in stock exchanges and depositories) shall be the principal instrument for the purpose of this section and no stamp-duty shall be charged on any other instruments relating to any such transaction.
4. Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

Section 4 not applicable

- (i) A lease is executed and got registered. A second document is executed altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.
- (ii) A purchaser of land executes a mortgage of the land in favour of the vendor for a portion of the purchase money. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

Instruments relating to several “distinct matters”- Section 5

Under Section 5, an instrument comprising or relating to several distinct matters is chargeable with the aggregate amount of the duties with which each separate instrument, relating to one of such matters, would be chargeable under the Act (This is the reverse of the situation governed by Section 4).

INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE-SECTION 6

There may be cases where an instrument may come under several descriptions in Schedule-I to the Act. In such a circumstance, Section 6 of the Act provides that the instrument shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties. Provided that nothing in the Act shall render chargeable, with duty exceeding one rupee, a counter part or duplicate, of any instrument chargeable with duty, in respect of which the proper duty has been paid. Section 6 is subject to the provisions of Section 5.

Section 6 applies only:

- where the instrument contains only one matter, but falls within two or more items in the Schedule.
- where the instrument does not cover distinct matters but is ambiguous in regard to the various entries given in Schedule-I to the Act. In such cases, Section 6 clearly provides that the highest of the duties mentioned against the various descriptions against which the instrument is likely to fall is to be paid.

BONDS, DEBENTURES, ETC. ISSUED UNDER THE LOCAL AUTHORITIES LOAN ACT, 1879 – SECTION 8

Section 8 provides that notwithstanding anything contained in the Indian Stamp Act, any local authority raising a loan under the provisions of the Local Authorities Loans Act, 1879 or of any other law for the time being in force by the issue of bonds, debentures or other securities, shall, in respect of such loans, be chargeable with a duty of one percent on the total amount of the bonds, debentures or other securities issued by it. Such bonds, debentures or other securities need not be stamped and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise.

Sub-section (3) provides that in the event of willful neglect to pay the duty required by this section, the local authority shall be liable to forfeit to the Government, a sum equal to 10 percent of the amount of duty payable and a like penalty for every month after the first, during which the neglect continues.

Securities dealt in Depository not liable to Stamp Duty – Section 8A

As per Section 8A of the Act, Notwithstanding anything contained in this Act or any other law for the time being in force –

- (a) an issuer, by the issue of securities to one or more depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such securities need not be stamped;
- (b) where an issuer issues certificate of security under sub-section (3) of Section 14 of the Depositories Act, 1996, on such certificate duty shall be payable as is payable on the issue of duplicate certificate under this Act;
- (c) the transfer of –
 - (i) registered ownership of securities from a person to a depository or from a depository to a beneficial owner
 - (ii) beneficial ownership of securities, dealt with by a depository
- (ii) beneficial ownership of units, such units being units of a Mutual Fund including units of the Unit Trust of India established under sub-section (1) of Section 3 of the Unit Trust of India Act, 1963, dealt with by a depository, shall not be liable to duty under this Act or any other law for the time being in force.

Corporatisation and Demutualisation schemes and related instruments not liable to Duty- Section 8B

Section 8B has been inserted by the Finance Act, 2005, w.e.f. 13.5.2005.

Section 8B states that, Notwithstanding anything contained in this Act or any other law for the time being in force-

- (a) a scheme for corporatisation or demutualisation, or both of a recognized stock exchange
- (b) any instrument, including an instrument of, or relating to, transfer of any property, business, asset whether movable or immovable, contract, right, liability and obligation, for the purpose of, or in connection with, the corporatisation or demutualisation, or both of a recognized stock exchange pursuant to a scheme, as approved by the Securities and Exchange Board of India under Sub-section (2) of Section 4B of the Securities Contracts (Regulation) Act, 1956 shall not be liable to duty under this Act or any other law for the time being in force

REDUCTION, REMISSION AND COMPOUNDING OF DUTIES- SECTION 9

Section 9 empowers the Government, (Central or the State as the case may be), to reduce or remit, whether prospectively, or retrospectively, the duties payable on any instrument or class of instruments or in favour of particular class of persons or members of such class. Section 9(1)(b) also empowers the

Central Government to provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers where there is single transferee (whether incorporated or not) of debentures, bonds or other marketable securities

INSTRUMENTS CHARGEABLE WITH DUTY FOR TRANSACTIONS IN STOCK EXCHANGES AND DEPOSITORIES – SECTION 9A

Not with standing anything contained in this Act:

1. when the sale of any securities, whether delivery based or otherwise, is made through a stock exchange, the stamp-duty on each such sale in the clearance list shall be collected on behalf of the State Government by the stock exchange or a clearing corporation authorised by it, from its buyer on the market value of such securities at the time of settlement of transactions in securities of such buyer, in such manner as the Central Government may, by rules, provide.
2. when any transfer of securities for a consideration, whether delivery based or otherwise, is made by a depository otherwise than on the basis of any transaction referred to in clause (a), the stamp-duty on such transfer shall be collected on behalf of the State Government by the depository from the transferor of such securities on the consideration amount specified therein, in such manner as the Central Government may, by rules, provide:
3. when pursuant to issue of securities, any creation or change in the records of a depository is made, the stamp-duty on the allotment list shall be collected on behalf of the State Government by the depository from the issuer of securities on the total market value of the securities as contained in such list, in such manner as the Central Government may, by rules, provide.
4. the instruments referred to in above point no.s 1 to 3 shall be chargeable with duty as provided therein at the rate specified in Schedule I and such instruments need not be stamped. However, no such duty shall be chargeable in respect of the instruments of transaction in stock exchanges and depositories established in any International Financial Services Centre set up under section 18 of the Special Economic Zones Act, 2005.
5. From the date of commencement of this Part, no stamp-duty shall be charged or collected by the State Government on any note or memorandum or any other document, electronic or otherwise, associated with the transactions mentioned in in point no. 1 to 3.
6. Every stock exchange or the clearing corporation authorised by it and depository shall submit to the Government details of the transactions

referred to in point no.s 1 to 3 in such manner as the Central Government may, by rules, provide

Instruments chargeable with Duty for transactions otherwise than through Stock Exchanges and Depositories – Section 9B

Notwithstanding anything contained in this Act:

when any issue of securities is made by an issuer otherwise than through a stock exchange or depository, the stamp-duty on each such issue shall be payable by the issuer, at the place where its registered office is located, on the total market value of the securities so issued at the rate specified in Schedule I.

when any sale or transfer or reissue of securities for consideration is made otherwise than through a stock exchange or depository, the stamp-duty on each such sale or transfer or reissue shall be payable by the seller or transferor or issuer, as the case may be, on the consideration amount specified in such instrument at the rate specified in Schedule I.

Certain instruments connected with Mortgages of Marketable Securities to be chargeable as Agreements – Section 23A

Where an instrument (not being a promissory note or bill of exchange)

1. is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or 2. makes redeemable or qualifies a duly stamped transfer, intended as a security, of any marketable security, it shall be chargeable with duty as if it were an agreement or memorandum of an agreement chargeable with duty under Article No. 5 (c) of Schedule
2. A release or discharge of any such instrument shall only be chargeable with the like duty

VALUATION FOR DUTY UNDER THE ACT

SECTION 20 to 28 Sections 20 to 28 (Chapter II of the Act) deal with valuation of instruments for duty.

According to Section 20, where an instrument is chargeable with advalorem duty in respect of any money expressed in any currency other than that of India, such duty shall be calculated on the value of such money in the currency of India, according to the current rate of exchange on the date of the instrument. The Central Government notifies from time to time, in the Official Gazette the rate of exchange for conversion of certain foreign currencies into Indian currency for this purpose and such rate shall be deemed to be the current rate.

Section 21 provides that in the case of an instrument chargeable with advalorem duty in respect of any stock or any marketable or other security, such duty shall be calculated on the the market value of such stock or security. The market value for calculating the stamp-duty shall be, in the case of –

- (i) options in any securities, the premium paid by the buyer
- (ii) repo on corporate bonds, interest paid by the borrower
- (iii) swap, only the first leg of the cash flow.

Where the shares are quoted on the stock exchange, it is easy to ascertain the price of the shares or stock. However, where the shares or stocks are not quoted on any stock exchange, the valuation has to be based upon the average of the latest private transactions, which can generally be ascertained from the principal officer of the concerned company or corporation. If, there have been no dealings at all, then unless some other reliable evidence of market value is forthcoming the value is to be taken at par. Section 22 of the Act, however, provides that if such price or value is mentioned in the instrument for the purpose of calculating duty, it shall be presumed (until the contrary is proved) to be correct.

Section 23 provides that where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with a duty higher than that with which it would have been chargeable, had no mention of interest been made therein. For instance, a promissory note for Rs. 10,000 is drawn with the recital of interest at the rate of 18 percent per annum, payable by the promissor; stamp duty is leviable on the basis that the instrument is for Rs. 10,000 only.

According to Section 24, where any property is transferred to any person in consideration (wholly or in part) of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, (whether being or constituting a charge or incumbrance upon the property or not), such debt, money or stock is to be deemed the whole or part, (as the case may be), of the consideration in respect whereof the transfer is chargeable with advalorem duty. However, nothing in this section shall affect such a certificate of sale as is mentioned in Article 18 of the First Schedule to the Act.

Explanation to Section 24 provides that in the case of sale of property subject to mortgage or other encumbrances, any unpaid mortgage money or money charged together with the interest, if any, due on the same shall be deemed to be part of the consideration for the sale provided that where property subject

to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage. Three illustrations which have been appended to the Section are as under:

- (i) A owes B Rs. 1,000/-. A sells a property to B, the consideration being Rs. 500/- and the release of the previous debt of Rs. 1,000/-. Stamp duty is payable on Rs. 1,500/-
- (ii) A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000/- and unpaid interest Rs. 200/-. Stamp duty is payable on Rs. 1,700.
- (iii) A mortgages a house of the value of Rs. 10,000/- to B for Rs. 5,000/-. B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000/- less the amount of stamp duty already paid for the mortgage.

Section 25 deals with the manner of computation of duty in the case of annuities. Valuation of an annuity will be material, where the payment of annuity or other sum payable periodically is secured by an instrument or where the consideration for a conveyance is an annuity or other sum payable periodically. In such cases, the amount secured by such instrument or the consideration for such conveyance, as the case may be, shall be deemed to be:

- (a) where the sum payable is for a definite period so that the total amount to be paid can be previously ascertained such total amount
- (b) where the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of such instrument or conveyance – the total amount which, according to the terms of such instrument or conveyance will or may be payable during the period of twenty years calculated from the date on which the first payment becomes due
- (c) where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance – the maximum amount which will be or which may be payable as aforesaid during the period of 12 years calculated from the date on which the first payment becomes due. Clause (a) mentioned above applies where the sum is payable for a definite period, so that the total amount to be paid can be previously ascertained. According to clause (b), where the payment is in perpetuity or for an indefinite period, then only the amount payable for 20 years would be taken for assessment of the duty.

1. Section 26 deals with cases where the value of the subject matter is indeterminate. The object of this section is to protect the revenue, in cases where an instrument is chargeable with advalorem duty, but such duty cannot be ascertained by reason of the fact that the amount of value of the subject matter of the instrument cannot be determined at the time of the execution of the instrument. This object is sought to be achieved by providing, that the executant can value the instrument as he pleases, but he shall not be entitled to recover under such document any amount in excess of the amount for which the stamp duty is sufficient.
2. However, under the combined operation of Sections 26 and 35, a lessee under the mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the stamp originally affixed to the lease. [AIR 1924 PC 221; AIR 1930 Cal. 526]. Section 26 applies only when the instrument is chargeable with ad valorem duty. Section 26 has two provisos. Under the first proviso, in the case of mining lease, the stamp duty is to be calculated on the estimated value of the royalty or the share of the produce, as the case may be. If the lease is granted by the Government, stamp duty has to be paid on the amount or value of the royalty as determined by the Collector of Stamps. And, if subsequently any excess is claimed, proper penalty under section 35 may be paid and the claim fully recovered. But when the lease has been granted by a person other than the Government, the valuation has to be at Rs. 20,000/- a year.
3. The second proviso to Section 26 is intended to cover the case where an instrument has, by accident or mistake, been insufficiently stamped. The deficiency is made up in proceedings under Section 31 or 41 and the Collector having certified the amount paid, it shall be deemed to be the stamp actually used at the date of execution. By reason of this proviso, the amount claimable under the instruments would be the amount for which the duty as certified by the Collector had been paid and not the amount for which duty was originally paid.

Consideration to be Set Out

Section 27 Section 27 provides that the consideration and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of duty with which it is chargeable shall be fully and truly set forth in the instrument.

However, the Collector can direct the prosecution of a person who executed the instrument under Section 64 of the Act. Under Section 64, what is

punishable is the omission to set-forth fully and truly the value of the property, with intent to defraud the Government. The Collector, can, if he feels that there is a deliberate undervaluation of property, hold an independent enquiry to ascertain the true value of the property and to consider whether there was deliberate under-valuation rendering the executant liable to prosecution for defrauding the Government.

APPORTIONMENT- SECTION 28

1. Section 28 prescribes certain rules for apportionment of the consideration, in cases of certain conveyances arising out of a property being contracted to be sold and thereafter conveyed in parts etc.
2. Under Section 28(1) where a person contracts the sale of property as a whole and thereafter conveys to the purchaser the property in separate parts, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration is set-forth for each separate part in the conveyance and thereafter the conveyances shall be chargeable with ad valorem in respect of such distinct consideration.
3. Under Section 28(2), where the contract is for the sale of a property as a whole to two or more purchasers jointly or by any person for himself and others, and the property is conveyed to them in parts by separate conveyance, then each distinct part of the consideration shall be chargeable with ad valorem duty in respect of the distinct part of the consideration so specified.
4. Section 28(3) covers cases where a person, after contracting to purchase a property from another and before the property has been duly conveyed to him, enters into a contract to sell the property to a third person, and the contract is given effect to only by one conveyance from the owner of the property to the sub-purchaser directly. The stamp duty payable is on the consideration paid by the sub-purchaser. This provision avoids double payment that would otherwise arise.
5. Section 28(4) provides that where a person contracts for the sale of property and before obtaining a conveyance in his favour, enters into a contract to sell the property in parts to other persons, the conveyances which may be executed directly by the owner to each sub-purchaser would be liable to be charged with duty in respect of the consideration paid by the sub-purchaser, original price for the whole and the aggregate price paid by the sub-purchasers, subject to a minimum duty of Re. 1/-.

6. Section 28(5) provides that when a person contracts to sell a property to another person and again contracts to sell the same property to a third person and such third person obtains a conveyance first from the seller with whom he had contracted and later gets another conveyance of the same property from original seller, the duty is to be charged on the consideration received by the original seller subject to a maximum of Rs. 5/-.

PERSONS LIABLE TO PAY DUTY- SECTION 29

Section 29 of the Indian Stamp Act provides for the person who is liable to pay the stamp duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

- (a) in the case of any instrument described in any of the following articles of Schedule-I, namely, -

No. 2	(Administration Bond),
No. 6	(Agreement relating to Deposit of Title-deeds, Pawn or Pledge),
No. 13	(Bill of Exchange),
No. 15	(Bond),
No. 16	(Bottomry Bond),
No. 26	(Customs Bond),
No. 32	(Further Charge),
No. 34	(Indemnity-bond),
No. 40	(Mortgage-deed),
No. 49	(Promissory-note),
No. 55	(Release),
No. 56	(Respondentia Bond),
No. 57	(Security Bond or Mortgage-deed)
No. 58	(Settlement),
No. 62(c)	(Transfer of any interest secured by a bond, mortgage-deed of policy of insurance),

by the person drawing, making or executing such instrument

- (b) in the case of a policy of insurance other than fire insurance by the person effecting the insurance

(bb) in the case of a policy of fire-insurance – by the person issuing the policy

- (c) in the case of a conveyance (including re-conveyance of mortgaged property) by the grantee: in the case of a lease or agreement to lease – by the lessee or intended lessee
- (d) in the case of a counterpart of a lease – by the lessor
- (e) in the case of an instrument of exchange 6 [including swap] –by the parties in equal shares
- (f) in the case of a certificate of sale – by the purchaser of the property to which such certificate relates
- (g) in the case of an instrument of partition –by the parties thereto in proportion to their respective shares in the whole property partitioned or, when the partition is made in execution of an order passed by a Revenue-authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.
- (h) in the case of sale of security through stock exchange, by the buyer of such security
- (i) in the case of sale of security otherwise than through a stock exchange, by the seller of such security
- (j) in the case of transfer of security through a depository, by the transferor of such security
- (k) in the case of transfer of security otherwise than through a stock exchange or depository, by the transferor of such security
- (l) in the case of issue of security, whether through a stock exchange or a depository or otherwise, by the issuer of such security
- (m) in the case of any other instrument not specified herein, by the person making, drawing or executing such instrument. Thus, Section 29 clearly lays down that in the case of conveyance in absence of any agreement to the contrary, the expenses for providing proper stamps shall be borne by the grantee.

Receipts - Section 30

Under Section 30 of the Act any person receiving any money exceeding twenty rupees in amount or any bill of exchange, cheque or promissory note for an amount exceeding five hundred rupees or receiving in satisfaction of a debt any movable property exceeding five hundred rupees in value, shall on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same.

MODE OF STAMPING- SECTION 10 to 16

According to the provisions of the Act and rules made thereunder, the duty with which an instrument is chargeable is to be paid by means of stamps indicated in the Act and the rules. Generally, rules deal with the subject. Duties how to be paid- Section 10 Subsection (1) provides that except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps –

- (a) according to the provisions herein contained
- (b) when no such provision is applicable thereto-as the State Government may be rule direct. The rules made under sub-section (1), may, among other matters, regulate:
 - (i) in the case of each kind of instrument, the description of stamps which may be used
 - (ii) in the case of instruments stamped with impressed stamps, the number of stamps which may be used
 - (iii) in the case of bills of exchange or promissory notes, the size of the paper on which they are written.

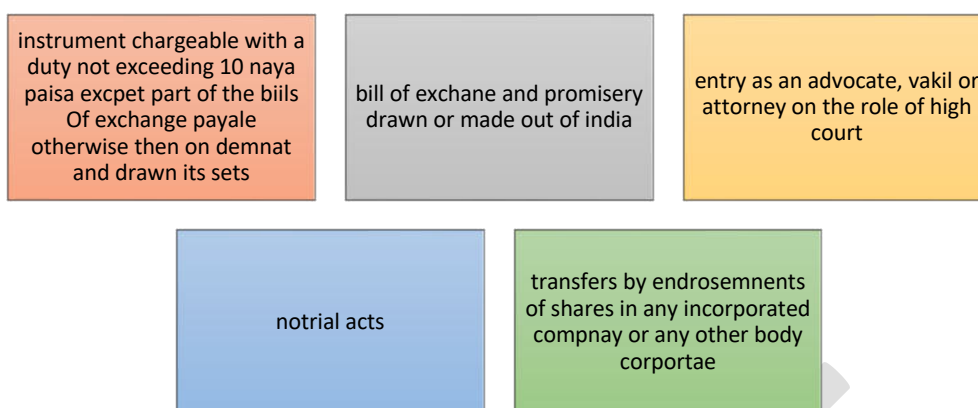
Types of stamping

There are two types of stamping, namely:

Adhesive Stamping

Impressed Stamping

Use of Adhesive Stamps – Section 11 Section 11 deals with the use of adhesive stamps. This Section provides that the following instruments may be stamped with adhesive stamps, namely –



The use of the words 'may be stamped' really connotes 'shall be stamped'. The rules framed under the Stamp Act as well as under the relevant state laws invariably provide that the adhesive stamps shall carry special words, to indicate the use to which the stamps can be put.

CANCELLATION OF ADHESIVE STAMPS

Section 12 Section 12(1)(a) provides that any person affixing any adhesive stamp to any instrument chargeable with duty which has been executed by another person shall, when affixing such stamp cancel the same so that it cannot be used again. Under Sub-section 12(1)(b), an obligation has been imposed on person executing any instrument on any paper bearing an adhesive stamp, to cancel the stamp, if such cancellation has not been done, at the time of such execution. If a person fails to cancel the stamp, he becomes liable to penalty in accordance with Section 63. The object is to prevent the same stamp from being used again. Under Sub-section (2) of Section 12, any instrument bearing an adhesive stamp which has not been cancelled is deemed to be unstamped. Under Sub-section (3) of Section 12, The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner.

MODE OF CANCELLATION OF ADHESIVE STAMPS

Valid Mode of Cancellation	Invalid Mode of Cancellation	Reference
Writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so	-	Section 12(3)

writing or in any other effectual manner.		
By merely drawing a line across it	-	Mahadeo Koeri v. Sheoraj Ram Teli, ILR 41 All 169; AIR 1919 All 196
-	If it is possible to use a stamp a second time, inspite of a line being drawn across it, there is no effectual cancellation.	Hafiz Allah Baksh v. Dost Mohammed, AIR 1935 Lah. 716
Drawing of diagonal lines right across the stamps with ends extending on to the paper of the document	-	Melaram v. Brij Lal, AIR 1920 Lah. 374
A cross marked by an illiterate person indicating his acknowledgement.	-	Kolai Sai v. Balai Hajam, AIR 1925 Rang. 209
-	Putting a date across the stamp by a third party on a date subsequent to the date on which the bill had been drawn	Daya Ram v. Chandu Lal, AIR 1925 Bom. 520 Cf. Rohini v. Fernandes, AIR 1956 Bom. 421, 423
	Crossing by drawing lines and signing on the adjacent stamp was held to be not a cancellation of the first stamp	U. Kyaw v. Hari Dutt, AIR 1934 Rang. 364

Where it is alleged that the cancellation was made at later stage than that of execution, the burden of proving it, lies on the party who so alleges. Where an instrument prima facie appears to be duly stamped and cancelled by the drawer at the date of execution, the burden of providing the contrary lies on the party who avers that the cancellation was not effected at the time of

execution. In the absence of evidence to the contrary, it may be inferred that the stamp was duly affixed and cancelled.

Instruments Stamped with impressed Stamps how to be written (Writing on Stamp Paper) – Section 13

Section 13 provides that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument.

Interpretation of section 13

The expression, 'face of the instrument' is not to be interpreted as meaning that the document must commence on the side on which the stamp is impressed or that both sides of the paper or parchment may not be written upon. In *Dowlat Ram Harji v. Vitho Radhoji*, 5 Bom. 188, it was held when the face of a deed or document is mentioned, no particular side of the parchment or paper, on which the deed or document is written, is thereby indicated. Even the last line may constitute the face (Westroph, CJ.).

Only one Instrument to be on same Stamp

1. Section 14 Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written.
2. Provided that nothing in this section shall prevent any endorsement which is duly stamped or is not chargeable with duty, being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt of any money or goods the payment or delivery of which, is secured thereby.
3. The object of Section 14 is to prevent a stamped paper which has been used for one instrument, from being used for another instrument thereby avoiding payment of duty in respect of second instrument, AIR 1928 Rang 262. Except for an endorsement of the kind referred to earlier, no second instrument shall be engrossed on a stamp paper on which there is already written 'an instrument chargeable with duty'.
4. An alteration in the instrument as originally written, if it is of such nature, as to require fresh stamp, would come within the prohibition contained in the section. It is an important question as to what would be a material alteration³ which converts an instrument written on stamp paper into a second instrument within the meaning of Section 14. A "material alteration" is one which alters (or purports to alter), the

character of the instrument itself and which affects (or may affect) the contract which the instrument contains or alters evidence of any charge, or varies the liability under the instrument in any way. An alteration which vitiates the instrument as could cause it to operate differently was also held to be a material alteration. An alteration which may affect the contract which the instrument contains is a material alteration.

Denoting Duty

Section 16 Section 16 of the Act deals with denoting duty. The object of this section is to spare parties to an instrument, the inconvenience of having to produce (in cases in which the duty payable on an instrument depends upon the duty already paid on another instrument), and the original or principal instrument in order to prove that the second instrument has been duly stamped.

Section 16 provides that where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last mentioned duty, shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, be denoted upon such first mentioned instrument, by endorsement under the hand of the Collector of Stamps or in such other manner as the State Government may by rule prescribe.

TIME OF STAMPING INSTRUMENTS SECTION 17 to 19

Instruments executed inside India:

Section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.

The scope of Section 17 is restricted to only instruments executed in India. If the executant of a document has already completed the execution of the document and in the eye of law the document, could be said to have been executed, a subsequent stamping, (however close in time) could not render the document as one stamped at the time of execution.

Instruments executed outside India :

- Section 18 relates to foreign instruments (other than bills and notes), received in India; Whereas Section 19 deals with Foreign bills and notes received in India.
- According to Section 18(1), every instrument chargeable with duty executed only out of India and (not being a bill of exchange or

promissory note) may be stamped within three months after it has been first received in India.

- Section 18(2) provides that where such instrument cannot with reference to the description of stamp prescribed therefore, be duly stamped by a private person, it may be taken within the said period of three months to the Collector who shall stamp the same in such a manner as the State Government may by rule prescribe, with a stamp of that value as the person so taking such instrument may require and pay for.
- Where an instrument is brought to the Collector after the expiry of three months, the Collector may, instead of declining to stamp it, validate it under Sections 41 and 42 if he is satisfied that the omission to stamp in time was due to a reasonable cause.
- As far as bills of exchange and promissory notes are concerned, Section 19 makes an elaborate provision. Any bill of exchange payable otherwise than on demand or promissory note drawn or made out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India.
- The proviso to Section 19 clarifies that if, (i) at any time any bill of exchange or note comes into the hands of any holder thereof in India, (ii) the proper adhesive stamp is affixed thereto and cancelled in the manner prescribed by Section 12 and (iii) such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person, and at the time required by the Act, then such stamp shall (so far as relates to such holder), be deemed to have been duly affixed and cancelled. However, nothing contained in the proviso shall relieve any person from any penalty incurred by him, for omitting to affix or cancel a stamp.

INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES (IMPOUNDING) SECTION 33 to 48

The definition of the term “duly stamped” has already been explained. Chapter IV of the Act (consisting of Sections 33 to 48) provides for the consequences that follow where instruments are not duly stamped.

Examination and Impounding of Instruments

Section 33 Section 33 contains a mandate on certain officials to impound an instrument which is not duly stamped. Section 33(1) provides that every

person having by law or consent of parties, authority to receive evidence and every person in charge of a public office, except an officer of police before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions, shall, if it appears to him that the instrument is not duly stamped, impound the same.

Section 33(2) provides that, for that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

Provided that :

- a. nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898
- b. in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

Section 33(3) for the purposes of this section, in cases of doubt

- a. the State Government may determine what offices shall be deemed to be public offices;
- b. the State Government may determine who shall be deemed to be persons in charge of public offices.

The object of this Section is to protect the revenue, and the Court or public officer authorised by this Section must, exercise the powers under the Section suo moto and the jurisdiction of the Court does not depend upon raising of an objection by the parties. For the purposes of this section, the State Government may determine what offices are public offices. The Section also provides that the instrument must be impounded, before it can be admitted in evidence. Once it is admitted in evidence, the instrument cannot be impounded at a later stage and a court, after it becomes functus officio, cannot rectify an earlier error.

An arbitrator has the consent of parties to adjudicate the issues coming before him and where the parties tender evidence, an arbitrator has a statutory duty under Section 33(1) to check whether the instrument so produced is duly stamped and if not, to impound the same.

However, this shall not compel any Magistrate or Judge of a Criminal Court to examine or impound (if he does not think it fit to do so) any instrument coming before him in the course of any proceeding other than possession proceedings and maintenance proceedings. Also, a

Judge of a High Court can delegate the duty of examining and impounding any instrument to any other person appointed by the court in this behalf

Unstamped Receipts-Section 34

Section 34 provides that where the instrument is an unstamped receipt produced in the course of an audit of any public account, the officer before whom the receipt is produced has a discretion either to impound or to require the receipt to be stamped. This section applies where the receipt is chargeable with a duty not exceeding 10 naya paisa. The officer concerned can, instead of impounding the receipt require a duly stamped receipt to be substituted therefore.

Instruments not duly Stamped inadmissible in Evidence- Section 35

1. Section 35 stipulates that no instrument chargeable with duty shall be
 - i. admitted in evidence for any purpose whatsoever by any person authorised by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence
 - ii. shall be acted upon
 - iii. registered
 - iv. authenticated by any such person as aforesaid or by any public officer. unless such instrument is duly stamped.
2. The proviso to Section 35 provides as under :
 - i. any instrument not being an instrument chargeable with a duty not exceeding 10 naya paisa only, or a bill of exchange, or promissory note, subject to all such expectations, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of Rs. 5/- or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5/-, on a sum equal to ten times such duty or portion
 - ii. where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, on payment of a penalty of Re. 1/- by the person tendering it
 - iii. where a contract or agreement of any kind is affected by the correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped
 - iv. nothing contained in Section 35 shall prevent the admission of any instrument in evidence in any proceeding in a criminal Court other than the proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898
 - v. also nothing contained in Section 35 shall prevent the admission of any instrument in the Court, when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of the Act.
3. The words 'shall not be admissible in evidence' used in this Section only means that the document shall not be made the basis of the decision or should not be relied upon to support any finding (Sheonath Prasad v. Sorjoo Nonia, 1943 ALJ, 189; AIR

1943 All 220 (FB)). There is no embargo upon proving the surrounding circumstances.

4. The words 'for any purpose' used in this Section would have their natural meaning. Where an unstamped document is admitted in proof of some collateral matter, it is certainly admitted in evidence for that purpose, which the Act prohibits. In *Ram Ratan v. Parmanand*, ILR 1946 Lah. 63, it was held that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its term. The words 'for any purpose' would in effect mean 'for each and every purpose whatsoever without any exception'.
5. It is immaterial whether the purpose is the main purpose or a collateral one. The words 'acted on' means that nothing can be recovered under the instrument unless it has a proper stamp. Similarly, where a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the claimant and a decree cannot be based on such instruments. Admitting an instrument in evidence also amounts to acting upon it and an instrument which should have been stamped but is not stamped is not admissible in evidence for any purpose whatsoever.
6. Where an unstamped instrument is lost, the party relying on it is helpless and no payment of penalty can enable admission of secondary evidence.
7. The provisions of Section 35 are not attracted to a case where the contention about improper stamping of the instrument forming the subject matter of a suit was not raised at the trial stage.

Chap 13 : Law relating to Registration of Documents

INTRODUCTION

Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document.

The Registration Act, 1908 was set up with the purpose of ensuring registration of documents related to deal regarding land or other immovable property. A document which is registered becomes more authentic and trustable.

The Registration Act provides the provisions relating to registration of the documents with the respective authority.

Both i.e. Stamping and Registration play a vital role in transferring a property. These two makes a document much more authentic and allows them to function smoothly without any hindrance. The Registration Act, 1908 lay down all essential amendments that show the importance of registering a document. The Registration Act, 1908 is the law relating to registration of documents. The registration is of a document and not of a transaction. Documents affecting immovable property through sale, gift, partition, release, mortgage, lease, sale agreement are some of the compulsorily registerable documents. Records containing the copies of registered documents in Registration Offices are permanent in nature); therefore, record preservation is one of the prime objectives behind the Registration Act. Civil courts depends on the records of Registration Department in deciding the issues like title, ownership, possession of immovable properties.

CLASSES OF DOCUMENTS

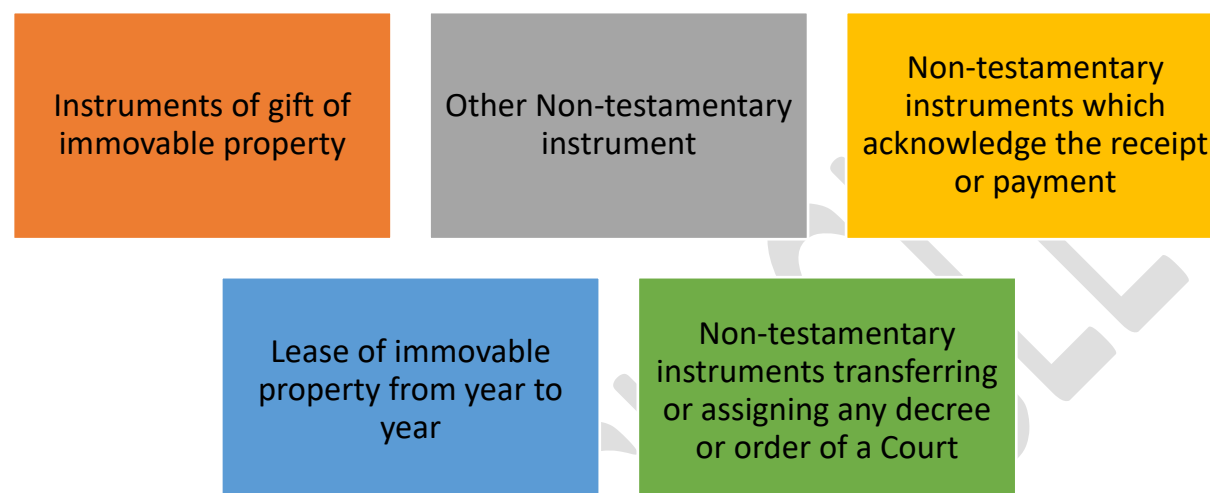
There are two kinds of classes of documents:

Compulsory Registerable Documents

Optional Registerable Documents

▪ Documents which are Compulsorily Registrable – Section 7

There are certain documents which are compulsorily registrable. Section 17 of the Registration Act, 1908 lays down all the documents which are compulsorily required to be registered and those documents are:



1. Instruments of gift of immovable property :

In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

It was held by the Privy Council in *Kalyana Sundram v. Karuppa*, AIR 1927 PC 42, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. And if it is presented by a person having necessary interest within the prescribed period, the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with. [Cf. Mulla Registration Act (1998), page 36]

2. Other Non-testamentary instrument:

Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

3. Non-testamentary instruments which acknowledge the receipt or payment:

Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest.

This clause requires an acknowledgement in the form of a receipt to be registered, but not an acknowledgement of the fact that a transaction has taken place. To be registrable under this clause a receipt must satisfy the following two conditions:

- (i) it must be the receipt of a consideration; and
- (ii) it must on the face of it be an acknowledgement of payment or some consideration on account of the creation, declaration, assignment, limitation or extinction of an interest of the value of Rs. 100 or upwards in immovable property.

The receipt must be such as to be linked with the creation etc. of a right. A mere acknowledgement of payment is not compulsorily registrable.

4. Lease of immovable property from year to year:

Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent

Exception: A lease for one year containing an option to the tenant to renew for a further period of one year or any other term is not a lease for a term exceeding one year, and does not require registration under this clause.

Under Section 107 of the Transfer of Property Act, a lease of one year or reserving a yearly rent can be made only by a registered instrument. But where the lease is only for one year with a reserved rent for the period for which it has been granted, viz. one year, it does not require registration.

5. Non-testamentary instruments transferring or assigning any decree or order of a Court:

non- testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

Further, the State Government has power to exempt the operation of clause (a) to clause (e) for any lease executed in any district for terms upto five years and rents upto fifty rupees.

▪ Exceptions to Section 17(1)

The registration of the non-testamentary documents mentioned in clauses (b) and (c) of Section 17(1) is subject to the exceptions provided in Sub-section (2) of Section 17. These are as follows:

- (i) any composition deed, i.e., every deed the essence of which is composition
- (ii) any instrument relating to shares in Joint Stock Company
- (iii) any debentures issued by any such Company
- (iv) any endorsement upon or transfer of any debenture
- (v) any document other than the documents specified under clause (e) above creating merely a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest; or
- (vi) any decree or order of a court
- (vii) any grant of immovable property by the Government
- (viii) any instrument of partition made by Revenue-officer
- (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883

- (x) any order granting loan made under the Agriculturists Loans Act, 1884 or instrument for securing the repayment of a loan made under that Act
- (xi) any order made under the Charitable Endowments Act, 1890 vesting any property in a treasurer of a charitable endowment or divesting any such Treasurer of any property
- (xii) any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money, due under a mortgage when the receipt does not purport to extinguish the mortgage
- (xiii) any certificate of sale granted to the purchaser of any property sold by public auction by Civil or Revenue Officer.

Explanation

A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require for ever to have required registration by reason only of the fact that such document contains a recital of payment of any earnest money or of the whole or any part of the purchase money.

- **Documents of which registration is optional – Section 18**

All the documents that are not included in Section 17 of The Registration Act, 1908 have the option of the optional registration.

Examples- A Will or an Instruments related to movable property.

Whereas Section 17 of the Act has made registration of certain documents compulsory, Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:

- (a) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value less than one hundred rupees, to or in immovable property
- (b) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any such right, title or interest

(c) leases of immovable property for any term not exceeding one year and leases exempted under Section 17

(d) Instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present

or in future, any right, title or interest, whether vested or contingent of a value less than one hundred rupees, to or in immovable property

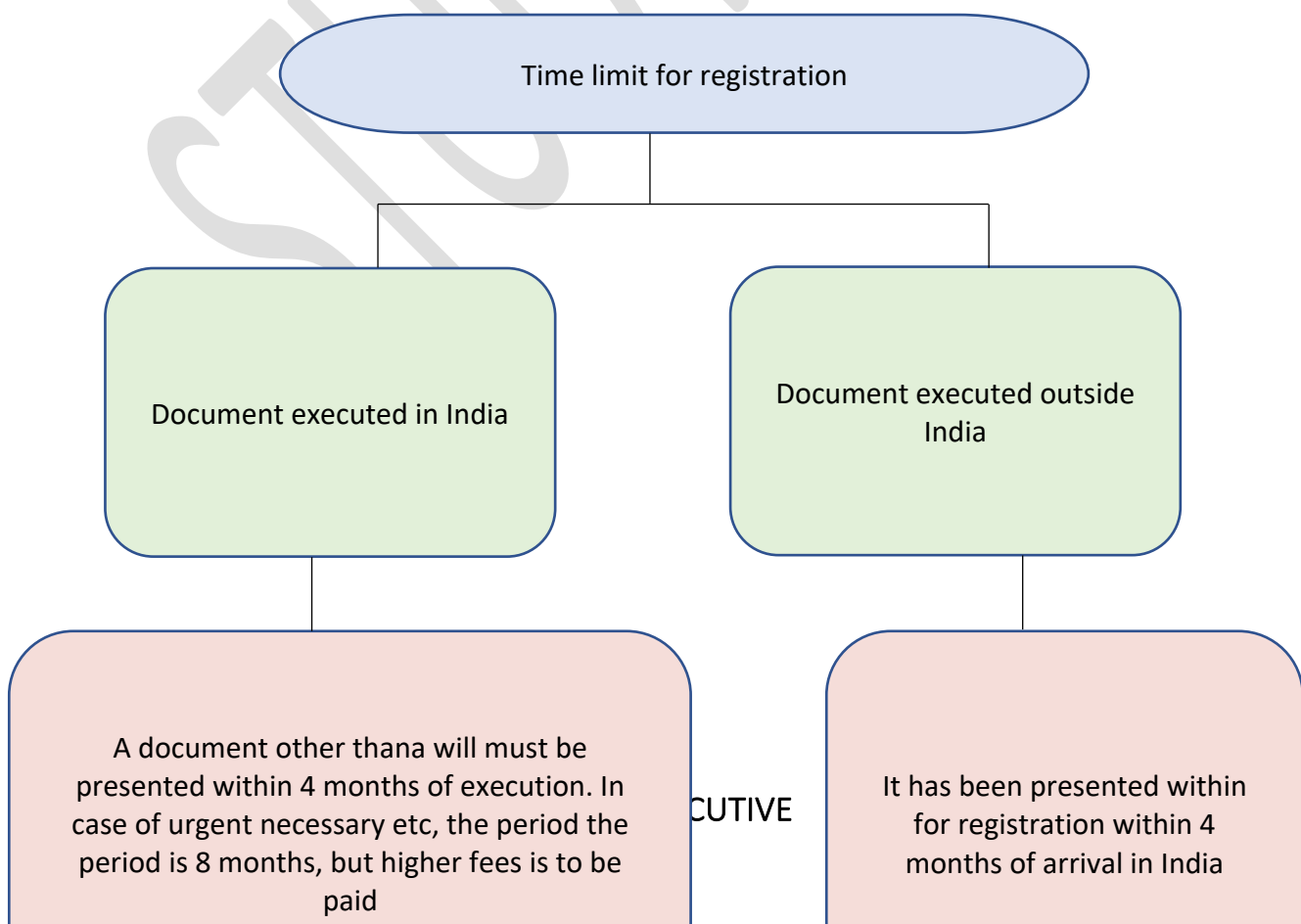
Example: A sold a plot in Mumbai to B by virtue of court's order, through a Sale Deed for Rs. 25. The registration of this sale deed is optional.

(e) Instruments (other than wills) which purport or operate to create declare, assign, limit or extinguish any right, title or interest to or in movable property;

(f) Wills

(g) Other documents not required by Section 17 to be registered.

TIME AND PLACE OF REGISTRATION - SECTION 23 – 31



OTHER IMPORTANT PROVISIONS

(a) Re-registration

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was by a person not duly authorised. It overrides the decision in *Jambu Prasad v. Mohammed Aftab Ali Khan*, (1914) ILR 37 All 49).

(b) Several Executants

Under Section 24 a document executed by several persons at different times may be presented for registration and re-registration within four months from the date of each execution.

The registration is “partial” in regard to each party. [Mulla, Registration Act (1998), page 163]

(c) Documents Executed Out of India- Section 26

As per Section 26, where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within four months after its arrival in India, he may accept such document for registration on payment of proper registration fee. Incidentally, Section 26 indicates that the Act applies to ex-India documents relating to property in India. (Mulla, page 166).

(d) Presentation of a will

Section 27 provides that a will may be presented for registration at any time or deposited in a manner provided in Sections 40-46. Registration of a will is optional under Section 18(e).

(e) Place of Registration- Section 28

Section 28 provides that documents affecting immovable property mentioned in Sections 17(1) and (2) and Sections 17(1)(a)(b)(c) and (c)(d) and (e), Section 17(2), etc. shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the relevant property is situated and any other document may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar under the State Government at which all the persons executing desire the document to be registered. (All these documents relate to immovable property).

Registration of a document elsewhere has been held to be void (*Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*, (1914) ILR 41 Cal. 972, 988 (PC); Mulla, Registration Act (1998), page 167 and cases in footnote 2). There is nothing in

law to prohibit a person conveying property in one district and residing and owning property in another district and asking the vendee to accept a conveyance also of some small property in the district in which he resides, so that the sale-deed may be registered there and he may not be put to the trouble and expense of a journey to the other district. It is not correct to say in such a case that the sale-deed is not validly registered at the place where it is got registered.

However, there should be no fraud or collusion. Smallness of the area does not necessarily lead to inference of fraud.

(Mulla Registration Act (1998), pages 169-171. See in particular the cases cited in Mulla page 170, footnotes 15-19).

- **Place for Registering Other Documents- Section 29**

Every document not being a document referred to in section 28 or a copy of a decree or order, may be presented for registration:

either in the office of the Sub-Registrar in whose sub-district the document was executed

in the office of any other Sub-Registrar under the State Government at which all the persons executing and claiming under the document desire the same to be registered.

- **Copy of a decree or order**

According to section 29(2) of the Registration Act, a copy of a decree or order may be registered with the Sub- Registrar within whose sub-district it was made. If the decree or order does not affect immovable property, it may be presented for registration in the office of any other Sub-Registrar under the State Government at whose office all persons claiming under the decree or order desire it to be registered.

- **Presenting of Documents for Registration**

Section 32 specifies the persons who can present documents for registration at the proper registration office. Such persons are as follows:

some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order,

the representative or assign of such person,

the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in the manner hereinafter mentioned.

▪ Compulsory affixing of photograph, etc.

Every person presenting any document at the proper registration office under section 32 shall affix his passport size photograph and fingerprints to the document:

However, where such document relates to the transfer of ownership of immovable property, the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document.

▪ Enquiry before Registration by registering officer

- For registering a document the persons executing such document or their representatives, assigns or authorized agents must appear before the registering officer within the time allowed for presentation. (Section 34)
- In Section 34, the expression "person executing" not only includes the agent who has signed (with authority), but also the principal who is a party (Puran Chand v. Manmotho Nath, AIR 1928 PC 38).
- It is the compliance with the provisions of Sections 34, 35, 58 and 59 of the Act, which really constitutes registration and not the presence of the certificate. Hence, subsequent acts of the Registrar which are ministerial acts, cannot affect the validity of the registration and the absence of final certificate of registration under section 60 cannot affect its validity.

▪ Presenting wills and authorities to adopt

Who is entitled to present Wills and authorises to adopt	The testator, or after his death, any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration. In case of authority for adoption, the donor or (after his death) the donee, or any authority to adopt, or the adoptive son, may

	present it to any Registrar or Sub- Registrar for registration. (Section 40) Thus, even a legatee can present a will (Venkatapayya v. Venkata Ranga, AIR 1929 PC 24)
Registration of will and authority to adopt	A will, or an authority to adopt, if presented by the testator or the donor, may be registered in the same manner as any other document. [Section 41(1)] If presented by any other person entitled to present it, it shall be registered if the registering officer is satisfied about the particulars mentioned in Section 41(2)

▪ **Deposit of Wills (Sections 42 to 46)**

- Any testator may, either personally or by duly authorised agent, deposit with any Registrar his will in a sealed cover superscribed with the name of the testator and that of his agent, if any, and with a statement of the nature of the document.
- On receiving such documents, the Registrar on being satisfied shall transcribe in his Register Book No. 5, the superscription and shall note the date, time, month, etc. of such receipt and shall then place and retain the sealed cover in his fire-proof box.
- However, the testator may withdraw it by applying for the same and the Registrar shall deliver it accordingly.

Consequences OF NON-REGISTRATION OF DOCUMENTS REQUIRED TO BE REGISTERED Compulsorily

Section 49 of the Registration Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall:

affect any immovable property comprised therein

confer any power to adopt

be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Section 49 is mandatory, and a document which is required to be registered cannot be received in evidence as affecting immovable property. (Mulla, pages 223 to 228)

An unregistered document which comes within Section 17 cannot be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required by this Act or the Transfer of property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 or as evidence of any collateral transaction not to be effective by registered instrument. All that the proviso to Section 49 permits is that in a suit for specific performance an unregistered document affecting immovable property may be given in evidence. The purpose is that the document which has not conveyed or passed title may still be used as evidence of the terms.

CERTAIN REGISTERED DOCUMENTS RELATING TO LAND WHICH WILL TAKE EFFECT AGAINST UNREGISTERED DOCUMENTS

Section 50 provides as under:

Every document of the kinds mentioned in clause (a), (b), (c) and (d) of Section 17(1), and clauses (a) and (b) of Section 18, shall if duly registered, take effect as regards the property, comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Nothing in Sub-section (1) applies to leases exempted under the proviso to Sub-section (1) of Section 17 or to any document mentioned in Sub-section (2) of the same section or to any registered document which had no priority under the law in force at the commencement of this Act.

MISCELLANEOUS PROVISIONS

Duties and powers of registering officer

The following books must be kept in the several offices as follows:

A – In all Registration Offices

Book 1 – “Register of non-testamentary documents relating to immovable property”

Book 2 – “Record of reasons for refusal to register”

Book 3 – “Register of wills and authorities to adopt”

Book 4 – “Miscellaneous Register”

B – In the Offices of Registrars

Book 5 – “Register of deposits of Wills”.

In Book 1 shall be entered or filed all documents or memorandum registered under Sections 17, 18 and 89 which relate to immovable property, and are not wills.

- In Book 4 shall be entered all documents registered under clauses (d) and (f) of Section 18 which do not relate to immovable property.
- The registering officer should enter the registration in the proper book. However, if by mistake and in good faith the registration was entered in the wrong book, it will not make the registration invalid.
- When the document is presented for registration, the day, hour and place of presentation and signature of every person presenting it shall be endorsed.
- The registering officer should give a receipt for such document to the person presenting it and shall make a copy of the document in the appropriate book.
- All such books shall be authenticated from time to time as prescribed by the Inspector General. (Sections 51 to 57)

PRECAUTIONS/ PREREQUISITES FOR Registration

Following are some of the pre-requisites for registration of document:

1. Attest blanks, erasures, alterations:

If there are any blanks, erasures, interlineations and alterations in the document, the parties shall attest them with their signatures or initials. So, please check whether there are any blanks, erasures, etc; in the document which require attestation by the parties before submitting it to Registrar for registration.

2. Full and identifiable property description:

- Property shall be described with full details to identify the same without any ambiguity. In case of agriculture property, the survey number (old and new), full extent of survey number, extent of property under transaction, village name, panchayat name, mandal name, district name shall be written clearly.
- The details like pattadar pass book and title deeds may also be recorded to link the ownership with the details of property.
- In respect of house property, the details like door number (old and new), assessment number of the property, street name, and village/city name shall be mentioned.
- In respect of vacant lands situated in remote places the property description requires a lot more caution and effort. The people are cheated by fraudsters by creating multiple documents by selling the same property with various descriptions.

3. Check whether property is Assigned/Government/ Wakf/Endowment Lands, etc.:

Purchase or otherwise dealing with the government, assigned, Wakf, Endowment, Scheduled Areas lands is prohibited and entails criminal proceedings. Therefore, it is advised to check and ensure that the property under transaction is not one of these lands.

4. Document shall be presented for registration within four months from the date of signing:

- Document other than will deed shall be presented for registration within four months from signing by the parties. In case of delay in presenting within the stipulated four months citing unavoidable circumstances by the parties, the Registrar may condone the delay after collecting the penalty. But in any case, the delay shall not exceed four months. That means a document shall be presented before the concerned Registering Officer for registration within four months without any penalty; and within eight months by paying penalty. But no document shall be accepted for registration after lapse of eight months from the date of signing (execution) by the parties. Therefore, the parties are advised to present the document before the Registering Officer concerned at the earliest possible day after execution of the document.
- In respect of document executed outside India, the document can be presented for registration before the jurisdiction Registering Officer within four months after its arrival in India. The party presenting the document may have to prove to the satisfaction of the Registering Officer that the document was received in India on a particular date with documentary evidence like courier delivery receipt, affidavit from carrier of the document etc.,

5. Will deeds can be presented at any time:

There is no time limit to present will deeds. A will can be presented for registration even after 50 years. A Will can be presented by the beneficiary/executor even after the death of the testator/testatrix. The Registering Officer will conduct enquiry as per the provisions of Registration Act, and may register the will if he is satisfied that the will was properly executed by the deceased testator.

6. Competent Registrar/Sub Registrar Office:

Documents in respect of immovable property transactions such as sale, lease, mortgage, release, partition, agreement/development agreements etc shall be presented to the jurisdiction Registrar/Sub Registrar Office for registration. It is always advisable to get the documents registered with the jurisdiction Sub Registrar. Documents other than immovable property transactions like movable property transactions, affidavits, etc., may be registered in any Registrar/Sub Registrar Office.

7. Persons competent to present the document for registration:

Person signing the document is called executant of the document. The executant can present the document for registration. If there is more than one executant in the document, then any one of the executants can present the document. But admission of execution shall be done by all the executants.

8. Affixing of photograph and fingerprints:

In respect of sale deed, the photographs and fingerprints of both the seller and buyer shall be affixed in the prescribed format under Section 32A of Registration Act, 1908.

9. Route Map :

A map/sketch shall be enclosed with the non-testamentary document affecting immovable properties clearly drawing the route leading to the scheduled property. This route map shall be drawn so that even a stranger can locate the property by using the landmarks mentioned in the map. The map must indicate where exactly the property is located and the nearby landmarks such as post office, police station, temple, mosque, chowrastha etc.

10. Address proof of parties, witnesses/identifying witnesses:

Along with the document, the parties shall also enclose copies of address proof of the executing, claiming parties, attesting witnesses and identifying witnesses. The address proof recognizable by the department includes passport, ration card, Aadhar card (UID), bank passbook containing the full address of the person, driving licence etc.

11. Production of PPBs & TDs at the time of registration and to get entries

made : The parties shall produce pattadar passbooks and title deeds issued by revenue department if the document affects agricultural land. Now, production of pattadar passbooks and title deeds is made compulsory. Parties shall ensure that relevant entries are made by the Registering Officer in these books regarding the transaction.

REFUSAL TO REGISTER BY THE SUB-REGISTRAR

Reasons for refusal to register to be recorded

Every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situate within his sub-district, shall make an order of refusal and record his reasons for such order in his Book No. 2 and endorse the words "Registration refused" on the document; and, on application made by any person executing or claiming under the document, shall without payment and unnecessary delay, give him a copy of the reasons so recorded.

No registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered. (Section 71) Registration cannot be refused on the ground of undervaluation for stamp or any other extraneous reason.
(Mulla (1998), page 308)

APPEAL TO REGISTRAR

According to Section 72(1), an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution.

If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in Sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration. [Section 72(2)]

Application to registrar

Refusal to register on the ground of denial of execution is governed by Section 73, under which the aggrieved party can make an “application” not appeal to the Registrar. (Section 73) (For denial of execution see Section 35)

PROCEDURE BEFORE THE REGISTRAR

In the case falling under Section 73 (refusal to register on the ground of denial of execution before the Sub Registrar) and also where denial of registration is made before the Registrar himself, the Registrar shall inquire:

whether the document has been executed

whether the requirements of the law have been satisfied so as to entitle the document to registration.

If a person denies execution, the Sub-Registrar must refuse registration leaving the parties to appeal under Section 73 (Chhotey Lal v. Collector of Moradabad, AIR 1922 PC 279). Ultimate remedy is a suit under Section 77 (Ka Plinis Mysthong v. Ring Pyrbot, AIR 1965 A.N. 42).

Order by Registrar to Register and Procedure Thereon

If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered (Section 75).

Institution of Suit in case of order of refusal by Registrar

Where the Registrar refuses to order the document to be registered any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered a suit for a decree

directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree. (Section 77)

PROVISIONS OF TRANSFER OF PROPERTY ACT, 1882 AND REGISTRATION OF DOCUMENTS

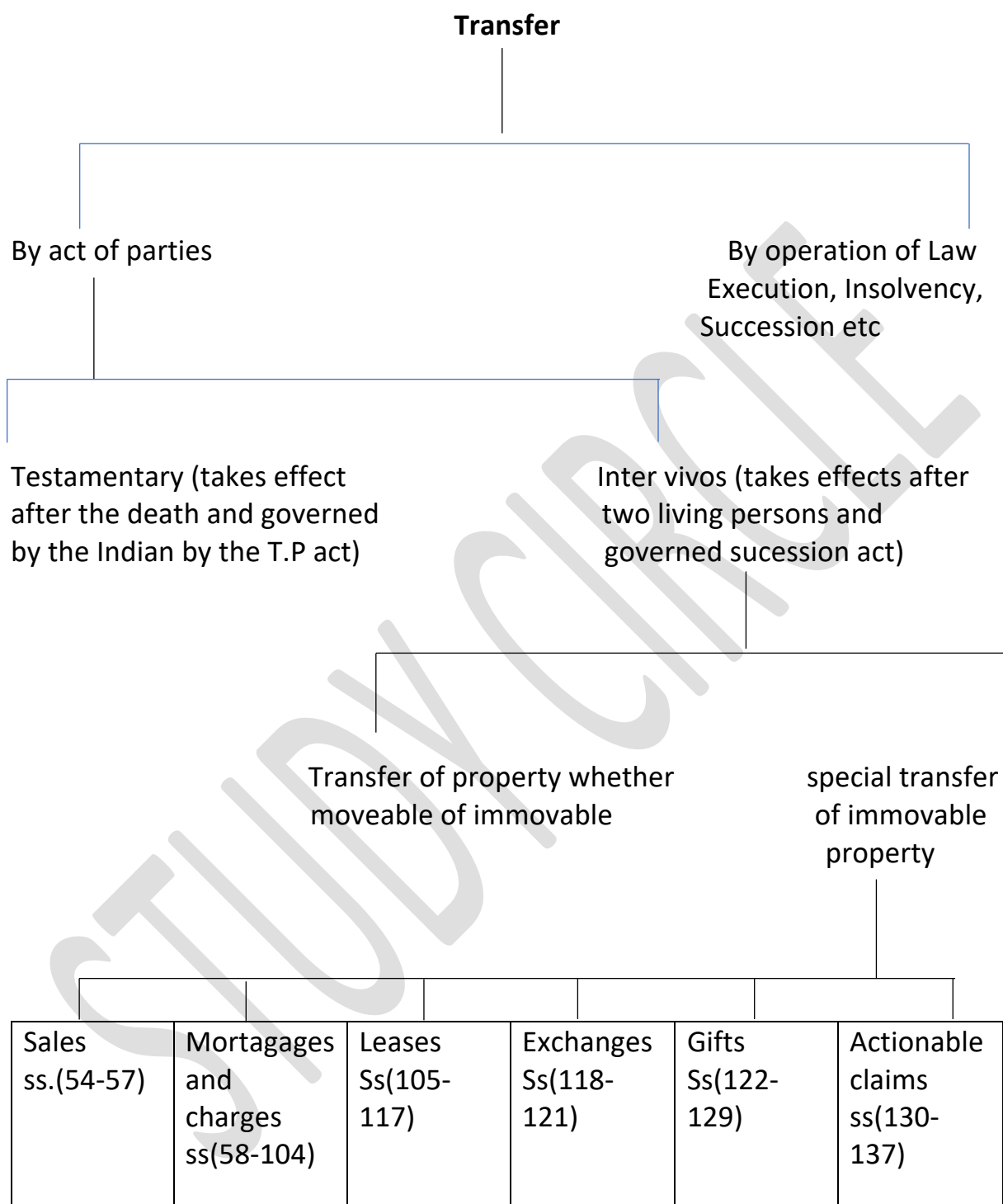
The Transfer of Property Act 1882 is legislation that came into effect on July 1, 1882. The Registration Act, 1908 prescribe compulsory registration of certain documents. The Transfer of Property Act mandates that certain documents are required to be registered to be valid. The law relating to transfer of property is governed by the Transfer of Property Act, 1882. The registration of various instrument containing transfers is governed by the Registration Act, 1908.

The Transfer of Property Act was enacted with the object to amend the law relating to the transfer of property by act of parties i.e. from one person to another person. The Act excludes from its purview the transfers by operation of law, i.e. by sale in execution, forfeiture, insolvency or intestate succession. The scope of the Act is limited, as it is confined to transfers inter vivos and excludes testamentary succession, i.e. transfers by will.

Whereas, the Registration Act, 1908 lays down all essential amendments that show the importance of registering a document. The Registration Act, 1908 is the law relating to registration of documents. The registration is of a document and not of a transaction.

For a transaction related to immovable property, both the legislations need to be taken care. For example, A transfers his immovable property to B by way of Sale Deed. The sale deed is liable to be registered as per district of property situated in the area with the Sub-registrar.

SCHEME OF ACTS



IMPORTANT DEFINITIONS

However, while explaining the provisions of the Act, the terms used are defined there itself, yet some of the important terms used under the Act are as follows:

- **Instrument**

Instrument means a non-testamentary instrument.

- **Attached to the earth**

Attach to the earth means:

- (a) rooted in the earth, as in the case of trees and shrubs
- (b) imbedded in the earth, as in the case of walls or buildings
- (c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

- **Absolute Interest**

When a person owns property, he has an “absolute interest” in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property. If A is the owner of a land, he has an absolute interest in the land. If A sells his land to B, then B becomes the owner and he acquires an absolute interest in the land he has purchased from A. Likewise if A makes a gift of his property to B, there again B gets an absolute interest in the property which is gifted to him. These are instances where persons may have an absolute interest.

- **Reversion and Remainder**

Some interests in the property are called in English Law, reversion and remainders. A “reversion” is the residue of an original interest which is left after the grantor has granted the lessee a small estate. For example, A, the owner of a land may lease it to B for a period of five years. The person who grants the lease is the lessor and the person who takes the lease is called the lessee. Here, after the period of 5 years the lease will come to an end and the property reverts back to the lessor. The property which reverts back to him is called the reversion or the reversionary interest. The grantor has a larger and an absolute interest out of which he carves out a smaller estate and gives to the grantee, i.e. the lessee.

When the owner of the property grants a limited interest in favour of a person or persons and gives the remaining to others, it is called a “remainder”. For instance, A the owner of a land transfers property to B for life and then to C absolutely. Here the interest in favour of B is a limited interest, i.e., it is only for life. So long as A is alive he enjoys the property. He has a limited right since he cannot sell away the property. His right is only to enjoy the property. If he sells this interest it will be valid so long as he is alive. So after B’s death the property will go to C, interest is called a remainder. In the case of a “remainder”, the property will not come back to the owner, but it goes over to the other person.

■ **Vested and Contingent Interests**

- The word “vested” is used in two different senses. It may mean “vested in possession” or “vested in interest”.
- A right is said to be “vested in possession” when it is a right to present possession of property and it is said to be “vested in interest” when it is not a right to present possession but a present right to future possession. For instance, if a land is given to A for life with a remainder to B, A’s right is vested in possession, B’s right is vested in interest. In the above example, the interest of B is not subject to any uncertain condition. It will come into his possession after A’s life comes to an end. Therefore, an interest is said to be vested when it is not subject to any condition, precedent, i.e., when it is to take effect on the happening of an event which is certain, whereas an estate is contingent when the right to enjoyment depends upon the happening of an event which may or may not happen. Thus, a gift to A on the death of B creates a vested interest in A even during the life time of B for there is nothing more certain than death. But a gift to A on the marriage of B creates a contingent interest, for B may never marry at all but that contingent interest becomes vested if and when B marries.
- A vested interest is transferable and heritable. If property is given to A for life and after words to B, B gets a vested interest and if B transfers this interest to C, C will take when the life estate of A comes to an end. B’s interest, since it is vested, is also heritable. Therefore, if B dies during the lifetime of A, C will get the property after the death of A.
- A contingent interest, as said above, is an interest which takes effect after the condition is satisfied. It is subject to a condition precedent, i.e., unless A marries B’s daughter, he will not get the property. The following example illustrate this point. Property is given to A for life and then to B

if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent.

- The contingent interest is not heritable although it is transferable. In a vested interest the transfer is complete, but when the interest is contingent the transfer depends upon a condition precedent. In a condition precedent the estate is not vested in the grantee until the condition is fulfilled.

MEANING OF TRANSFER OF PROPERTY - SECTION 5

- “Transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and “to transfer property” is to perform such act. Transfer inter vivos (i.e., between living persons)
- The term “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. The term ‘transfer’ in the act basically involves transfer through a mortgage, exchange, gift, sale, actionable claim or lease.
- It may be noted that the Transfer of Property Act talks about the transfer between two living persons where the Indian Succession Act talks about the transfer from dead person to living person.
- The words in present or in future qualify the words ‘conveys’, and not the word ‘property’. A transfer of property not in existence operates as a contract to be performed in future which may be specially enforced as soon as the property comes into existence [Jugalkishore v. Ram Cotton Company, (1955) 1 SCR 1369].

MOVEABLE AND IMMOVEABLE PROPERTY

The term “property” signifies the subject matter over which the right of ownership or any less right carved out of ownership (e.g. mortgage right) is exercised. The Act deals with (i) various specific transfers relating to Immoveable property and (ii) lays down general principles relating to transfer of both moveable and immoveable property. Chapter II of the Act is divided into two parts. Part A deals with the rules pertaining to both moveable and immoveable property (Section 5 to 37), Part B embodies the rules relating to immoveable property (Section 38 to 53A). The other chapters of the Act deal with transfers such as sales, mortgages, leases, gifts, exchanges and actionable claims.

- **Moveable property**

The Transfer of Property Act does not define the term “moveable property”. Therefore, it is to be defined with the help of other statutes. For e.g., it has been defined in the General Clauses Act, 1897 as to mean “property of every description except immoveable property”. The Registration Act defines “moveable property” to include property of every description excluding immoveable property but including standing timber, growing crops and grass. For the purpose of law, moveable property is sometimes regarded as immoveable property. This may happen when a thing of chattel is attached or embedded in earth. For instance, if a machinery or a plant is installed on the land, the question arises whether the machinery or the plant is moveable property or immoveable property. If the machinery is fixed on the land permanently then it becomes immoveable property, whereas if the machinery or engine or any other thing is fixed on a temporary basis, then it will be regarded as moveable property.

- **Immoveable property**

- The term “immoveable property” is also not defined under the Act. However, it is defined in the negative sense as “the immoveable property does not include standing timber, growing crops, or grass” (S. 3 Para 2). Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immoveable property.

- The General Clauses Act defines the term “immoveable property” but not exhaustively. It states: “immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to any thing attached to the earth” [Section 3(25)].
- The Registration Act expressly includes under to immoveable property the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

The following have been recognized as immovable property:

right to collect rents of immovable property

a right of way

a right to collect dues from fair on a piece of land

hereditary offices

the equity of redemption

the interest of mortgagee

right to collect lecs from trees

a right of ferry

a right of fishery

right to receive future rents and profits of land

reversion in property leased

a factory

The following have been held not to be immoveable property:

Right to worship
Government promissory notes
Royalty
A right to recover maintenance allowance
Copyright
A decree for sale on mortgagee deed
A decree for arrears on rent

SUBJECT MATTER OF TRANSFER

Section 6 of the Transfer of Property Act says that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. The words “property of any kind” indicate that transferability is the general rule and the right to property includes the right to transfer the property to another person. Property of any kind excludes from its purview the future property. A transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence.

Exceptions to the general rule of transferability made by other laws

Certain restrictions are placed by Hindu law and Mohammedan law on the transfer of property.

FORMALITIES OF TRANSFER

Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. Section 54 lays down the mode of transfer of immoveable property. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property .

When a transfer is effected in writing, the person who signs the document professing to transfer the property is called the executant. Execution consists in affixing his signature to the document to the effect that he is transferring the property. An illiterate person who cannot write may direct some literate person to sign it on his behalf and in his presence and the illiterate person may put his thumb impression.

Attestation	Registration	Notice
• Attestation is an important formality in connection with the execution of transfer. "Attest" means to testify a factor, to bear witness to a fact. Attestation, in relation to a document, signifies the fact of authentication of the signature of the executant of that document by the attestator by putting down his own signature on the document in testimony of the fact of its execution. All transfers do not require attestation. For example, a sale or a lease does not require attestation. But a mortgage or a gift requires that a mortgage deed or a gift deed must be attested by two or more witnesses.	• Registration is an essential legal formality to effect a valid transfer in certain cases. The advantage of registering a document is that any person who deals with the property would be bound by the rights that are created in earlier registered document.	• Notice, may be actual or constructive. If a person knows about a fact, he has an actual notice. But, in certain circumstances law treats a man who ought to have known a fact even though he did not in fact know it. This is called constructive notice

RESTRAINT ON TRANSFERS OR RULE AGAINST INALIENABILITY

Section 10 of the Act says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. Suppose, B gives property to A and his heirs adding a condition that if the property is alienated it should revert to B. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

▪ Partial restraint valid

Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid. But it is not permissible to restrict the alienation to a

particular time. Such a restriction is not partial but an absolute restraint and as such invalid.

- **When absolute restraint valid?**

There are two exceptions to the rule that absolute restraints are void. Firstly, in the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid. The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

- **Restraint on enjoyment**

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property. Thus, it is clear in the above illustration that the condition which is imposed by A is for the benefit of another property which he retains. Such a condition is valid. Section 12 also makes the transfer void if a property is transferred to any person adding a condition that if such person becomes insolvent he ceases to hold that property. Such a condition is not recognised as valid in law.

Again, this is subject to the exception that if a landlord leases his property he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

WHO CAN TRANSFER THE PROPERTY?

According to Section 7 of the Transfer of Property Act, every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property. Hence, every person competent to contract and having ownership can transfer property. According to Indian Contract Act, a person is competent to contract when he is a major and of sound mind and is not disqualified from contracting by any law to which he is subject. But a minor can be a transferee as there is nothing in the Transfer of Property Act to disqualify a person, who is a minor to be a transferee. Thus, a mortgage can be validly executed in favour of a minor who has paid the consideration [Hari Mohan v. Mohini, 22 C.W.C. 130, Raghava v.

Srinivasa, (1917) 60 Mad. 308]. Persons who are authorised to transfer property can also transfer property validly. Although a minor is not competent to be a transferor yet a transfer to a minor is valid. However, there are exceptions to this. If a person holds himself out as the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. doctrine of feeding the grant by estoppel.

PROPERTIES WHICH CANNOT BE TRANSFERRED

Section 6 of this Transfer of Property Act contains some exceptions to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:

the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

An easement cannot be transferred apart from the dominant heritage.

An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

A mere right to sue cannot be transferred.

A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.

Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

TRANSFER FOR BENEFIT OF UNBORN PERSON

Section 13 of the Transfer of Property Act lays down that where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property. Thus if a property is given to an unborn person, two conditions should be satisfied:

- (i) It should be preceded by a life estate in favour of person living.
- (ii) It should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others.

EFFECT OF A TRANSFER ON FAILURE OF PRIOR INTEREST

- Further, where by reason of any rules or the rules contained in Sections 13 and 14, interest created for the benefit of a person or class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect or upon failure of such prior interests also fail (Section 16). For example, property is transferred to A for life then to his unborn son B for life and then to C, who is living at the date of transfer, absolutely. Here B is given only a life interest. So the transfer to B is invalid.
- The subsequent transfer to C absolutely is also invalid, because according to Section 16, if a prior transfer fails, the subsequent transfer will also fail.
No transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at date on such transfer, and the minority of some person who shall be in existence on the expiration of that period, to whom, if he attains full age, the interest created is to belong.
- The policy of the law has been to prevent property being tied up for ever. The vesting cannot be postponed beyond the life time of any

person living at the date of transfer. For example, if an estate is given to a living person A for life and then to the unborn son of A, the son of A must be in existence on or before the date of the expiry of the life estate in favour of A. The vesting of absolute interest in favour of an unborn person may be postponed until he attains majority. For example, an estate may be transferred to A, living person, and after his death to his unborn son when he attains the age of 18. Such transfer would not be violative of the rule against perpetuity.

DOCTRINE OF LIS PENDENS - SECTION 52

Lis means dispute, Lis pendens means a pending suit, action, petition or the like. Section 52 of the T.P. Act incorporates the doctrine of Lis pendens. It states that during the pendency of a suit in a Court of Law, property which is subject to a litigation cannot be transferred.

▪ Essentials

In order to constitute a Lis pendens, the following elements must be present:

there must be suit or proceeding in a court of competent jurisdiction

the suit or proceeding must not be collusive

the litigation must be one in which right to immovable property is directly and specifically in question

there must be transfer or otherwise dealing with the property in dispute by any party to the litigation

such transfer must affect the right of other party that may ultimately accrue under the terms of the decree or order

- The rule is based on the doctrine of expediency i.e., the necessity for final adjudication. A plea of lis pendens will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.

- When an application to sue in forma pauperis is admitted, the suit is pending from the time of presentation of the application to the Court but not if it is rejected.
- A suit in foreign Court cannot operate as lis pendens. The doctrine of lis pendens does not apply to moveables. It is the essence of the rule that a right to immoveable property is directly and specifically in question in the suit. The doctrine is not applicable in favour of a third-party.

DOCTRINE OF PART-PERFORMANCE

1. Lastly, we may also discuss briefly the doctrine of part-performance which is embodied in Section 53A of the Transfer of Property Act.
2. A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. Can he do so? No, B will not be allowed to suffer simply because the formality of registration has not been through. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.
3. If all the abovementioned conditions are satisfied, then, the transferor and the persons claiming under him are debarred from exercising any right in relation to the property other than the rights expressly provided by the terms of the contract notwithstanding the fact that the instrument of transfer has not been registered or complete in the manner prescribed therefor by the law for time being in force. It should be noted that Section 53A does not confer any positive right on the transferee. It only prohibits exercise of the right of ownership in relation to the property in order to evict the transferee from the property because legal requirements have not been satisfied.
4. However, the doctrine of part-performance will not affect the right of a subsequent transferee for consideration without notice of the earlier contract and of its being partly performed.

SALE

Under Section 54 of the T.P. Act, “sale” has been defined as a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

Essentials

The seller must be a person competent to transfer. The buyer must be any person who is not disqualified to be the transferee under Section 6(h)(3).

The subject matter is transferable property.

There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.

It must be an exchange for a price paid or promised or part paid and part promised.

There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

Mode of transfer by sale

Sale of an immoveable property can be effected

Where such property is tangible (i) by a registered instrument if it is of the value of Rs. 100 and upwards, and (ii) by a registered instrument or by delivery of property when it is less than Rs. 100 in value

Where the property is tangible or a reversion, only by a registered instrument.

Contract for sale

A contract for the sale of immoveable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown.

The rights and liabilities of a seller and buyer are dealt with in Section 55 of the Transfer of Property Act.

EXCHANGE

Sections 118 to 121 of the Transfer of Property Act, 1882 deal with “Exchanges”. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange”.

Essentials

The person making the exchange must be competent to contract.

There must be mutual consent.

There is a mutual transfer of ownership though things and interests may not be identical.

Neither party must have paid money only.

This Section applies to both moveable and immoveable property.

MORTGAGES

Sections 58 to 104 of the Act deal with “Mortgages”.

Definition and nature of mortgage:

According to Section 58 of the Transfer of Property Act, a “mortgage” is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee. The principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called a mortgage deed.

Essentials of a mortgage:

Transfer of interest: The first thing to note is that a mortgage is a transfer of interest in the specific immoveable property. The mortgagor as an owner of the property is possessed of all the interests in it, and when he mortgages the property to secure a loan, he only parts with an interest in that property in favour of the mortgagee. After mortgage, the interest of the mortgagor is reduced by the interest which has been transferred to the mortgagee. His ownership has become less for the time being by the interest which he has parted with in favour of the mortgagee. If the mortgagor transfers this property, the transferee gets it subject to the right of the mortgagee to recover from it what is due to him, i.e., the principal plus interest.

Specific immoveable property: The second point is that the property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated "all of my property" in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immoveable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property in a suit by the mortgagee.

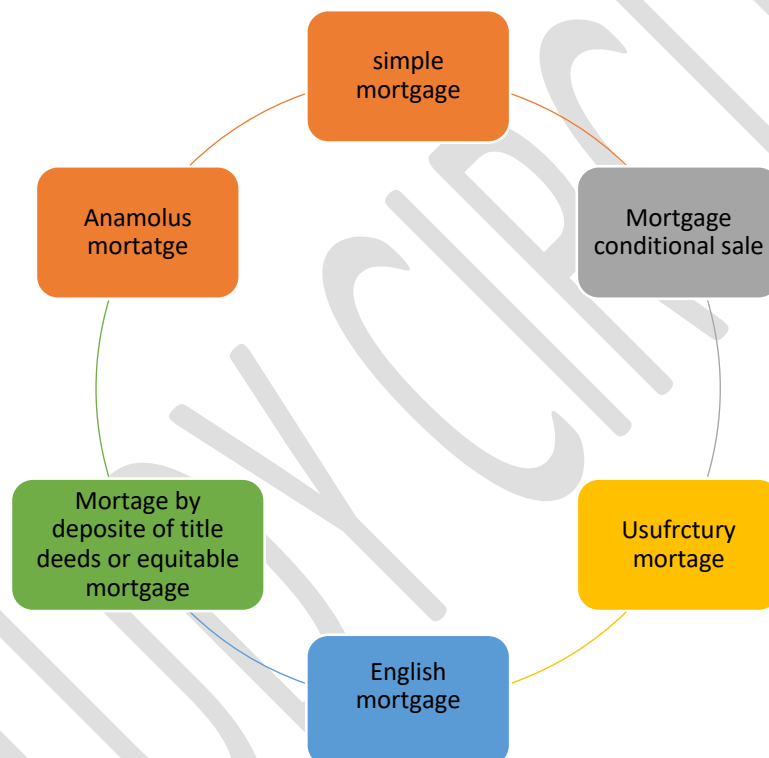
To secure the payment of a loan: Another characteristic of a mortgage is that the transaction is for the purpose of securing the payment of a loan for the performance of an obligation which may give rise to pecuniary liability. It may be for the purpose of obtaining a loan, or if a loan has already been granted to secure the repayment of such loan. There is thus a debt and the relationship between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy and further quantity by way of interest, it is mortgage transaction for the performance of an obligation.

Form of a mortgage contract:

According to Section 59, where the principal money secured is Rs. 100 or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument or by delivery of property. It should be noted that a mortgage is not a mere contract but it is the Conveyance of Interest in the mortgaged property and as soon as the mortgage deed is registered an interest in the property vests in the mortgagee.

Kinds of mortgages:

There are in all six kinds of mortgages in immoveable property, namely

**(a) Simple mortgage**

In a simple mortgage, the mortgagor binds himself personally to pay the debt and agrees in the event of his failure to pay the mortgage money, the mortgagee shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the sale of property. If the mortgaged property is not sufficient to discharge the debt, the mortgagee can bring a personal action against the mortgagor and obtain a decree which, like any other money decree, can be executed against other properties of the

mortgagor. In simple mortgage, no right of possession or foreclosure is available to the mortgagee.

(b) Mortgage by conditional sale

In this type of mortgage, the property is mortgaged with a condition super added that in the event of a failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded a sale, and in case the loan is repaid at the stipulated time, the sale shall be invalid, or on condition that on such payment being made the buyer shall transfer the property to the seller. Thus, for all practical purposes, this type of mortgage is ostensible sale of the mortgaged property with a condition for re-purchase by the mortgagor by repaying the loan.

(c) Usufructuary mortgage

Section 58(d) defines a “usufructuary mortgage as “where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage. It is also called a mortgage with possession.

(d) English mortgage

Section 58(e) states that: “where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the money as agreed, the transaction is called an English mortgage”. Here the mortgagor transfers the ownership of the property as security and the mortgagee promises to re- transfer the ownership, if the money is paid within a definite time. There is also a personal covenant as the mortgagor promises to repay within a certain date. In this type of mortgage, there is proviso that if money is repaid the property would be reconveyed. The remedy of the mortgagee is sale of the property to recover the debt.

(e) Mortgage by deposit of title deeds

This type of mortgage is called equitable mortgage in English law. In this transaction, a person delivers to the creditor or his agent documents of title of

his immoveable property with an intention to create a security, and obtains a loan. The requisites of such a mortgage are (i) a debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt.

(f) Anomalous mortgage

Section 58(g) of the Transfer of Property Act provides that “a mortgage which is not a simple mortgage, a mortgage by conditional sale, usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage”.

Thus, an anomalous mortgage is a combination of various other mortgages, for example, a usufructuary mortgage may be created and the mortgagee shall have the right of sale. You have already noticed that in a usufructuary mortgage only possession is given to the mortgagee and there is no right of sale. But in an anomalous mortgage the right of sale along with the possession of the property may be given. You have also seen that in the case of usufructuary mortgage, there is no personal liability on the part of a mortgagor but if the mortgagor assumes personal liability to pay the mortgage money, it will be an anomalous mortgage.

▪ Sub-mortgage:

Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage. For example, where A mortgages his house to B for Rs. 10,000 and B mortgage his mortgagee right to C for Rs. 8,000. B creates a sub-mortgage.

▪ Puisne mortgage:

Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage. For example, where A mortgages his house worth Rs. One lakh to B for Rs.40,000 and mortgages the same house to C for a further sum of Rs.30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of Rs.40,000 plus interest.

▪ Rights of mortgagor:

By mortgaging the property the mortgagor does not cease to be its owner, he only transfers an interest in it. The law, therefore, grants him the following rights:

(a) Right of redemption:

The first and the most important right of the mortgagor is the right to redeem i.e., take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment. Section 60 of the Act provides that any time after the principal amount has become due, the mortgagor has a right to redeem the property. Although the Act gives him the right to redeem “any time” after their debt has become due, it enjoins upon the mortgagor the obligation to exercise this right before the right is extinguished by the Act of parties or by a decree of Court, or (ii) before it is barred by the Limitation Act. According to the Law of Limitation the, mortgagor can redeem the property within 60 years after the money has become due. This right to redeem the property even after the time of payment has elapsed is called the Right of Equity or Redemption. But the mortgagor is not entitled to redeem before the mortgage money becomes due on the date fixed for repayment of the loan. His right to redeem arises only when mortgage money becomes due and not before.

(b) Right against clog on equity of redemption:

Right of redemption or equity of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void. Any condition which prevents the mortgagor from redeeming the property is called a “clog” on the equity or right of redemption and is void. The rule of equity that once a mortgage always a mortgage prohibits a clog on the right of redemption. In other words, once a transaction is found to be a mortgage, the Court would not permit any condition in a mortgage deed which would prevent or impede redemption or repayment of the loan for which the security was given.

(c) Right of partial redemption:

A mortgage, as a rule, being one and indivisible for the debt and every part of it, the mortgagor cannot redeem piecemeal; he must redeem the whole property. But Section 61 of the Act gives a right of partial redemption stating that “a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when

the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together.”

- **Implied contract by mortgagor:**

The parties are free to enter into any terms they like. Where, however, the contract does not contain all the terms, Section 65 provides for implied terms as follows:

In the absence of a contract to the contrary, the mortgagor shall be deemed to have contracted with the mortgagee that the:

mortgagor is entitled to transfer the interest (covenant for title)

mortgagor will assist the mortgagee to enjoy quiet possession

mortgagor will pay public charges in respect of the mortgaged property

mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased

mortgagor covenants as to payment of interest and principal on prior encumbrances, where the mortgage is a second or subsequent encumbrance on the property.

- **Rights of mortgagee and his remedies:**

If the mortgagor does not pay the mortgage money, the mortgagee may proceed to recover

- from the mortgaged property
- sue for recovery from the mortgagor personally.

Thus the mortgagor has two remedies: one against the property and the other against the mortgagor personally.

CHARGE

“Charge” has been defined under Section 100 as follows: “Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property”.

As is evident from the above definition, a charge comes into existence either by the act of parties or by operation of law.

Charge by act of parties: When in a transaction for value, both the parties (debtor and creditor) intend that the property existing or future shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge.

Charge by Operation of Law: Charges created by law are those which arise on account of some statutory provisions. They are not created by the voluntary action of parties but arise as a result of some legal obligation.

Floating charge: A charge may be floating as well as fixed. A fixed charge is a charge on specific property but a floating charge is an equitable charge on the assets for time being of a going concern. It is peculiar to companies which are able to borrow money without any interference with their assets so long as they are going concern. In other words, it is a charge on a class of the assets of the company, present as well as future. The assets of the company are constantly undergoing a change but the creditors will not normally interfere with the assets of the company unless there is breach of some condition. As Professor Gower says, the assets are liquid and the charge is floating. It is ambulatory and shifting in its nature hovering over and so to speak floating with the property which it is intended to effect. As it does not attach to any specific property, it remains document until it crystallises.

- Crystallisation of floating charge:

A floating charge becomes fixed or crystallises in the following cases:

1. When the money becomes payable under a condition in the debenture and the debenture holder, (i.e., the creditor) takes some steps to enforce the security
2. When the company ceases to carry on business
3. When the company is being wound-up.

- Distinction between Mortgage and Charge:

Although in a charge, the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage. It is important, therefore to distinguish between a charge and mortgage.

- (a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
- (b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.
- (c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
- (d) In certain types of mortgage (viz., mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged

property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.

(e) From the very nature of it, a charge as a general rule, cannot be enforced against a transferee for consideration without notice. But in a mortgage, the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore, only bound by the mortgage.

(f) In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only. In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

LEASE

○ Meaning and Nature of Lease

According to Section 105, a “lease” of immoveable property is a transfer of a right to enjoy property. Since it is a transfer to enjoy and use the property, possession is always given to the transferee. The lease of immoveable property must be made for a certain period. For example, you may give a lease of property for a definite number of years, or for life, or even permanently. The transferor is called the lessor, the transferee is called the lessee, the price is called premium and the money, share, service or any other thing of value to be so rendered is called the rent. The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively.

○ Lease and licence

A lease should be distinguished from a licence. A licence is a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such a right, be unlawful. A licence does not transfer any interest in the property and the licensee has no right to possession. A licence can be revoked by the grantor at any time, whereas a lease cannot be revoked. If, I sell the fruits of my garden to you, you are given permission or licence to enter my garden and take away the fruits. A lease involves a transfer of interest followed by possession of the property for a specified period. The real test is the intention of the parties.

○ Formalities

According to Section 107, a lease from year to year or for any term exceeding one year can be made only by a registered document. If a lease is for a term below one year, it can be made by an oral agreement. If a lease is created by oral agreement, it must be accompanied by delivery of possession. If the lease is for a year or more, it must be effected by a registered document. If after the registration, the lessor does not give possession, the lessee can sue for possession.

○ Requirements of a valid notice

In order that a notice to quit is valid it must be a proper notice. The notice must convey the intention to terminate the tenancy as a whole and must specify the date on which the tenancy would expire. As mentioned earlier, if the lease is a lease from month to month, 15 days, notice is required. If it is from year to year 6 months' notice is required. A lease of the moveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. The notice should expire with the end of the period of the tenancy. If it is a lease from month to month and the notice is given by the landlord, the tenant should be asked to quit at the end of the month of the tenancy. The landlord cannot ask his tenant to quit at any time before the expiry of a month or a year of the tenancy.

○ Determination of leases

Section 111 of the Transfer of Property Act spells out the various contingencies in which a lease comes to an end. A lease is determined, i.e., comes to an end in the following ways:

- (1) By efflux of time or lapse of time:** A lease for a definite period, such as a lease for a year, or for a term of years, expires on the last day of the term and the lessor or any person entitled to get back the property may enter without notice or any other formality. Since a lease is a transfer of interest in the property, if during the period for which a lease is valid, the lessee dies, the heirs of the lessee can continue the lease till the expiry of the period.

- (2) By the happening of a special event:** When a lease is granted subject to the happening of an event, it comes to an end when the event takes place. Thus, if B grants lease to A for life, it comes to an end on the death of A. Similarly, if a lease is granted for the duration of the war, it comes to an end when the war ends. Where the interest of the lessor is limited, the lease comes to an end when he loses the interest or where he does not have any power to grant a lease. For example, a tenant for life can grant a lease only to last during his life time. It comes to an end on his death.
- (3) Merger:** A lease comes to an end when the lessee buys the property of the lessor or when the lessee takes the lessor's interest by succession. Here the right of the lessee merges in that of the lessor. Naturally, the lessee becomes the owner of the property after he acquires it. So there will be no more a lease.
- (4) By surrender:** A lease may come to an end by surrender. Surrender may be either express or implied. Express surrender arises when the lessee yields up his interest under a lease by mutual consent. Implied surrender occurs, as follows :- if during the subsistence of the lease, a new lease is granted to the tenant to commence at once in substitution for the existing lease, it operates as a surrender of the old lease
- (5) By forfeiture:** A lease also comes to an end by forfeiture. A forfeiture occurs when there is breach of a condition in a lease contract by the lessee. Under the Transfer of Property Act, forfeiture occurs in the following circumstances—the first case in which forfeiture occurs is the case when the lessee breaks an express condition which may be of various types such as, if the lessee does not pay the rent regularly, or if the lessee becomes insolvent, or where the lessee sublets the property to another person. In all such cases there will be a forfeiture. But the condition that the lessee breaks must be an express condition which must have been incorporated in the contract of lease.

○ Duties of the Lessor

Following are some of the duties of the lessor:

- (a) The lessor is bound to disclose to the lessee any material defect in the property with reference to its intended use of which the lessor is and the lessee is not aware. This rule applies only to physical defects of the property such as the condition and the nature of the property leased. You will note that

the lessor is not bound to disclose whether or not he has title to the property.

(b) The next duty of the lessor is to put the lessee in possession of the property. A lease is a transfer of possession the consideration being rent and, therefore, it follows that the landlord cannot recover the rent unless he has delivered possession to the tenant. If a contract of lease has been executed and the lessor does not give possession of the property to the lessee, the lessee can sue the lessor for possession.

(c) The next duty that is cast on the lessor is what is usually called covenant for quiet enjoyment. The covenant, that is the right to undisturbed possession, so long as the lessee pays the rent, presupposes possession and, therefore, no action can be brought on this covenant unless the lessee has first obtained possession. The covenant for possession gives the lessee the right to obtain possession; the covenant for quiet enjoyment gives the lessee a right to continue in such possession. If the lessee's possession is disturbed, he can sue for damages or, in case a part of the leased property is taken possession of either by the lessor or by any third-party; the lessee can hold a part of the leased property and pay a proportionate rent.

○ Duties of the lessee

The lessee has the following duties:

- (a) The lessee is bound to disclose to the lessor any fact as to nature or extent of the interest that the lessee is about to take, of which the lessee is, and the lessor is not aware and which materially increases the value of such interest.
- (b) The lessee is bound to pay or tender at the proper time and place, the premium or rent to the lessor or his agent in this behalf. We have already seen that in case the lessee does not pay the rent, he may incur forfeiture of the tenancy. The liability to pay the rent commences from the date the tenant is put into possession.
- (c) The next duty of the lessee is that he uses the property as a person of ordinary prudence would make use of. But he shall not permit another person to use the property for purposes other than that for which it was leased.

- (d) He should not do any act which is destructive of or permanently injurious to the property.
- (e) The lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purpose. If he wants to erect certain fixtures or chattel on the leased property, it must be done without causing any damage to the property. Before the termination of the lease, he can remove all the things attached to the earth. If permanent fixtures are to be made, the lessee must obtain the consent of the landlord.
- (f) If the lessee comes to know of any proceedings by way of suit to recover the property of the lessor, the lessee should immediately inform the lessor. Since, the tenant is in possession of the property he is the person who is not likely to know of any encroachment on the landlord's property and he should therefore inform the landlord.
- (g) The lessee should hand over the property at the end of the lease.

○ Rights of the lessee

The lessee enjoys the following rights:

- (a) If during the continuance of the lease any accession is made to the property, such accession is deemed to be comprised in the lease, the lessee has a right to enjoy the accretions of the leased property.
- (b) Where, under the contract, the landlord has agreed to repair the property, the lessee can carry out the repairs and deduct the expenses from the rent if the landlord fails to do so.
- (c) If the lessee has made payment which the lessor is bound by law to pay such as payment of Government revenues or municipal taxes on the property, the lessee can deduct the amount from the rent and pay the balance to the lessor. He can even take interest on the amount he has paid.
- (d) The lessee has a right to remove the fixtures he has erected-during the term of the lease.

(e) If, due to no fault of his, the lease comes to an end (i.e., when the lease is of uncertain duration), the lessee or his legal representatives are entitled to all the crops planted or grown by the lessee. The lessee or his representatives have got a right to come and carry away the crops, etc., which are growing on the land. If the lease is of a definite period, such a right cannot be claimed particularly, when lessee has committed a fault, e.g., where he has committed a breach of a condition entailing forfeiture.

(f) The lessee may avoid the lease, if property is wholly or partly destroyed by tempest, flood, or fire so as to make it impossible to continue the lease for the purpose for which it was let.

(g) The lessee has right to transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property. We have also noticed that the lessee's rights are transferable.

GIFT

The provisions relating to "Gift" have been stipulated under Sections 122 to 128 of the Act. Section 122 of the Transfer of Property Act defines "gift" as follows:

"Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Essentials

There must be a transfer of ownership.

The subject matter of gift must be a certain existing moveable or immovable property.

The transfer must be made voluntarily.

It must be done without consideration.

There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

A gift of immoveable property, as said above, must be effected by registration. Where a gift in favour of someone is registered but it is not accepted by the donee, the gift is incomplete. Suppose, a document is executed by the donor who makes a gift of immoveable property and the deeds are delivered to donee, and the donee accepts the gifts but the document is not registered. Will the gift be valid? It has been held by the Courts that the gift is valid. While registration is a necessary formality for the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. The donee in such a case can ask the donor to complete the gift by registration. Thus, the most essential thing for the validity of a gift is its acceptance. If the gift is accepted but not registered it is a valid gift.

Onerous gift: Lastly reference may also be made to what is known as an onerous gift. It may be that several things are transferred as a gift by single transaction. Whereas some of them are really beneficial the others convey burdensome obligations. The result is that the benefit which it confers is more than counter balanced by the burden it places. For instance, A makes a gift of shares in the companies X and Y. X is prosperous but heavy calls are expected in respect of shares in Y company. The gift is onerous. The rule as laid down in Section 127 is that the donee takes nothing by the gift unless he accepts it fully. Where the gift is in the form of two or more independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the other.

ACTIONABLE CLAIMS

“Actionable claim” has been dealt with under Sections 130 to 137 of the Act.

Definition:

“Actionable claim” is defined in Section 3 of the Transfer of Property Act as follows:

A claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

NON-ACTIONABLE CLAIMS

Debentures are secured debts and therefore not regarded as actionable claims.

Copy right though a beneficial interest in immoveable property is not an actionable claim since the owner has actual or constructive possession of the same [Savitri Devi v. Dwarka Bhatya, (1939) All 305]. Debentures are secured debts and therefore not regarded as actionable claims.

Again, an actionable claim includes a beneficial interest in the moveable property not in possession. Now, a benefit of a contract for the purchase of goods is a beneficial interest in moveable property.

The other essential characteristic of a gift is that it cannot be revoked at the will and pleasure of the grantor. A revocable gift is one which may be revoked by the donor at any time. Its revocation would depend upon the mere will or pleasure of the donor. Such a gift is void. But on the other hand, if the condition is one which does not depend on the will or pleasure of the donor, the gift can be revoked on the happening of such condition.

A gift which comes into existence on the fulfilment of a condition, that is to say, a gift which is subject to a condition precedent is also valid. A condition precedent, as already explained in this study dealing with vested interest and contingent interest, is one which must be fulfilled before the transfer takes effect. But the condition attached to the gift should not be illegal or immoral. For instance, a gift to A on condition that he murders B is not valid.

Cases under Section 107 of Transfer of Property Act, and Section 17(1)(d) of Registration Act

A comparison of both these Sections would show that a lease of immovable property is compulsory registrable:

if it is from year to year

if it is for a term exceeding one year

if it reserves a yearly rent. If a lease is of a very high value but is neither from year to year, nor for any term exceeding one year, nor reserving a yearly rent, it does not require registration under Section 17(1)(d).

Non-testamentary instruments transferring or assigning any decree or order of a Court or any award in order to create interests as mentioned in Clause (b). A transfer of a decree or order of a court or of any award when such decree or order or award operates to create, declare, etc. any interest of the value of Rs. 100 and upwards in immovable property, requires registration.

However, the State Government is empowered to exempt any leases executed which do not exceed five years and the annual rents reserved which do not exceed 50 rupees, from the operation of this Sub-section.

It may be pointed out that the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A (Part performance) of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A.

EASEMENT RIGHT- SECTION 6(c)

As conferred above, transfer of easement right is not possible by virtue of clause (c) of the Section 6 of the Transfer of Property Act. An easement includes a right to enjoy a profit out of the land of another. An easement exists for the accommodation and better enjoyment of the land to which it is annexed. The land owned by the possessor of the land is known as dominant tenement and the land over which the right is enjoyed is known as the servient tenement.

CHAP 14 :RIGHT TO INFORMATION LAW

INTRODUCTION

Throughout the world, RTI is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. In India also, the Government enacted Right to Information (RTI) Act in 2005 which came into force w.e.f. October 12, 2005.

RIGHT TO KNOW

Before dwelling on the RTI Act, 2005, mention should be made that case *Reliance Petrochemicals Limited v. Indian Express Newspapers*, 1989 AIR 90 in which the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression “liberty” must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information.

It may be pointed out that the right to impart and receive information is a species of the right to freedom of speech and expression. Article 19(1) (a) of our Constitution guarantees to all citizens freedom of speech and expression. At the same time, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the Constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign

States, public order, decency, morality, contempt of court, defamation and incitement of offence.

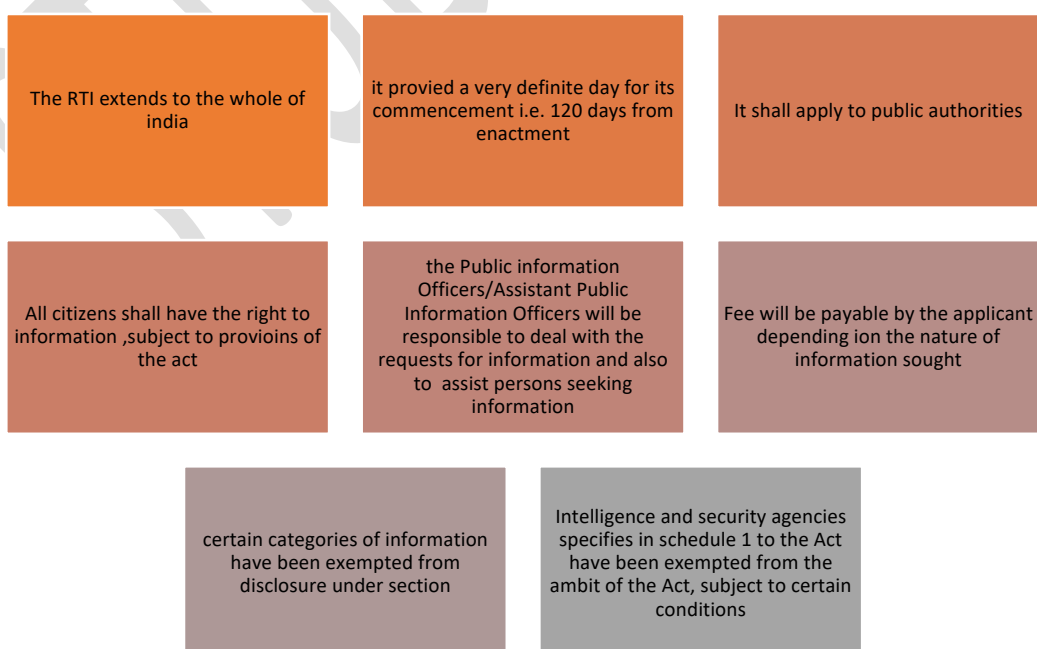
Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a). The State is not only under an obligation to respect the Fundamental Rights of the citizens, but it is equally under an obligation to ensure conditions under which these rights can meaningfully and effectively be enjoyed by one and all.

Right to freedom of speech and expression in Article 19 (1)(a) carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions as mentioned above. The prerequisite for enjoying this right is knowledge and information. Information adds something "new to our awareness and removes vagueness of our ideas".

THE RIGHT TO INFORMATION (RTI) ACT, 2005

The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. It may be pointed out that the Right to Information Bill was passed by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005. The Act considered as watershed legislation, is the most significant milestone in the history of Right to Information movement in India allowing transparency and autonomy and access to accountability.

SALIENT FEATURES OF THE ACT



OBJECTIVE

As stated above, the RTI Act confers on all citizens a right to information. The Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority. The right to information, therefore, is not only a constitutional right of the citizens but there is now a legislation in the form of RTI Act which provides a legal regime for people to exercise their fundamental right to information and to access information from public authorities. The very preamble of the Act captures the importance of this democratic right which reads as “democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.” This Act is enacted not only to sub-serve and ensure freedom of speech. On proper implementation, it has the potential to bring about good governance which is an integral part of any vibrant democracy. Attaining good governance is also one of the visions of the Constitution.

DEFINITIONS

1) Appropriate Government: - (Section 2(a)) appropriate government means in relation to a public authority which is established, constituted, owned, controlled, or substantially financed by funds provided directly or indirectly a) By the central government or the union territory administration- the central government b) By the state government- the state government

2) Competent authority: - (Section 2(e)) competent authority means the following:

- a) Speaker of the house of the people.
- b) Speaker of the Legislative Assembly of a state or a union territory.
- c) Chairman of the legislative council of a state having such council.
- d) Chief justice of India in the case of the Supreme Court.
- e) Chief justice of the high court in the case of a high court.
- f) President or the governor, as the case may be, in the case of other authorities established or constituted by or under the constitution.
- g) Administrator appointed under article 239 of the constitution.

3) Information: - (Section 2(f)) Information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to

any private body which can be accessed by a public authority under any other law for the time being in force.

4) Public authority: - (Section 2(h)) Public authority means any authority or body or institution of self-government established or constituted

- a) By or under the constitution.
- b) By any other law made by parliament
- c) By any other law made by state legislature;
- d) By notification issued or order made by the appropriate government.

Such authority also includes the following:

- a) Anybody owned, controlled or substantially financed directly or indirectly by funds provided by the appropriate government.
- b) Any non-government organization substantially financed, directly or indirectly by funds provided by the appropriate government.

5) Record: - (Section 2(i)) Record includes the following:

- a) Any document, manuscript and file.
- b) Any microfilm, microfiche and facsimile copy of a document.
- c) Any reproduction of image or images embodied in such microfilm (whether enlarged or not).
- d) Any other material produced by a computer or any other device.

6) Right to information:- (Section 2(j)) Right to information means the right to information accessible under the Right to Information act, 2005 which is held by or under the control of any public authority and includes the following:-

- a) Right to inspection of work, document, records.
- b) Right to taking notes, extracts or certified copies of documents or records.
- c) Right to taking certified samples of material.
- d) Right to obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

7) Third party: - (Section 2(n)) Third party means a person other than citizen making a request for information and includes a public authority.



Designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information

Designate at each sub-divisional level or sub-district level Central Assistant or State Assistant Public Information Officers to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers

– No reason to be given by the person making request for information except those that may be necessary for contacting him. (Section 5)

REQUEST FOR OBTAINING INFORMATION

The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).

information to be provided within 30 days



35 days where request is given to Asst, POI



40 days if interest of third party involve



48 hours where life or liberty is involved



40 days included maximum period + time given to the party to make

DUTIES OF A PIO

1. POI shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing.
2. If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.
3. PIO may seek the assistance of any other officer for the proper discharge of his/her duties. PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Section 8 or Section 9.
4. Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request. Where a request has been rejected, the PIO shall communicate to the requester –
 - (i) the reasons for such rejection,
 - (ii) the period within which an appeal against such rejection may be preferred, and
 - (iii) the particulars of the Appellate Authority. PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to the safety or preservation of the record in question.
 - (iv) If allowing partial access, the PIO shall give a notice to the applicant, informing:
 - that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;
 - the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;
 - the name and designation of the person giving the decision;

- the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and
- his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided. If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request.

EXEMPTION FROM DISCLOSURE

As provided in section 8 of the Right to Information Act, 2005, there shall be no obligation to give the following information to any citizen:

- a) Information, disclosure of which prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign state or lead to incitement of an offence.
- b) Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court.
- c) Information, the disclosure of which would cause a breach of privilege of Parliament or the state legislature.
- d) Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.
- e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.
- f) Information received in confidence from foreign government.
- g) Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes.
- h) Information, which would impede the process of investigation or apprehension or prosecution of offenders.

i) Cabinet papers including records of deliberations of the council of ministers, secretaries and other officers.

j) Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless central public information officer or state public information officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed. Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

Rejection of Request

The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved. (Section 9)

PARTIAL DISCLOSURE ALLOWED

Under Section 10 of the RTI Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided. As per Section 10 of the Act if the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure, in that event access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can be reasonably severed from any part that contains exempt information.

INFORMATION COMMISSIONS

The Act envisages constitution of Central Information Commission and the State information Commissions.

Central Information Commission

The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of the Chief Information Commissioner and Central Information Commissioners not exceeding 10. These shall be appointed by the President of India on the recommendations of a committee consisting of Prime Minister who is the Chairman of the Committee; the leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister.

The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory. He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

The general superintendence, direction and management of the affairs of the Commission vests in the Chief Information Commissioner who shall be assisted by the Information Commissioners. Commission shall have its Headquarters in Delhi. Other offices may be established in other parts of the country with the approval of the Central Government. Commission will exercise its powers without being subjected to directions by any other authority. (Section 12)

Term of office and conditions of service of Central Information Commission

(1) The Chief Information Commissioner shall hold office for such term as may be prescribed by the Central Government and shall not be eligible for reappointment: Provided that no Chief Information Commissioner shall hold office as such after he has attained the age of sixty-five years.

(2) Every Information Commissioner shall hold office for such term as may be prescribed by the Central Government or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such Information Commissioner:

Provided that every Information Commissioner shall, on vacating his office under this sub-section be eligible for appointment as the Chief Information Commissioner in the manner specified in section 12:

Provided further that where the Information Commissioner is appointed as the Chief Information Commissioner, his term of office shall not be more than five years in aggregate as the Information Commissioner and the Chief Information Commissioner.

(3) The Chief Information Commissioner or an Information Commissioner shall before he enters upon his office make and subscribe before the President or some other person appointed by him in that behalf, an oath or affirmation according to the form set out for the purpose in the First Schedule.

(4) The Chief Information Commissioner or an Information Commissioner may, at any time, by writing under his hand addressed to the President, resign from his office: Provided that the Chief Information Commissioner or an Information Commissioner may be removed in the manner specified under section 14.

(5) The salaries and allowances payable to and other terms and conditions of service of the Chief Information Commissioner and the Information Commissioners shall be such as may be prescribed by the Central Government: Provided that the salaries, allowances and other conditions of service of the Chief Information Commissioner or the Information Commissioners shall not be varied to their disadvantage after their appointment: Provided further that the Chief Information Commissioner and the Information Commissioners appointed before the commencement of the Right to Information (Amendment) Act, 2019 shall continue to be governed by the provisions of this Act and the rules made thereunder as if the Right to Information (Amendment) Act, 2019 had not come into force.

(6) The Central Government shall provide the Chief Information Commissioner and the Information Commissioners with such officers and employees as may be necessary for the efficient performance of their functions under this Act, and the salaries and allowances payable to, and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.

Provided also that the salaries, allowances and other conditions of service of the Chief Information Commissioner and the Information Commissioners shall not be varied to their disadvantage after their appointment.

State Information Commission

The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of one State Chief Information Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC). These shall be appointed by the Governor on the recommendations of a committee consisting of the Chief Minister who is the Chairman of the committee. Other members include the Leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.

Term of office and conditions of service of State Information Commission

(1) The State Chief Information Commissioner shall hold office for such term as may be prescribed by the Central Government and shall not be eligible for reappointment: Provided that no State Chief Information Commissioner shall hold office as such after he has attained the age of sixty-five years.

(2) Every State Information Commissioner shall hold office for such term as may be prescribed by the Central Government or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such State Information Commissioner:

Provided that every State Information Commissioner shall, on vacating his office under this subsection, be eligible for appointment as the State Chief Information Commissioner in the manner specified in section 15(3):

Provided further that where the State Information Commissioner is appointed as the State Chief Information Commissioner, his term of office shall not be more than five years in aggregate as the State Information Commissioner and the State Chief Information Commissioner.

(3) The State Chief Information Commissioner or a State Information Commissioner, shall before he enters upon his office make and subscribe before the Governor or some other person appointed by him in that behalf, an oath or affirmation according to the form set out for the purpose in the First Schedule.

(4) The State Chief Information Commissioner or a State Information Commissioner may, at any time, by writing under his hand addressed to the Governor, resign from his office: Provided that the State Chief Information

Commissioner or a State Information Commissioner may be removed in the manner specified under section 17.

(5) The salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall be such as may be prescribed by the Central Government:

Provided that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment:

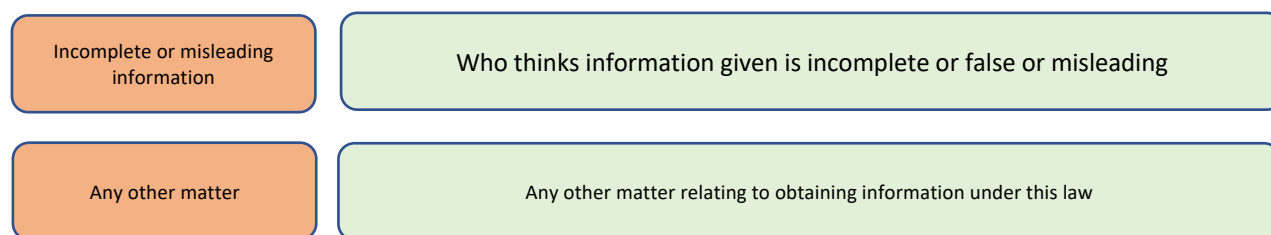
Provided further that the State Chief Information Commissioner and the State Information Commissioners appointed before the commencement of the Right to Information (Amendment) Act, 2019 shall continue to be governed by the provisions of this Act and the rules made there under as if the Right to Information (Amendment) Act, 2019 had not come into force.

(6) The State Government shall provide the State Chief Information Commissioner and the State Information Commissioners with such officers and employees as may be necessary for the efficient performance of their functions under this Act, and the salaries and allowances payable to and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.

POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person—

Non appointment of POI	Who has not been able to submit an information request because a POI has not been appointed
Refusal of information	Who has been refused information that was requested
Breach of privilege of parliament or state legislature	Where disclosure would cause a breach of privilege of parliament or state legislature
No response	Who has received no response to his/her information request within the specified time limit
Unreasonable fees	Who thinks the fees charged are unreasonable

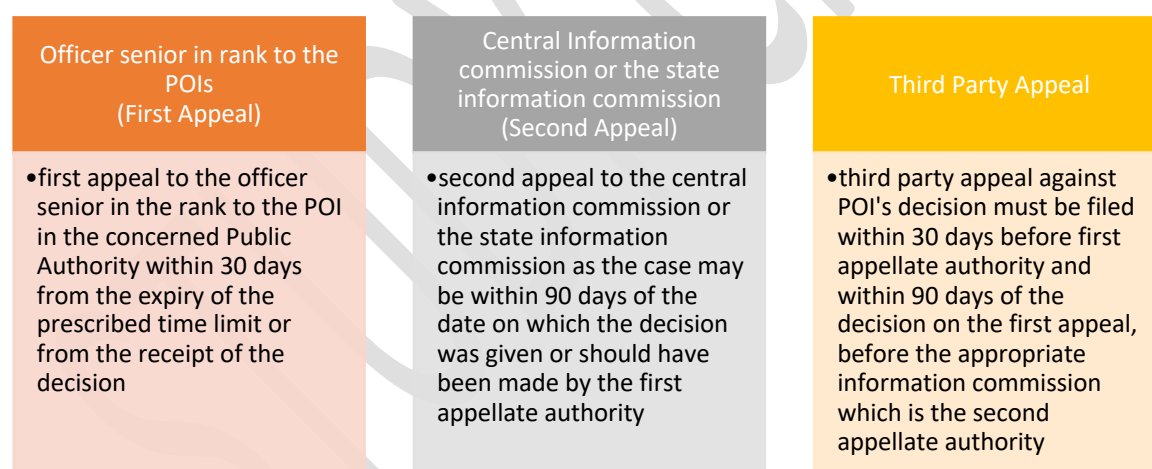


If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds. (Section 18)

APPELLATE AUTHORITIES

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.



Burden of proving that denial of information was justified lies with the PIO. First Appeal shall be disposed of within 30 days from the date of its receipt or within such extended period not exceeding a total of forty-five days from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary. (Section 19)

PENALTIES

Section 20 of the Act imposes stringent penalty on a Public Information Officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs.250 per day, up to a maximum of Rs.25,000/-, for

- Not accepting an application
- Delaying information release without reasonable cause
- Malafidely denying information
- Knowingly giving incomplete, incorrect, misleading information
- Destroying information that has been requested and
- Obstructing furnishing of information in any manner.

The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty. They can also recommend disciplinary action for violation of the law against the PIO for persistently failing to provide information without any reasonable cause within the specified period.

JURISDICTION OF COURTS

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

Role of Central/State Governments

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:

develop and organise educational programmes to advance the understanding of the public in the particular of disadvantaged communities as to how to exercise the rights contemplated under the act

encourage public authorities to participate in the development and organisation of programmes referred to in clause(A) and to understand such programmes themselves

promote timely and effective dissemination of accurate information by public authorities about their activities

train central public information officers or state public information officers, as the case may be, of public authorities and produce relevant training materials for use by the public authorities themselves

CHAP 15 : Law relating to Information Technology

INTRODUCTION :

“Information technology”, most commonly termed as IT is the use of computers or computer system to create, process, store, retrieve, and exchange all kinds of data and information. The term IT is typically used within the context of business operations as opposed to personal or entertainment technologies. An information technology system (IT system) is a communications system, or, more specifically speaking, a computer system — including all hardware, software, and peripheral equipment — operated by a limited group of IT users .

With the changing needs and requirement of the information technology and communication, the Information Technology Act 2000 has been substantially amended through the Information Technology (Amendment) Act 2008 which was passed by the Indian Parliament on December 24, 2008 and received the Presidential assent on February 5, 2009. The Amendment Act came into force on October 27, 2009.

The Information Technology Act, 2000, was enacted to make, in the main, three kinds of provisions, as under

It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, usually referred to, as “electronic Commerce”.

It facilitates the electronic filing of documents with the Government agencies, (and also with the publication of rules etc., in the electronic form).

It amends the, Indian Penal Code, the Indian Evidence Act, 1872, the Bankers’ Book Evidence Act, 1891, and the Reserve Bank of India Act, 1934, so as to bring in electronic documentation within the purview of the respective enactments.

DOCUMENTS OR TRANSACTIONS TO WHICH THE ACT SHALL NOT APPLY

A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.

A power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882.

A trust as defined in section 3 of the Indian Trust Act, 1882.

4. A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.

Any contract for the sale or conveyance of immovable property or any interest in such property

IMPORTANT DEFINITIONS:

“Addressee” means a person who is intended by the originator to receive the electronic record, but does not include any intermediary. [Section 2(1)(b)]

“Adjudicating Officer” means an adjudicating officer appointed under sub-section (1) of section 46.

“Appellate Tribunal” means the Appellate Tribunal referred to in sub-section (1) of section 48. [Section 2(1) (da)]

“Asymmetric crypto system” means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature. [Section 2(1)(f)]

“Computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions, by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. [Section 2(1)(i)]

“Computer network” means the interconnection of one or more computers through - (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained. [Section 2(1)(j)]

“Computer system” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions. [Section 2(1)(l)]

“Digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3. [Section 2(1)(p)]

“Information” includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche. [Section 2(1)(v)]

“Intermediary” with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service

providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes. [Section 2(1) (w)]

“Key pair” in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key. [Section 2(1) (x)]

“Originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary. [Section 2(1)(za)]

“Private Key” means the key of a key pair, used to create a digital signature. [Section 2(1)(zc)]

“Public Key” means the key of a key pair, used to verify a digital signature and listed in the Digital Signature Certificate. [Section 2(1)(zd)]

“Secure system” means computer hardware, software, and procedure that— (a) are reasonably secure from unauthorised access and misuse; (b) provide a reasonable level of reliability and correct operation; (c) are reasonably suited to performing the intended functions; and (d) adhere to generally accepted security procedures.

Digital Signature and Electronic Signature

Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognised as a valid method of authentication. The authentication is to be effected by the use of “asymmetric crypto system and hash function”, which envelop and transform electronic record into another electronic record. [Sections 3(1), 3(2)]

Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning “key pair”. Section 3A deals with electronic signature. Section 3A(1) provides that notwithstanding anything contained in section 3(1), but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which—

- (a) is considered reliable;
- (b) may be specified in the Second Schedule.

Example
Physical documents are signed manually, similarly, electronic documents, for example e-forms are required to be signed digitally using a Digital Signature Certificate.
Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning “key pair”.

For the purposes of above any electronic signature or electronic authentication technique shall be considered reliable if—

the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or, as the case may be, the authenticator and to no other person

the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person

any alteration to the electronic signature made after affixing such signature is detectable;

any alteration to the information made after its authentication by electronic signature is detectable

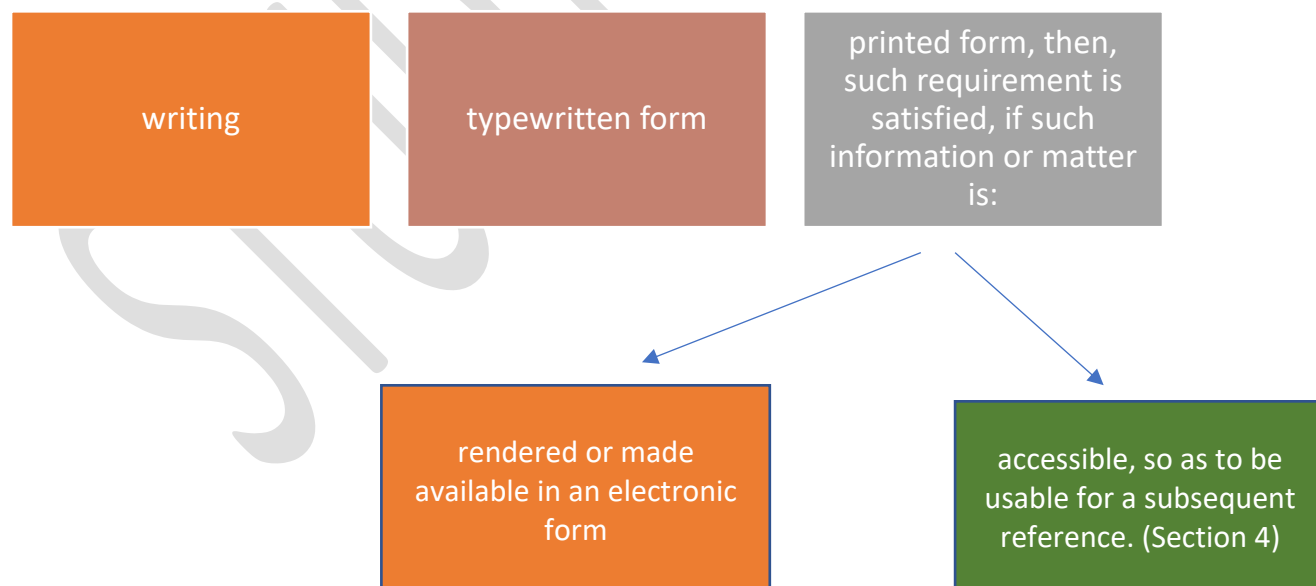
it fulfils such other conditions which may be prescribed. Central Government may prescribe the procedure for the purpose of ascertaining whether electronic signature is that of the person by whom it is purported to have been affixed or authenticated.

Difference between Electronic Signature & Digital Signature

Basis of Distinction	Electronic Signature	Digital Signature
Meaning	An electronic signature is a digital form of a web link signature that is legally binding and secure	Digital Signature is a secured signature that works with an electronic signature and relies on public key.

Purpose	It is used for verifying a document.	It is used for securing a document.
Validation	The validation of electronic signatures is not performed by any trusted certificate authorities or trust service providers.	While the validation of digital signature is performed by trusted certificate authorities or trust service providers.
Security	It is vulnerable to tampering as there are fewer security features in electronic signatures.	While it is highly secure as it comprised of more security features.
Verification	Electronic signatures cannot be verified.	A digital signature can be verified.
Types	Verbal, electronic ticks, or scanned signatures are the common types of e-signatures.	Types of digital signatures include Adobe and Microsoft.
Utility I	It is simple to use, but it has a lesser level of evidential value.	It is generally preferred because of more authenticity.

ELECTRONIC GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)



It may be pointed out that “information”, as defined in Section 2(1) (v) of the Act, includes data, text, images, sound, voice, codes, computer programmes, software and data-bases or micro-film or computer-generated “micro-fiche”.

Private transactions

Thus, Section 4 of the Information Technology Act, practically equates electronic record with a manual or typed or printed record. Section 5 deals with legal recognition of electronic signatures. It states that where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.

It may be noted that “signed”, with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression “signature” shall be construed accordingly.

Public records

Above provisions are primarily intended for private transactions. The Act then proceeds to bring in the regime of electronic records and electronic signature in public records, by making an analogous provision which grants recognition to electronic records and electronic record signatures, in cases where any law provides for

- (a) the filing of any form, application or any other document with a Governmental office or agency
- (b) the grant of any licence, permit etc.
- (c) the receipt or payment of money in a particular manner. (Section 6)

Delivery of services by service provider

According to Section 6A the appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorise, by order, any service provider to set up, maintain and upgrade the computerised facilities and perform such other services as it may specify, by notification in the Official Gazette.

It may be noted that service provider so authorised includes any individual, private agency, private company, partnership firm, sole proprietor firm or any such other body or agency which has been granted permission by the appropriate Government to offer services through electronic means in accordance with the policy governing such service sector.

RETENTION OF INFORMATION

The Act also seeks to permit the retention of information in electronic form, where any law provides that certain documents, records or information shall be retained for any specific period. Certain conditions as to accessibility, format etc. are also laid down. (Section 7)

AUDIT OF DOCUMENTS MAINTAINED IN ELECTRONIC FORM

Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in the electronic form. (Section 7A)

PUBLICATION OF SUBORDINATE LEGISLATION IN ELECTRONIC GAZETTE

Subordinate legislation is also authorised, by the Act, to be published in the Official Gazette or the electronic Gazette, and the date of its first publication in either of the two Gazette shall be deemed to be the date of publication. (Section 8)

But the provisions summarised above shall not confer any right upon any person to insist, that any Government agency shall accept, issue etc. any document in electronic form or effect any monetary transaction in electronic form. (Section 9)

VALIDITY OF CONTRACTS FORMED THROUGH ELECTRONIC MEANS

The 2008 amendment to the IT Act introduced Sec 10A which provides for a greater acceptance to the electronic contract, establishing without question its

validity in the eyes of the law. As more and more businesses and organizations are realizing the effectiveness and efficiency gained by e-commerce, electronic contracts, and e-signatures, we see an increase in legislation supporting it. As per section 10A of the Act, where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

ATTRIBUTION AND DISPATCH OF ELECTRONIC RECORDS

Since, in an electronic record, the maker remains behind the curtain, it was considered desirable to make a provision for “attribution” of the record. An electronic record is attributed to the “originator”.

[Defined in Section 2(1)(za)] Broadly, the “originator” is the person at whose instance it was sent in the following cases –

(a) if it was sent by the originator himself; or (b) if it was sent by a person authorised to act on behalf of the originator in respect of that electronic record; or (c) if it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

if it was sent by the originator himself

if it was sent by a person authorised to act on behalf of the originator in respect of that electronic record

if it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

Regarding acknowledgement of receipt of electronic records, the Act provides that where there is no agreement that the acknowledgment be given in a particular form etc. then the acknowledgement may be given by:

any communication by the addressee (automated or otherwise)

any conduct of the addressee which is sufficient to indicate to the originator that the electronic record has been received. [Section 12(1)]

Special provisions have been made for cases where the originator has stipulated for receipt of acknowledgment, [Section 12 (b)] or where the

acknowledgement is not received by the originator in time. [Section 12(2), 12(3)]

TIME AND PLACE OF DISPATCH ETC.

After these provisions, there follows a provision which is of considerable significance for the law of contracts. The date of offer and the date of acceptance are crucial, in determining whether and which contract has come into existence. The two terminal points - despatch and receipt, are dealt with, in detail. Subject to agreement between the parties, the dispatch of an electronic record occurs, when it enters a "computer resource" outside the control of the originator. [Section 13 (1)]

"Computer resource", as defined in Section 2 (k), means a computer, computer system, computer network, data, computer database or software.

Time of receipt

As regards the time of receipt of electronic records, two situations are dealt with, separately. Subject to agreement, if the addressee has designated a computer resource for receipt, then receipt occurs when the electronic record enters the designated resource. However, if the record is sent to a computer resource of the addressee which is not the designated resource, then receipt occurs at the time when the electronic record is retrieved by the addressee. [Section 13(2)(a)]

SECURE ELECTRONIC RECORDS AND SIGNATURES

The Central Government may prescribe the security procedures and practices for the purposes of sections 14 dealing with secure electronic records and 15 dealing with secure electronic signature.

While prescribing such security procedures and practices, the Central Government shall have regard to the commercial circumstances, nature of transactions and such other related factors as it may consider appropriate.

When the procedure has been applied to an electronic record at a specific point of time, then such record is deemed to be a secure electronic record, from such point of time to the time of verification. (Section 14)

An electronic signature shall be deemed to be a secure electronic signature, if—

- (i) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and
- (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed. (Section 15)

CERTIFYING AUTHORITIES

The Act contains detailed provisions as to “Certifying Authorities” (Sections 17-34). A Certifying Authority is expected to reliably identify persons applying for “signature key certificates”, reliably verify their legal capacity and confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate. To regulate the Certifying Authorities, there is a Controller of Certifying Authorities. (Section 17) Obligations of Certifying Authorities are also set out, in the Act. (Sections 30-34)

The Controller of Certifying Authorities (CCA) has been appointed by the Central Government under section 17 of the Information Technology Act, 2000. It aims at promoting the growth of E-Commerce and E- Governance through the wide use of digital signatures.

The CCA certifies the public keys of Certifying Authorities (CAs) using its own private key, which enables users in the cyberspace to verify that a given certificate is issued by a licensed CA. For this purpose it operates, the Root Certifying Authority of India (RCAI). The CCA also maintains the Repository of Digital Certificates, which contains all the certificates issued to the CAs in the country

ELECTRONIC SIGNATURE CERTIFICATES

Sections 35-39 of the Act deal with Electronic Signature Certificates. As per section 35 of the Act, Certifying authority to issue electronic signature Certificate. Followings are the procedure of obtaining electronic signature Certificate:

- ✚ Any person may make an application in prescribed form to the Certifying Authority for the issue of electronic signature Certificate in such form as may be prescribed by the Central Government.
- ✚ Every such application shall be accompanied by prescribed fees.
- ✚ Every such application shall be accompanied by a certification practice statement or where there is no such statement, a statement containing such particulars, as may be specified by regulations.
- ✚ On receipt of an application, the Certifying Authority may, after consideration of the certification practice statement or the other statement and after making such enquiries as it may deem fit, grant the electronic signature Certificate or for reasons to be recorded in writing, reject the application.

It may be noted that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection.

Suspension of Digital Signature Certificate (DSC)

The Certifying Authority which has issued a Digital Signature Certificate may suspend such Digital Signature Certificate,—

(a) on receipt of a request to that effect from—

- (i) the subscriber listed in the Digital Signature Certificate; or
- (ii) any person duly authorised to act on behalf of that subscriber;

(b) if it is of opinion that the Digital Signature Certificate should be suspended in public interest.

A Digital Signature Certificate should not be suspended for a period exceeding fifteen days unless the subscriber has been given an opportunity of being heard in the matter.

On suspension of a Digital Signature Certificate, the Certifying Authority shall communicate the same to the subscriber.

Revocation of Digital Signature Certificate (DSC)

A Certifying Authority may revoke a Digital Signature Certificate issued by it in the following circumstances:

- ❖ where the subscriber or any other person authorised by him makes a request to that effect; or
- ❖ upon the death of the subscriber; or
- ❖ upon the dissolution of the firm or winding up of the company where the subscriber is a firm or a company.

Further, a Certifying Authority may revoke a Digital Signature Certificate which has been issued by it at any time, if it is of opinion that

- a material fact represented in the Digital Signature Certificate is false or has been concealed;
- a requirement for issuance of the Digital Signature Certificate was not satisfied;
- the Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability;
- the subscriber has been declared insolvent or dead or where a subscriber is a firm or a company, which has been dissolved, wound-up or otherwise ceased to exist.

However, a Digital Signature Certificate shall not be revoked unless the subscriber has been given an opportunity of being heard in the matter. On revocation of a Digital Signature Certificate, the Certifying Authority shall communicate the same to the subscriber.

Control of Private Key

Every subscriber shall exercise reasonable care to retain control of the private key corresponding to the public key listed in his Digital Signature Certificate and take all steps to prevent its disclosure. If the private key corresponding to the public key listed in the Digital Signature Certificate has been compromised, then, the subscriber shall communicate the same without any delay to the Certifying Authority in such manner as may be specified by the regulations. The subscriber is liable till he has informed the Certifying Authority that the private key has been compromised.

PENALTIES AND ADJUDICATIONS

The Act contemplates a dual scheme in regard to wrongful acts concerning computers etc. Certain acts are vested with (so called) "penalties", which are however, adjudicated, not before courts, but before adjudication officers. (Sections 43-47)

In fact, however, though the heading of Section 43 speaks of “penalty and compensation for damage to computer, computer system”.

Section 43 provides that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network,—

- ✚ accesses or secures access to such computer, computer system or computer network or computer resource;
- ✚ downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
- ✚ introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
- ✚ damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
- ✚ disrupts or causes disruption of any computer, computer system or computer network; (f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
- ✚ provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
- ✚ charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network;
- ✚ destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
- ✚ steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

he shall be liable to pay damages by way of compensation to the person so affected.

For the purposes of Section 43,–

(i) “Computer contaminant” means any set of computer instructions that are designed–

(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or

(b) by any means to usurp the normal operation of the computer, computer system, or computer network.

(ii) “computer data-base” means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;

(iii) “Computer virus” means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;

(iv) “Damage” means to destroy, alter, delete, add, modify or rearrange any computer resource by any means;

(v) “Computer source code” means the listing of programme, computer commands, design and layout and programme analysis of computer resource in any form.

COMPENSATION FOR FAILURE TO PROTECT DATA

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.(Section 43A)

“body corporate” means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

“reasonable security practices and procedures” means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;

“sensitive personal data or information” means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit

Penalty for failure to furnish information, return, etc . (Section 45)

If any person who is required under this Act or any rules or regulations made thereunder to—

furnish any document, return or report to the Controller or the Certifying Authority fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure;

maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

file any return or furnish any information, books or other documents within the time specified therefor in the regulations fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;

Residuary Penalty (Section 46)

Whoever contravenes any rules or regulations made under Information Technology Act, for the contravention of which no penalty has been separately provided, shall be liable to pay a compensation not exceeding twentyfive thousand rupees to the person affected by such contravention or a penalty not exceeding twenty-five thousand rupees.

Adjudicating officer

An adjudication officer is to be appointed by the Central Government for adjudging whether any person has committed a contravention of the Act or of any rule, regulation, direction or order issued under the Act. He may impose penalty or award compensation in accordance with the provisions of the relevant section (Section 46).

The Act takes-care to set out the factors to be taken into account by the Adjudicating officer, in adjudging the quantum of compensation under this Chapter. He has to have due regard to the following factors:

- the amount of gain of unfair advantage (wherever quantifiable), made as a result of the default;
- the amount of loss caused to any person as a result of the default; and
- the repetitive nature of the default.

However, the adjudicating officer may exercise jurisdiction to adjudicate matters in which the claim for injury or damage does not exceed rupees five crore. The jurisdiction in respect of the claim for injury or damage exceeding rupees five crores is vested with the competent court

OFFENCES**Tampering with computer source documents**

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable

with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

It may be noted that “computer source code” means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.(Section 65)

Computer related offences

If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both. (Section 66)

The offences listed in the Act are the following

- Dishonestly receiving stolen computer resource or communication device
- Identity theft
- Cheating by personation by using computer resource
- Violation of privacy
- terrorism
- Publishing or transmitting of material containing sexually explicit act, etc., in electronic form
- Publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form
- Misrepresentation
- Breach of confidentiality and privacy
- Disclosure of information in breach of lawful contract
- Publishing electronic signature Certificate false in certain particulars
- Publication for fraudulent purpose

Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

Data privacy and protection in today's world has become a matter of Individual rights. The right to privacy is recognized as a fundamental right under Article 21 of the Indian constitution which was held in the historic verdict by the Supreme Court in the case of Justice KS Puttaswamy v. Union of India. India's digital transformation requires the law to transform as well. Information Technology Act, 2000 ('the IT Act') and Information Technology (Reasonable

security practices and procedures and sensitive personal data or information) Rules, 2011, commonly known as SPDI Rules, is one of the key legislations in this area.

Under Section 87(2) read with Section 43 – A of the IT Act, “SPDI Rules” were issued on 13th of April 2011 which govern the Sensitive Personal Data or information and apply to body corporate or any person located in India.

The rules define sensitive personal data under the Rule 3 that the following types of data or information shall be considered as personal and sensitive:

-  Passwords,
-  Bank Account details,
-  Credit/debit card details,
-  Present and past health records,
-  Sexual orientation,
-  Biometric data

1. Privacy Policy

Rule 4 requires a body corporate to provide a privacy policy on their website, which is easily accessible, provides for the type and purpose of personal, sensitive personal information collected and used, and Reasonable security practices and procedures.

2. Consent

Rule 5 requires that prior to the collection of sensitive personal data, the body corporate must obtain consent, either in writing or through fax regarding the purpose of usage before collection of such information.

3. Collection Limitation

Rule 5 (2) requires that a body corporate should only collect sensitive personal data if it is connected to a lawful purpose and is considered necessary for that purpose.

4. Notice

Rule 5(3) requires that while collecting information directly from an individual, the body corporate must provide the following information:

The fact that information is being collected

The purpose for which the information is being collected

The intended recipients of the information

The name and address of the agency that is collecting the information

The name and address of the agency that will retain the information.

5. Retention Limitation

Rule 5(4) requires that body corporate must retain sensitive personal data only for as long as it takes to fulfil the stated purpose or otherwise required under law.

6. Purpose Limitation

Rule 5(5) requires that information must be used for the purpose that it was collected for.

7. Right to Access and Correct:

Rule 5(6) requires a body corporate to provide individuals with the ability to review the information they have provided and access and correct their personal or sensitive personal information.

8. Right to 'Opt Out' and Withdraw Consent

Rule 5(7) requires that the individual must be provided with the option of 'opting out' of providing data or information sought by the body corporate. Also, they must have the right to withdraw consent at any point of time.

9. Grievance Officer

Rule 5(9) requires that body corporate must designate a grievance officer for redressal of grievances, details of which must be posted on the body corporate's website and grievances must be addressed within a month of receipt.

10. Disclosure with Consent, Prohibition on Publishing and Further Disclosure

Rule 6 requires that body corporate must have consent before disclosing sensitive personal data to any third person or party, except in the case with Government agencies for the purpose of verification of identity, prevention, detection, investigation, on receipt of a written request. Also, the body corporate or any person on its behalf shall not publish the sensitive personal information and the third party receiving the sensitive personal information from body corporate or any person on its behalf shall not disclose it further.

11. Requirements for Transfer of Sensitive Personal Data

Rule 7 requires that body corporate may transfer sensitive personal data into another jurisdiction only if the country ensures the same level of protection and may be allowed only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of information or where such person has consented to data transfer.

12. Security of Information

Rule 8 requires that the body corporate must secure information in accordance with the ISO 27001 standard or any other best practices notified by Central Government, which must be audited annually or when the body corporate undertakes a significant up gradation of its process and computer resource.

Developments & Law of Data Protection

A committee led by former Supreme Court Justice BN Srikrishna, constituted in August 2017, submitted the draft Personal Data Protection(PDP) Bill 2018. But, the bill that was designed to protect the privacy of Indians, the Personal Data Protection Bill 2019, was withdrawn by the government with an assurance that a new bill will soon be tabled. On December 11th, 2019, the Ministry of Electronics and Information Technology tabled the PDP Bill 2019 in Lok Sabha. The same day, it was referred to a Joint Parliamentary Committee (JPC), which tabled its report two years later, on December 16, 2021. The bill was withdrawn because the panel suggested 81 amendments and 12 major recommendations. The bill had alarmed big technology companies, who feared it could increase their compliance burden, data storage requirements and restrict cross-border flow of data. As the bill provided large exemptions to government departments. The parliamentary panel also said that non-personal data should be included in the purview of the bill, which originally focused only on individual privacy in tune with the 2017 Supreme Court verdict that held Right to Privacy as a fundamental right. In year 2022, the Central Government has formulated a draft Bill, titled 'The Digital Personal Data Protection Bill, 2022'. The purpose of the Bill is to provide for the procedure for processing of personal data. This Bill will establish the legal framework on protection of personal data. The Bill aims to protect personal data in a manner that recognizes the right of individuals.

CHAP 16 : CONTRACT LAW

Meaning and nature of contract

- ✚ The law relating to contract is governed by the Indian Contract Act, 1872.
- ✚ The Act came into force on the first day of September, 1872.
- ✚ It extends to the whole of India.
- ✚ The Indian Contract Act mostly deals with the general principles and rules governing contracts.
- ✚ The Act is divisible into two parts. The first part (Section 1-75) deals with the general principles of the law of contract, and therefore applies to all contracts irrespective of their nature. The second part (Sections 124-238) deals with certain special kinds of contracts, namely contracts of Indemnity and Guarantee, Bailment, Pledge, and Agency.

What is Contract?

Offer + Acceptance = Promise

Promise + Consideration = Agreement

Agreement + Enforceability = Contract

Offer – Section 2(a) of the Indian Contract Act defines proposal or offer as “when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal”. The person making the proposal or offer is called the proposer or offeror or Promisor.

Acceptance – Section 2(b) of the Contract Act when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise. The person to whom the proposal is made is called the offeree or Promisee.

Consideration - Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise” Consideration is something in return

Agreement – As per Section 2(e) of the Indian Contract Act “every promise and every set of promises, forming the consideration for each other, is an agreement.

Contract - The Indian Contract Act has defined contract in Section 2(h) as “an agreement enforceable by law”. “Every Contract is an ‘Agreement’ But not all Agreements are Contract ”

Types of contract

1. Void contract

Contracts which were valid at the time of creation but subsequently became unenforceable. In other words void contract is a contract which when created was enforceable by law but due to some change of law ceases to be enforceable.

2. Void Agreement

Agreements, which were not supported by law since the time of creation, are known as void agreements. One special thing to be remembered is void agreements are always void-ab-initio.

KEY POINTS

1. These agreements does not create any obligation on the parties
2. These agreements are not punishable
3. These agreements are always void-ab-initio
4. Collateral agreements to void agreement can be valid

EXAMPLE: ‘A’ bets on a horse race with ‘B’ and borrows 5000 from ‘C’ For this purpose. ‘C’ can always recover the money lent whether he knew the purpose of loan or not because his loan agreement was collateral of a void agreement only.

3. Illegal Agreement

An act, which is punishable under the Indian penal court, creates an Illegal agreement. Every illegal agreement is void-ab-initio.

Every illegal agreement is a void agreement but not all void agreements are illegal agreements. Collateral agreement to an illegal agreement is also illegal.

EXAMPLE 'A' enters into an agreement of smuggling with 'B' and borrows 100000 from 'C', 'C' cannot recover the money lent if he knew the illegal purpose.

4. Unenforceable Contracts

Contracts which are valid but becomes unenforceable due to some technical defect/legal defect, They again become enforceable once defect is removed.

EXAMPLE : Bills of exchange not stamped – Unenforceable due to technical defect Once it gets stamped it will again become enforceable.

5. Voidable contracts

The contracts, which can be cancelled by one party to the contract but not by the other party to the contract, are known as voidable contract. The party who can cancel the contract is the aggrieved party. So basically voidable contracts are valid and becomes void only on the option of aggrieved party.

6. Express Contract

Contracts which are entered by usage of words (spoken or written) are known as express contracts.

7. Implied Contracts

Contracts created by the acts of the parties and not with the words these contracts are known as implied contracts.

Rights and Obligations

Where parties have made a binding contract, they have created rights and obligations between themselves. The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for Rs. 10,00,000 to him. In this example, the following rights and obligations have been created:

- (i) A is under an obligation to deliver the car to B.
B has a corresponding right to receive the car.
- (ii) B is under an obligation to pay Rs. 10,00,000 to A.
A has a correlative right to receive Rs. 10,00,000.

Agreements which are not Contracts

Agreements in which there is no intention to create legal relations are not contracts. These are:

(a) Agreements relating to social matters: An agreement between two persons to go together

to the cinema, or for a walk, does not create a legal obligation on their part to abide by it. Similarly, if I promise to take you for a dinner and break that promise, I do not expect to be liable to legal penalties.

(b) Domestic arrangements between husband and wife: In *Balfour v. Balfour* (1919) 2 KB 571, a husband working in Ceylone, had agreed in writing to pay a housekeeping allowance to his wife living in England. On receiving information that she was unfaithful to him, he stopped the allowance. Held, he was entitled to do so. This was a mere domestic arrangement with no intention to create legally binding relations. Therefore, there was no contract.

Essential elements of a valid contract

Section 10 of the Indian Contract Act, 1872 provides that “all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void”.

The essential elements of a valid contract are:

(i) An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement – consensus-ad-idem.

(ii) An intention to create legal relations or an intent to have legal consequences.

(iii) The agreement is supported by a lawful consideration.

(iv) The parties to the contract are legally capable of contracting. (v) Genuine consent between the parties.

(v) The object and consideration of the contract is legal and is not opposed to public policy.

(vi) The terms of the contract are certain.

(vii) The agreement is capable of being performed i.e., it is not impossible of being performed.

Therefore, to form a valid contract there must be (1) an agreement, (2) based on the genuine consent of the parties, (3) supported by a lawful consideration, (4) made for a lawful object, and (5) between the competent parties.

A. Offer or Proposal and Acceptance

One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance. Thus, when one party (the offeror) makes a definite proposal to another party (the offeree) and the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties and a contract comes into being, assuming that all other elements are also present.

Rules Governing Offers

A valid offer must comply with the following rules:

1. An offer must be clear, definite, complete and final. It must not be vague. For example, a promise to pay an increased price for a horse if it proves lucky to promisor, is too vague and is not binding.
2. An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.
3. The communication of an offer may be made by express words-oral or written-or it may be implied by conduct. A offers his car to B for `10,000. It is an express offer. A bus plying on a definite route goes along the street. This is an implied offer on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.
4. The communication of the offer may be general or specific. Where an offer is made to a specific person it is called specific offer and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a general offer and can be accepted by any member of the general public by fulfilling the condition laid down in the offer.

Case :

- ✚ The leading case on the subject is Carlill v. Carbolic Smoke Ball Co. The company offered by advertisement, a reward of `100 to anyone who contacted influenza after using their smoke ball in the specified manner.
- ✚ Mrs. Carlill did use smoke ball in the specified manner, but was attacked by
- ✚ influenza. She claimed the reward and it was held that she could recover the reward as general offer can be accepted by anybody.
- ✚ Since this offer is of a continuing nature, more than one person can accept it and can even claim the reward.

Note :

- ❖ But if the offer of reward is for seeking some information or seeking the restoration of missing thing, then the offer can be accepted by one individual who does it first of all.
- ❖ The condition is that the claimant must have prior knowledge of the reward before doing that act or providing that information.
- ❖ Example: A advertises in the newspapers that he will pay rupees one thousand to anyone who brings to him his lost son. B without knowing of this reward finds A's lost son and restore him to A.
- ❖ In this case since B did not know of the reward, he cannot claim it from A even though he finds A's lost son and brings him to A.

Case :

- ✚ In India also, in the case of HarbhajanLal v. HarcharanLal (AIR 1925 All. 539), the same rule was applied.
- ✚ In this case, a young boy ran away from his fathers home.
- ✚ The father issued a pamphlet offering a reward of `500 to anybody who would bring the boy home.
- ✚ The plaintiff saw the boy at a railway station and sent a telegram to the boys father.
- ✚ It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person who fulfilled the conditions contained in the offer.
- ✚ The plaintiff substantially performed the conditions and was entitled to the reward offered.

An Offer must be Distinguished from

(a) An invitation to treat or an invitation to make an offer: e.g., an auctioneer's request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopkeeper's catalogue of prices are invitations to an offer.

(b) A mere statement of intention: e.g., an announcement of a coming auction sale. Thus, a person who attended the advertised place of auction could not sue for breach of contract if the auction was cancelled (*Harris v. Nickerson* (1873) L.R. 8 QB 286).

(c) A mere communication of information in the course of negotiation: e.g., a statement of the price at which one is prepared to consider negotiating the sale of a piece of land (*Harvey v. Facey* (1893) A.C. 552).

Lapse of Offer

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if—

- (a) it is not accepted within the specified time (if any) or after a reasonable time, if none is specified.
- (b) it is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested;
- (c) the offeree rejects it by distinct refusal to accept it;
- (d) either the offeror or the offeree dies before acceptance;
- (e) the acceptor fails to fulfill a condition precedent to an acceptance.
- (f) the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

Revocation of Offer by the Offeror

An offer may be revoked by the offeror at any time before acceptance.

Like any offer, revocation must be communicated to the offeree, as it does not take effect until it is actually communicated to the offeree.

Before its actual communication, the offeree, may accept the offer and create a binding contract.

The revocation must reach the offeree before he sends out the acceptance.

Acceptance

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer.

Rules Governing Acceptance

- (a) Acceptance may be express i.e. by words spoken or written or implied from the conduct of the parties.
- (b) If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner.
- (c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.
- (d) A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, e.g., where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.
- (e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Mere mental acceptance is not enough.
- (f) Mere silence on the part of the offeree does not amount to acceptance. Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribe the mode of acceptance but not the mode of rejection.
- (g) If the offer is general one no communication of acceptance to the offeror is necessary,
Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer
- (h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked.

An offer becomes irrevocable by acceptance.

An acceptance never precedes an offer. There can be no acceptance of an offer which is not communicated.

Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Thus in *Lalman Shukla v. Gauri Dutt* (1913), where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

Standing Offers

Where a person offers to another to supply specific goods, up to a stated quantity or in any quantity which may be required, at a certain rate, during a fixed period, he makes a standing offer.

Each successive order given, while the offer remains in force, is an acceptance of the standing offer as to the quantity ordered, and creates a separate contract. It does not bind either party unless and until such orders are given.

Where P tendered to supply goods to L upto a certain amount and over a certain period, L's order did not come up to the amount expected and P sued for breach of contract. Held: Each order made was a separate contract and P was bound to fulfill orders made, but there was no obligation on L to make any order.

Tickets

Tickets purchased for entrance into places of amusement, or tickets issued by railways or bus companies, clock-room tickets, and many other contracts set out in printed documents contain numerous terms, of many of which the party receiving the ticket or document is ignorant. If a passenger on a railway train receives a ticket on the face of which is printed

“this ticket is issued subject to the notices, regulations and conditions contained in the current time-tables of the railway”, the regulations and conditions referred to are deemed to be communicated to him and he is bound by them whether or not he has read them. He is bound even if he is illiterate and unable to read them. But it is important that the notice of the conditions is contemporaneous with the making of the contract and not after the contract has been made.

Contracts by Post

Contracts by post are subject to the same rules as others, but because of their importance, these are stated below separately:

(a) An offer by post may be accepted by post, unless the offeror indicates anything to the contrary.

(b) An offer is made only when it actually reaches the offeree and not before, i.e., when the letter containing the offer is delivered to the offeree.

(c) An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted, to offerors correct address; it binds the offeror, but not the acceptor. An acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. The result is that the acceptor can revoke his acceptance before it reaches the offeror.

(d) An offer may be revoked before the letter containing the acceptance is posted. An acceptance can be revoked before it reaches the offeror.

Contracts over the Telephone

Contracts over the telephone are regarded the same in principle as those negotiated by the parties in the actual presence of each other. In both cases an oral offer is made and an oral acceptance is expected. It is important that the acceptance must be audible, heard and understood by the offeror. If during the conversation the telephone lines go “dead” and the offeror does not hear the offerees word of acceptance, there is no contract at the moment. If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete (Kanhaiyalal v Dineshwarchandra)

B. Intention to Create Legal Relations

The second essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them.

C. Consideration

Need for Consideration

Consideration is one of the essential elements of a valid contract. The requirement of consideration stems from the policy of extending the arm of

the law to the enforcement of mutual promises of parties. A mere promise is not enforceable at law. For example, if A promises to make a gift of `500 to B, and subsequently changes his mind, B cannot succeed against A for breach of promise, as B has not given anything in return. It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor.

(i) Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party.

If A rushes to B's help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B's help at B's request, there is good consideration as B did not wish to do the act gratuitously.

(ii) Consideration may move from the promisee or any other person:
In English law, consideration must move from the promisee, so that a stranger to the consideration cannot sue on the contract. A person seeking to enforce a simple contract must prove in court that he himself has given the consideration in return for the promise he is seeking to enforce.
In Indian law, however, consideration may move from the promisee or any other person, so that a stranger to the consideration may maintain a suit.

Case

In *Chinnaya v. Ramaya*, (1882) 4 Mad. 137,
A lady by a deed of gift made over certain property to her daughter directing her to pay an annuity to the donor's brother as had been done by the donor herself before she gifted the property. On the same day, her daughter executed in writing in favour of the donor's brother agreeing to pay the annuity. Afterwards the donee (the daughter) declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. The Court, however, held that the uncle could sue even though no part of the consideration received by his niece moved from him. The consideration from her mother was sufficient consideration.

Privity of Contract

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract. The following illustration explains this point.

In Dunlop Pneumatic Tyre Co. v. Selfridge Ltd. (1915) A.C. 847,

D supplied tyres to a wholesaler X, on condition that any retailer to whom X re-supplied the tyres should promise X, not to sell them to the public below Ds list price. X supplied tyres to S upon this condition, but nevertheless S sold the tyres below the list price. Held: There was a contract between D and X and a contract between X and S. Therefore, D could not obtain damages from S, as D had not given any consideration for Ss promise to X nor was he party to the contract between D and X. Thus, a person who is not a party to a contract cannot sue upon it even though the contract is for his benefit.

A, who is indebted to B, sells his property to C, and C the purchaser of the property, promises to pay off the debt to B. In case C fails to pay B, B has no right to sue C for there is no privity of contract between B and C.

The leading English case on the point is Tweddle v. Atkinson (1861) 1B and Section 393.

In this case, the father of a boy and the father of a girl who was to be married to the boy, agreed that each of them shall pay a sum of money to the boy who was to take up the new responsibilities of married life. After the demise of both the contracting parties, the boy (the husband) sued the executors of his father-in-law upon the agreement between his father-in-law and his father. Held: the suit was not maintainable as the boy was not a party to the contract.

Exception to the doctrine of privity of contract:

Both the Indian law and the English law recognize certain exceptions to the rule that a stranger to a contract cannot sue on the contract. In the following cases, a person who is not a party to a contract can enforce the contract:

(i) A beneficiary under an agreement to create a trust can sue upon the agreement, though not a party to it, for the enforcement of the trust so as to get the trust executed for his benefit. In *Khawaja Muhammad v. Hussaini Begum*, (1910) 32 All. 410, it was held that where a Mohammedan lady sued her father-in-law to recover arrears of allowance payable to her by him under an agreement between him and her own father in consideration of her marriage, she could

enforce the promise in her favour in so far as she was a beneficiary under the agreement to make a settlement in her favour, and she was claiming as beneficiary under such settlement.

(ii) An assignee under an assignment made by the parties, or by the operation of law (e.g. in case of death or insolvency), can sue upon the contract for the enforcement of his rights, title and interest. But a mere nominee (i.e., the person for whose benefit another has insured his own life) cannot sue on the policy because the nominee is not an assignee.

(iii) In cases of family arrangements or settlements between male members of a Hindu family which provide for the maintenance or expenses for marriages of female members, the latter though not parties to the contract, possess an actual beneficial right which place them in the position of beneficiaries under the contract, and can therefore, sue.

(iv) In case of acknowledgement of liability, e.g., where A receives money from B for paying to C, and admits to C the receipt of that amount, then A constitutes himself as the agent of C.

(v) Whenever the promisor is by his own conduct estopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable.

(vi) In cases where a person makes a promise to an individual for the benefit of third party and creates a charge on certain immovable property for the purpose, the third party can enforce the promise though, he is stranger to the contract.

Kinds of Consideration

Consideration may be:

(a) Executory or future which means that it makes the form of promise to be performed in the future, e.g., an engagement to marry someone; or

(b) Executed or present in which it is an act or forbearance made or suffered for a promise. In other words, the act constituting consideration is wholly or completely performed, e.g., if A pays today Rs. 100 to a shopkeeper for goods which are promised to be supplied the next day, A has executed his

consideration but the shopkeeper is giving executory consideration—a promise to be executed the following day. If the price is paid by the buyer and the goods are delivered by the seller at the same time, consideration is executed by both the parties.

(c) Past which means a past act or forbearance, that is to say, an act constituting consideration which took place and is complete (wholly executed) before the promise is made.

Note :

According to English law, a consideration may be executory or executed but never past. The Indian law recognizes all the above three kinds of consideration.

Rules Governing Consideration

(a) Every simple contract must be supported by valuable consideration otherwise it is formally void subject to some exceptions.

(b) Consideration may be an act of abstinence or promise.

(c) There must be mutuality i.e., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable. For example, where A promises to subscribe `5,000 for the repair of a temple, and then refuses to pay, no action can be taken against him.

(d) Consideration must be real, and not vague, indefinite, or illusory, e.g., a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.

(e) Although consideration must have some value, it need not be adequate i.e., a full return for the promise.

(f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime.

When Consideration not Necessary

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding.

1. If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or
2. If it is made to compensate a person who has already done something voluntarily for the promisor,
3. If it is a promise in writing and signed by the person to be charged therewith, or by his agent, to pay a debt barred by the law of limitation.
4. Besides, according to Section 185 of the Indian Contract Act, consideration is not required to create an agency.
5. In the case of gift actually made, no consideration is necessary. There need not be nearness of relation and even if it is, there need not be any natural love and affection between them.

Thus, an agreement without consideration is valid.

Whether Gratuitous Promise can be Enforced

A gratuitous promise to subscribe to a charitable cause cannot be enforced, but if the promisee is put to some detriment as a result of his acting on the faith of the promise and the promisor knew the purpose and also knew that on the faith of the subscription an obligation might be incurred, the promisor would be bound by promise (KedarNath v. Gorie Mohan 64).

It may be noted that it is not necessary that the promisor should benefit by the consideration, it is sufficient if the promisee does some act from which a third person is benefited and he would not have done that act but for the promise of the promisor.

For example, Y requests X for loan, who agrees to give loan to Y if S gives guarantee of repayment of the loan. S gives such a guarantee of repayment by Y. Thereupon X gives loan to Y. Here S will be promisor and X the promisee, but from X's action, benefit is derived by Y and not by S. X would not have given

the loan to Y had S not given the guarantee of repayment of loan. Thus, the benefit conferred on Y by X at the request of S is a sufficient consideration on the part of X as against the promise of S to repay the loan.

Alternatively, it may be said that the detriment which X suffered by giving loan to Y at the request of S is sufficient consideration on the part of X in respect of the promise of S to repay the loan.

Flaws in contract

 **Void Contract**

 **Voidable Contract**

 **Illegal Agreement**

The chief flaws in contract are:

I. Flaw in Capacity – Capacity and Persons

The general rule is that all natural persons have full capacity to make binding contracts. But the Indian Contract Act, 1872 admits an exception in the case of:

- ❖ minors,
- ❖ lunatics, and
- ❖ persons disqualified from contracting by any law to which they are subject.

These persons are not competent to contract.

Minor's Contract

According to the Indian Majority Act, 1875, a minor is a person, male or female, who has not completed the age of 18 years. In case a guardian has been appointed to the minor or where the minor is under the guardianship of the Court of Wards, the person continues to be a minor until he completes his age of 21 years. According to the Indian Contract Act, no person is competent to enter into a contract who is not of the age of majority. It was finally laid down by the Privy Council in the leading case of *Mohori Bibi v.*

Dharmodas Ghose, (1903) 30 Cal. 539, that a minor has no capacity to contract and minors contract is absolutely void. In this case, X, a minor borrowed Rs. 20,000 from Y, a money lender. As a security for the money advanced, X executed a mortgage in Y's favour. When sued by Y, the Court held that the contract by X was void and he cannot be compelled to repay the amount advanced by him. Indian Courts have applied this decision to those cases where the minor has incurred any liability or where the liabilities on both sides are outstanding. In such cases, the minor is not liable. But if the minor has carried out his part of the contract, then, the Courts have held, that he can proceed against the other party. The rationale is to protect minors interest. According to the Transfer of Property Act, a minor cannot transfer property but he can be a transferee (person accepting a transfer). This statutory provision is an illustration of the above principle.

The following points must be kept in mind with respect to minors contract:

- (a) A minor's contract is altogether void in law, and a minor cannot bind himself by a contract. If the minor has obtained any benefit, such as money on a mortgage, he cannot be asked to repay, nor can his mortgaged property be made liable to pay.
- (b) Since the contract is void ab initio, it cannot be ratified by the minor on attaining the age of majority.
- (c) Estoppel is an important principle of the law of evidence. To explain, suppose X makes a statement to Y and intends that the latter should believe and act upon it. Later on, X cannot resile from this statement and make a new one. In other words, X will be estopped from denying his previous statement. But a minor can always plead minority and is not estopped from doing so even where he had produced a loan or entered into some other contract by falsely representing that he was of full age, when in reality he was a minor.
- (d) A minors estate is liable to pay a reasonable price for necessities supplied to him or to anyone whom the minor is bound to support (Section 68 of the Act).
- (e) An agreement by a minor being void, the Court will never direct specific performance of the contract.

(f) A minor can be an agent, but he cannot be a principal nor can he be a partner. He can, however, be admitted to the benefits of a partnership.

(g) Since a minor is never personally liable, he cannot be adjudicated as an insolvent.

(h) An agreement by a parent or guardian entered into on behalf of the minor is binding on him provided it is for his benefit or is for legal necessity. For, the guardian of a minor, may enter into contract for marriage on behalf of the minor, and such a contract would be good in law and an action for its breach would lie, if the contract is for the benefit of the minor (*Rose Fernandez v. Joseph Gonsalves*, 48 Bom. L. R. 673) e.g., if the parties are of the community among whom it is customary for parents to contract marriage for their children. The contract of apprenticeship is also binding. However, it has been held that an agreement for service, entered into by a father on behalf of his daughter who is a minor, is not enforceable at law (*Raj Rani v. PremAdib*, (1948) 51 Bom. L.R. 256).

Lunatics Agreement (Section 2)

(i) A person of unsound mind is a lunatic. That is to say for the purposes of making contract, a person is of unsound mind if at the time when he makes the contract, he is incapable of understanding it and of forming rational judgment as to its effect upon his interests.

(ii) A person of unsound mind cannot enter into a contract. A lunatics agreement is therefore void.

(iii) But if he makes a contract when he is of sound mind, i.e., during lucid intervals, he will be bound by it.

(iv) A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests cannot contract whilst such delirium or state of drunkenness lasts.

(v) A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought by old age or disease also comes within the definition.

(vi) Agreement by persons of unsound mind are void. But for necessities supplied to a lunatic or to any member of his family, the lunatics estate, if any, will be liable.

Persons Disqualified from Entering into Contract

(i) Some statutes disqualify certain persons governed by them, to enter into a contract. For example, Oudh Land Revenue Act provides that where a person in Oudh is declared as a 'disqualified proprietor under the Act, he is incompetent to alienate his property.

(ii) Alien Enemies

A person who is not an Indian citizen is an alien. An alien may be either an alien friend or a foreigner whose sovereign or State is at peace with India, has usually contractual capacity of an Indian citizen. On the declaration of war between his country and India he becomes an alien enemy. A contract with an alien enemy becomes unenforceable on the outbreak of war.

(iii) Foreign Sovereigns and Ambassadors

Foreign sovereigns and accredited representatives of foreign states, i.e., Ambassadors, High Commissioners, enjoy a special privilege in that they cannot be sued in Indian Courts, unless they voluntarily submit to the jurisdiction of the Indian Courts. Foreign Sovereign Governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of the contracts.

(iv) Professional Persons

In England, barristers-at law are prohibited by the etiquette of their profession from suing for their fees. So also are the Fellow and Members of the Royal College of Physicians and Surgeons. But they can sue and be sued for all claims other than their professional fees. In India, there is no such disability and a barrister, who is in the position of an advocate with liberty both to act and plead, has a right to contract and to sue for his fees (*Nihal Chand v. Dilawar Khan*, 1933 All. L.R. 417).

(v) Corporations

A corporation exists only in contemplation of law and has no physical shape or form. The Indian Contract Act does not speak about the capacity of a corporation to enter into a contract. But if properly incorporated, it has a right to enter into a contract. It can sue and can be sued in its own name. There are

some contracts into which a corporation cannot enter without its seal, and others not at all. A company, for instance, cannot contract to marry. Further, its capacity and powers to contract are limited by its charter or memorandum of association. Any contract beyond such power is ultra vires and void.

(vi) Married Women

In India there is no difference between a man and a woman regarding contractual capacity. A woman married or single can enter into contracts in the same ways as a man. She can deal with her property in any manner she likes, provided, of course, she is a major and is of sound mind. Under the English law, before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a husband was responsible for his wife's contracts but since 1935 this liability no longer arises unless the wife is acting as the husband's agent. Now, therefore, even in England a married woman has full contractual capacity, and can sue and be sued in her own name.

II. Mistake (Sections 20 and 21)

The law believes that contracts are made to be performed. The whole structure of business depends on this as the businessmen depend on the validity of contracts. Accordingly, the law says that it will not aid any one to evade consequences on the plea that he was mistaken. On the other hand, the law also realises that mistakes do occur, and that these mistakes are so fundamental that there may be no contract at all. If the law recognises mistake in contract, the mistake will render the contract void.

Kinds of Mistakes

I. Mistake of Law and

II. Mistake of Fact

If there is a mistake of law of the land, the contract is binding because everyone is deemed to have knowledge of law of the land and ignorance of law is no excuse (*ignorantia juris non-excusat*). But mistake of foreign law and mistake of private rights are treated as mistakes of fact and are excusable. The law of a foreign country is to be proved in Indian Courts as ordinary facts. So mistake of foreign law makes the contract void.

Mutual or Unilateral Mistake

Mistake must be mutual or bilateral, i.e., it must be on the part of both parties. A unilateral mistake, i.e., mistake on the part of only one party, is generally of no effect.

Mutual or Common Mistake as to Subject-matter

A contract is void when the parties to it assume that a certain state of things exist which does not actually exist or in their ignorance the contract means one thing to one and another thing to the other, and they contract subject to that assumption or under that ignorance. There is a mistake on the part of both the parties. Such a mistake may relate to the existence of the subject matter, its identity, quantity or quality.

(a) Mistake as to existence of the subject matter: Where both parties believe the subject matter of the contract to be in existence but in fact, it is not in existence at the time of making the contract, there is mistake and the contract is void.

(b) Mistake as to identity of the subject matter: Where the parties are not in agreement to the identity of the subject matter, i.e., one means one thing and the other means another thing, the contract is void; there is no consensus ad idem.

(c) Mistake as to quantity of the subject matter: There may be a mistake as to quantity or extent of the subject matter which will render the contract void even if the mistake was caused by the negligence of a third-party.

(d) Mistake as to quality of the subject-matter or promise: Mistake as to quality raises difficult questions. If the mistake is on the part of both the parties the contract is void. But if the mistake is only on the part of one party difficulty arises.

Unilateral Mistake as to Nature of the Contract

The general rule is that a person who signs an instrument is bound by its terms even if he has not read it. But a person who signs a document under a fundamental mistake as to its nature (not merely as to its contents) may have it avoided provided the mistake was due to either-

(a) the blindness, illiteracy, or senility of the person signing, or

(b) a trick or fraudulent misrepresentation as to the nature of the document. Unilateral Mistake as to the Identity of the Person Contracted With It is a rule of law that if a person intends to contract with A, B cannot give himself any right under it. Hence, when a contract is made in which personalities of the contracting parties are or may be of importance, no other person can interpose and adopt the contract.

For example, where M intends to contract only with A but enters into contract with B believing him to be A, the contract is vitiated by mistake as there is no consensus ad idem.

III. Misrepresentation (Section 18)

The term “misrepresentation” is ordinarily used to connote both “innocent misrepresentation” and “dishonest misrepresentation”. Misrepresentation may, therefore, be either (i) Innocent misrepresentation, or (ii) Wilful misrepresentation with intent to deceive and is called fraud.

Innocent Misrepresentation

If a person makes a representation believing what he says is true he commits innocent misrepresentation.

Thus, any false representation, which is made with an honest belief in its truth is innocent. The effect of innocent misrepresentation is that the party misled by it can avoid the contract, but cannot sue for damages in the normal circumstances.

Damages for Innocent Misrepresentation

Generally the injured party can only avoid the contract and cannot get damages for innocent misrepresentation. But in the following cases, damages are obtainable:

(i) From a promoter or director who makes innocent misrepresentation in a company prospectus inviting the public to subscribe for the shares in the company;

(ii) Against an agent who commits a breach of warranty of authority:

(iii) From a person who (at the Courts discretion) is estopped from denying a statement he has made where he made a positive statement intending that it should be relied upon and the innocent party did rely upon it and thereby suffered damages;

(iv) Negligent representation made by one person to another between whom a confidential relationship, like that of a solicitor and client exists.

IV. Wilful Misrepresentation or Fraud (Section 17)

Fraud is an untrue statement made knowingly or without belief in its truth or recklessly, carelessly, whether it be true or false with the intent to deceive. The chief ingredients of a fraud are:

- ✚ a false representation or assertion;
- ✚ of fact (and not a mere opinion),
- ✚ made with the intention that it should be acted upon,
- ✚ the representation must have actually induced the other party to enter into the contract and so deceived him,
- ✚ the party deceived must thereby be indemnified, for there is no fraud without damages, and
- ✚ the statement must have been made either with the knowledge that it was false or without belief in its truth or recklessly without caring whether it was true or false.

It is immaterial whether the representation takes effect by false statement or with concealment. The party defrauded can avoid the contract and also claim damages.

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless silence is in itself equivalent to speech, or where it is the duty of the person keeping silent to speak as in the cases of contracts *uberrimae fidei*- (contracts requiring utmost good faith).

Contracts Uberrimae Fidei

There are contracts in which the law imposes a special duty to act with the utmost good faith i.e., to disclose all material information. Failure to disclose

such information will render the contract voidable at the option of the other party. Contracts uberrimaefidei are:

(a) Contract of insurance of all kinds: The assured must disclose to the insurer all material facts and whatever he states must be correct and truthful.

(b) Company prospectus: When a company invites the public to subscribe for its shares, it is under statutory obligation to disclose truthfully the various matters set out in the Companies Act. Any person responsible for non-disclosure of any of these matters is liable to damages. Also, the contract to buy shares is voidable where there is a material false statement or non-disclosure in the prospectus.

(c) Contract for the sale of land: The vendor is under a duty to the purchaser to show good title to the land he has contracted to sell.

(d) Contracts of family arrangements: When the members of a family make agreements or arrangements for the settlement of family property, each member of the family must make full disclosure of every material fact within his knowledge.

Difference between Fraud and Innocent Misrepresentation

1. Fraud implies an intent to deceive, which is lacking if it is innocent misrepresentation.
2. In case of misrepresentation and fraudulent silence, the defendant can take a good plea that the plaintiff had the means of discovering the truth with ordinary diligence. This argument is not available if there is fraud (Section 19-exception).
3. In misrepresentation the plaintiff can avoid or rescind the contract. In fraud, the plaintiff can claim damages as well.
4. If there is fraud, it may lead to prosecution for an offence of cheating under the Indian Penal Code.

V. Coercion

Coercion as defined in Section 15 means “the committing or threatening to commit any act forbidden by the Indian Penal Code, or unlawful detaining or threatening to detain, any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement”. Simply stated, the doing of any act forbidden by the Indian Penal Code is coercion even though such an act is done in a place where the Indian Penal Code is not in force. If A at the point of a pistol asks B to execute a promissory note in his favour and B to save his life does so he can avoid this agreement as his consent was not free. Even a threat to third-party, e.g., where A compels B to sign a document threatening to harm C, in case B does not sign would also amount to coercion.

VI. Undue Influence

Under Section 16 of the Indian Contract Act, 1872, a contract is said to be produced by undue influence “where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other”.

The elements of undue influence are

- (i) a dominant position, and
- (ii) the use of it to obtain an unfair advantage.

Sub-section (2) of Section 16 provides that a person is deemed to be in a position to dominate the will of another—

(a) Where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other, e.g., minor and guardian; trustee and beneficiary; solicitor and client. There is, however, no presumption of undue influence in the relation of creditor and debtor, husband and wife (unless the wife is a parda-nishin woman) and landlord and tenant. In these cases the party has to prove that undue influence has been exercised on him, there being no presumption as to existence of undue influence.

(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress e.g., doctor and patient.

Transaction with parda-nishin women

The expression 'parda-nishin denotes complete seclusion. Thus, a woman who goes to a Court and gives evidence, who fixes rents with tenants and collects rents, who communicates when necessary, in matters of business, with men other than members of her own family, could not be regarded as a parda-nishin woman (Ismail Musafee v. Hafiz Boo (1906) 33 Cal. LR 773 and 33 I.A. 86). The principles to be applied to transactions with parda-nishin woman are founded on equity and good conscience and accordingly a person who contracts with parda-nishin woman has to prove that no undue influence was used and that she had free and independent advice, fully understood the contents of the contract and exercised her free will. "The law throws around her a special cloak of protection" (Kali Baksh v. Ram Gopal (1914) L.R. 41 I.A. 23, 28-29, 36 All 81, 89).

Unconscionable transactions:

An unconscionable transaction is one which makes an exorbitant profit of the others distress by a person who is in a dominant position. Merely the fact that the rate of interest is very high in a money lending transaction shall not make it unconscionable. But if the rate of interest is very exorbitant and the Court regards the transaction unconscionable, the burden of proving that no undue influence was exercised lies on the creditor. It has been held that urgent need of money on the part of the borrower does not itself place the lender in a position to dominate his will within the meaning of this Section (Sunder Koerv. Rai Sham Krishen (1907) 34 Cal. 150, C.R. 34 I.A. 9).

VII. Legality of Object

One of the requisites of a valid contract is that the object should be lawful. Section 10 of the Indian Contract Act, 1872, provides, "All agreements are contracts if they are made by free consent of parties competent to contract for a lawful consideration and with a lawful object..." Therefore, it follows that where the consideration or object for which an agreement is made is unlawful, it is not a contract.

Section 23 of the Indian Contract Act, 1872 provides that the consideration or object of an agreement is lawful unless it is

- (i) forbidden by law; or
- (ii) it is of such nature that if permitted it would defeat the provisions of law; or
- (iii) is fraudulent; or
- (iv) involves or implies injury to the person or property of another; or

(v) the Court regards it an immoral or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Void and Illegal Contracts

A void contract is one which is destitute of legal effects altogether. An illegal contract too has no legal effect as between the immediate parties to the contract, but has the further effect of tainting the collateral contracts also with illegality. For instance A borrows from B Rs. 1,000 for lending to C a minor. The contract between A and C is void, but B can nevertheless recover the money from A. On the other hand, if A had borrowed Rs. 1,000 from B to buy a pistol to shoot C, the question whether B can recover the money hinges on whether B was aware of the purpose for which money was borrowed. If B had knowledge of the illegal purpose, he cannot recover. Therefore, it may be said that all illegal agreements are void but all void agreements are not necessarily illegal.

Consequence of Illegal Agreements

- (i) an illegal agreement is entirely void;
- (ii) no action can be brought by a party to an illegal agreement. The maxim is "Ex turpi cause non-oritur action" - from an evil cause, no action arises;
- (iii) money paid or property transferred under an illegal agreement cannot be recovered. The maxim is in parti delicto potior est conditio defendentes- In cases of equal guilt, more powerful is the condition of the defendant;
- (iv) where an agreement consist of two parts, one part legal and other illegal, and the legal parts is separable from the illegal one, then the Court will enforce the legal one. If the legal and the illegal parts cannot be separated the whole agreement is illegal; and
- (v) any agreement which is collateral to an illegal agreement is also tainted with illegality and is treated as being illegal, even though it would have been lawful by itself (Film Pratapchand v. Firm Kotri Re. AIR (1975) S.C. 1223).

Exception to General Rule of no Recovery of Money or Property

In the following cases, a party to an illegal agreement may sue to recover money paid or property transferred:

(a) Where the transfer is not in pari delicto (equally guilty) with the defendant, i.e. the transferee. For example, where A is induced to enter into an illegal agreement by the fraud of B, A may recover the money paid if he did not know that the contract was illegal.

(b) If the plaintiff can frame a cause of action entirely dependent of the contract.

(c) Where a substantial part of the illegal transaction has not been carried out and the plaintiff is truly and genuinely repentant. (Bigos v. Bonstead(1951), All E.R. 92).

Agreements Void as being Opposed to Public Policy

The head public policy covers a wide range of topics. Agreements may offend public policy by tending to the prejudice of the State in times of war, by tending to the abuse of justice or by trying to impose unreasonable and inconvenient restrictions on the free choice of individuals in marriage, or their liberty to exercise lawful trade or calling. The doctrine of public policy is not to be extended beyond the classes of cases already covered by it and no Court can invent a new head of public policy. It has been said by the House of Lords that public policy is always an unsafe and treacherous ground for legal decisions. Even if it is possible for Courts to evolve a new head of public policy, it should be done under extraordinary circumstances giving rise to incontestable harm to the society.

The following agreements are void as being against public policy but they are not illegal:

(a) Agreement in restraint of parental rights: An agreement by which a party deprives himself of the custody of his child is void.

(b) Agreement in restraint of marriage: An agreement not to marry at all or not to marry any particular person or class of persons is void as it is in restraint of marriage.

(c) Marriage brokerage or brokerage Agreements: An agreement to procure marriage for reward is void. Where a purohit (priest) was promised Rs. 200 in consideration of procuring a wife for the defendant, the promise was held void

as opposed to public policy, and the purohit could not recover the promised sum.

(d) Agreements in restraint of personal freedom are void: Where a man agreed with his money lender not to change his residence, or his employment or to part with any of his property or to incur any obligation on credit without the consent of the money lender, it was held that the agreement was void.

(e) Agreement in restraint of trade: An agreement in restraint of trade is one which seeks to restrict a person from freely exercising his trade or profession.

Agreements In Restraint Of Trade Void

This Section is not happily worded and has been criticised by many authors. It appears from the wording that every kind of restraint, whether total or partial falls within the prohibition of this Section. In English law the Courts have held that if a restraint is reasonable, it will be valid. Leading case on this point is *Nordenfelt v. Maxim Nordenfelt Guns Co.*, (1894) A.C. 535. N was an inventor and a manufacturer of guns and ammunition. He sold his world-wide business to M and promised not to manufacture guns anywhere in the world for 25 years. The House of Lords held that the restraint was reasonable as it was no more than is necessary for the protection of the company, the contract was binding. Whether a restraint is reasonable or not depends upon the facts of each case. Our courts are not consistent on the point whether reasonable restraints are permitted or not. Prima facie every restraint of trade is void, but certain exceptions to this general rule are recognised. If a partial and reasonable restraint falls under any of the following exceptions, the contract will be enforceable:

(a) Sale of goodwill: Where the seller of the goodwill of a business undertakes not to compete with the purchaser of the goodwill, the contract is enforceable provided the restraint appears to be reasonable as to territorial limits and the length of time.

(b) Partners agreements: Section 11(2) of the Indian Partnership Act permits contracts between partners to provide that a partner shall not carry on any business other than that of the firm while he is a partner.

(c) Section 36(2) and Section 54 of the Indian Partnership Act provide that a partner may make an agreement with his partners that on ceasing to be a

partner he will not carry on any business similar to that of the firm within specified period or within specified limits. The agreement shall be binding if the restrictions are reasonable.

(d) Trade Combinations: An agreement, the object of which is to regulate business and not to restrain it is valid. Thus, an agreement in the nature of a business combination between traders or manufactures e.g. not to sell their goods below a certain price, to pool profits or output and to divide the same in an agreed proportion does not amount to a restraint of trade and is perfectly valid (*Fraser & Co. v. Laxmi Narain*, (1931) 63 All 316).

(e) Negative stipulations in service agreements: An agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else is not in restraint of lawful profession and is valid.

Wagering Agreements

The literal meaning of the word “wager” is a “bet”. Wagering agreements are nothing but ordinary betting agreements. For example, A and B enter into an agreement that if England's Cricket Team wins the test match, A will pay B Rs. 100 and if it loses B will pay Rs. 100 to A. This is a wagering agreement and nothing can be recovered by winning party under the agreement. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature that is to say, if the event turns out one way A will lose; but if it turns out the other way he will win (*Thacker v. Hardy*, (1878) 4 OBD 685).

Wagering Agreements Void In India except Mumbai, wagering agreements are void. In Mumbai, wagering agreements have been declared illegal by the Avoiding Wagers (Amendment) Act, 1865. Therefore, in Mumbai a wagering agreement being illegal, is void not only between the immediate parties, but taints and renders void all collateral agreements to it. Thus, A bets with B and loses, applies to C for a loan, who pays B in settlement of A's losses. C cannot recover from A because this is money paid “under” or “in respect of” a wagering transaction which is illegal in Mumbai. But in respect of India such a transaction (i.e., betting) being only void, C could recover from A. Of course, if A refused to pay B the amount of the bet that he has lost, B could not sue A anywhere. Again, where an agent bets on behalf of his principal and loses and pays over the money to the winner, he cannot recover the money from his principal, if the transactions took place in Mumbai, but elsewhere he

could recover. But if the agent wins, he must pay the winnings to the principal, as this money was received on behalf of the principal.

Void Agreements

The following types of agreements are void under Indian Contract Act:

- ✓ Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - Section 11;
- ✓ Agreement made under a mistake of fact, material to the agreement on the part of the both the parties - Section 20.
- ✓ An agreement of which the consideration or object is unlawful - Section 23.
- ✓ If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void - Section 24.
- ✓ An agreement made without consideration subject to three exceptions provided to Section 25.
- ✓ An agreement in restraint of marriage - Section 26.
- ✓ An agreement in restraint of trade - Section 27.
- ✓ An agreement in restraint of legal proceedings - Section 28.
- ✓ Agreements, the meaning of which is not certain, or capable of being made certain - Section 29.
- ✓ Agreement by way of wager- Section 30.
- ✓ An agreement to enter into an agreement in the future.
- ✓ An agreement to do an act impossible in itself - Section 56(1)

Restitution

When a contract becomes void, it is not to be performed by either party. But if any party has received any benefit under such a contract from the other party he must restore it or make compensation for it to the other party. A agrees to sell to B after 6 months a certain quantity of gold and receives Rs. `500 as advance. Soon after the agreement, private sales of gold are prohibited by law. The contract becomes void and A must return the sum of Rs. 500 to B.

Contingent Contract (Section 31)

As per Section 31, a contingent contract is a contract to do or not to do something, if some event collateral to such contract, does or does not happen. For example, A contracts to sell B 10 bales of cotton for Rs. 20,000, if the ship

by which they are coming returns safely. This is a contingent contract. Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

Rules regarding contingent contracts

The following rules are contained in Section 32-36:

(a) Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. If the event becomes impossible, the contract becomes void - Section 32.

A contracts to pay B a sum of money when B marries C, C dies without being married to B. The contract becomes void.

(b) Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible and not before – Section 33. A contracts to pay B a certain sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

(c) If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time or otherwise than under further contingencies - Section 34. A agrees to pay B Rs. 1,000 if B marries C. C marries D. The marriage of B to C must now be considered impossible although it is possible that D may die and C may afterwards marry B.

(d) Contracts contingent on the happening of an event within a fixed time become void if, at the expiration of the time, such event has not happened, or if, before the time fixed, such event becomes impossible - Section 35.

A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(e) Contracts contingent upon the non-happening of an event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or before the time fixed has expired, if it becomes certain that such event will not happen - Section 35

A promises to pay B a sum of money if a certain ship does not return within the year. The contract may be enforced if the ship does not return within the year or is burnt within the year.

5. Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement at the time when it is made - Section 36. A agrees to pay Rs. 1,000 to B if two straight lines should enclose a space. The agreement is void.

Quasi Contracts

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even when there is no offer, no acceptance, no consensus ad idem, and in fact, there is neither agreement nor promise. Such cases are not contracts in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts, hence the term quasi- contracts (i.e., resembling a contract).

A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract at all. It is an obligation which the law creates, in the absence of any agreement, when any person is in the possession of other persons money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which in justice and fairness belongs to another.

The following types of quasi-contracts have been dealt within the Indian Contract Act—

- (a) Necessaries supplied to person incapable of contracting or to anyone whom he is illegally bound to support - Section 68.
- (b) Suit for money had and received - Section 69 and 72.
- (c) Quantum Meruit
- (d) Obligations of a finder of goods - Section 71.
- (e) Obligation of person enjoying benefit of a non-gratuitous act - Section 70

Necessaries

Contracts by minors and persons of unsound mind are void. However, Section 68 of the Indian Contract Act provides that their estates are liable to reimburse the trader, who supplies them with necessities of life.

Suit for money had and received

The right to file a suit for the recovery of money may arise

- (a) Where the plaintiff paid money to the defendant
 - (i) under a mistake,
 - (ii) in pursuance of a contract the consideration for which has failed, or
 - (iii) under coercion, oppression, extortion or other such means. A debtor may recover, from a creditor the amount of an over-payment made to him by mistake. The mistake may be mistake of fact or a mistake of law.
- (b) Payment to third-party of money which another is bound to pay.
- (c) Money obtained by defendant from third-parties

Quantum Meruit

The expression “Quantum Meruit” literally means “as much as earned” or reasonable remuneration. It is used where a person claims reasonable remuneration for the services rendered by him when there was no express promise to pay the definite remuneration, Thus, the law implies reasonable compensation for the services rendered by a party if there are circumstances showing that these are to be paid for.

The general rule is that where a party to a contract has not fully performed what the contract demands as a condition of payment, he cannot sue for payment for that which he has done. The contract has to be indivisible and the payment can be demanded only on the completion of the contract.

But where one party who has performed part of his contract is prevented by the other from completing it, he may sue on a quantum meruit, for the value of what he has done. The claim on a quantum meruit arises when one party abandons the contract, or accepts the work done by another under a void contract.

Obligations of finder of lost goods The liability of a finder of goods belonging to someone else is that of a bailee. This means that he must take as much care of the goods as a man of ordinary prudence would take of his own goods of the same kind. So far as the real owner of the goods is concerned, the finder is only a bailee and must not appropriate the goods to his own use.

If the owner is traced, he must return the goods to him.

The finder is entitled to get the reward that may have been offered by the owner and also any expenses he may have incurred in protecting and preserving the property.

Obligation of a person enjoying benefit of non-gratuitous act

Section 70 of the Indian Contract Act provides that where a person lawfully does something for another person or delivers anything to him without any intention of doing so gratuitously and the other person accepts and enjoys the benefit thereof, the latter must compensate the former or restore to him the thing so delivered.

Discharge Or Termination Of Contracts

A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished. Contracts may be discharged or terminated by any of the following modes:

1. Performance of Contracts (Section 37)

Section 37 of the Act provides that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provision of the Indian Contract Act, or any other law. In case of death of the promisor before performance, the representatives of the promisor are bound to perform the promise unless a contrary intention appears from the contract.

Tender of Performance (Section 38)

In case of some contracts, it is sometimes sufficient if the promisor performs his side of the contract. Then, if the performance is rejected, the promisor is discharged from further liability and may sue for the breach of contract if he so wishes. This is called discharge by tender.

Who can demand performance?

Generally speaking, a stranger to contract cannot sue and the person who can demand performance is the party to whom the promise is made. But an assignee of the rights and benefits under a contract may demand performance by the promisor, in the same way as the assignor, (i.e., the promisee) could have demanded.

Effect of refusal of party to perform wholly Section 39 provides that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he had signified by words or conduct his acquiescence in its continuance.

Illustration (a) X, a singer enters into a contract with Y, the manager of a theatre to sing at his theatres two nights in every week during the next two months, and Y engaged to pay her Rs. 100 for each nights performance. On the sixth night X wilfully absents herself from the theatre. Y is at liberty to put an end to the contract.

(b) If in the above illustration, with the assent of Y, X sings on the seventh night, Y is presumed to have signified his acquiescence in the continuance of the contract and cannot put an end to it; but is entitled to compensation for the damages sustained by him through X's failure to sing on the sixth night.

By whom contract must be performed

Under Section 40 of the Act, if it appears from the nature of the case that it was the intention of the parties to a contract that it should be performed by the promisor himself such promise must be performed by the promisor himself. In other cases, the promisor or his representative may employ a competent person to perform it.

Illustration (a) X promises to pay Rs. 1,000 to Y. X may either personally pay the money to Y or cause it to be paid to Y by another. If X dies before making payment, his representatives must perform the promise or employ some proper person to do so.

(b) X promises to paint a picture for Y. X must personally perform the promise.

Devolution of Joint Liabilities

Under Section 42 of the Indian Contract Act, where two or more persons have made a joint promise then, unless a contrary intention appears from the contract all such persons should perform the promise. If any one of them dies, his representatives jointly with the survivor or survivors should perform. After the death of the last survivor, the representatives of all jointly must fulfil the promise. Under Section 43 of the Indian Contract Act when two or more persons made a joint promise, the promisee may, in the absence of an express agreement to the contrary compel any one or more of such joint promisors to perform the whole of the promise. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise unless a contrary intention appears from the contract. If any one of two or more promisors make default in such contribution, the remaining joint promisors should bear the loss arising from such default in equal share. Illustrations (a) X, Y and Z jointly promise to pay Rs. 6,000 to A. A may compel either X or Y or Z to pay the amount. 594 EP-EB&CL (b) In the above example imagine, Z is compelled to pay the whole amount; X is insolvent but his assets are sufficient to pay one-half of his debts. Z is entitled to receive Rs. 1,000 from X's estate and Rs. 2,500 from Y. (c) X, Y and Z make a joint promise to pay 5,000 to A, Z is unable to pay any amount and X is compelled to pay the whole. X is entitled to receive Rs. 2,500 from Y.

Devolution of Joint Rights

A promise may be made to two or more persons. The promisees are called joint promisees. For example, X may give a promise to repay Rs. 1,000 given by Y and Z jointly. In such case, in the absence of a contrary intention, the right to claim, performance rests with Y and Z. If Y dies, Y's representative jointly with Z may, demand performance. If Z also dies, the representatives of Y and Z may demand jointly performance from X. Assignment The promisee may assign rights and benefits of contract and the assignee will be entitled to demand performance by the promisor.

b) Discharge by Mutual Agreement or Consent (Sections 62 and 63)

A contract may be discharged by the agreement of all parties to the contract, or by waiver or release by the party entitled to performance. The methods stipulated under Sections 62 and 63 of the Indian Contract Act for discharging a contract by mutual consent are:

Novation – when a new contract is substituted for existing contract either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

Alteration – change in one or more of the material terms of a contract.

Rescission – by agreement between the parties at any time before it is discharged by performance or in some other way.

Remission – acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made.

Waiver – deliberate abandonment or giving up of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

(c) Discharge by Lapses of Time

The Limitation Act, in certain circumstance, affords a good defence to suits for breach of contract, and in fact terminates the contract by depriving the party of his remedy to law. For example, where a debtor has failed to repay the loan on the stipulated date, the creditor must file the suit against him within three years of the default. If the limitation period of three years expires and he takes no action he will be barred from his remedy and the other party is discharged of his liability to perform.

(d) Discharge by Operation of the Law

Discharge under this head may take place as follows:

By merger: When the parties embody the inferior contract in a superior contract.

By the unauthorised alteration of items of a written document: Where a party to a written contract makes any material alteration without knowledge and consent of the other, the contract can be avoided by the other party.

By insolvency: The Insolvency Act provides for discharge of contracts under particular circumstances. For example, where the Court passes an order discharging the insolvent, this order exonerates or discharges him from liabilities on all debts incurred previous to his adjudication.

(e) Discharge by Impossibility or Frustration (Section 56)

A contract which is entered into to perform something that is clearly impossible is void. For instance, A agrees with B to discover treasure by magic. The agreement is void by virtue of Section 56 para 1 which lays down the principle that an agreement to do an act impossible in itself is void. Sometimes subsequent impossibility (i.e. where the impossibility supervenes after the contract has been made) renders the performance of a contract unlawful and stands discharged; as for example, where a singer contracts to sing and becomes too ill to do so, the contract becomes void. In this connection, para 2 of Section 56 provides that a contract to do an act, which after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. If the impossibility is not obvious and the promisor alone knows of the impossibility or illegally then existing or the promisor might have known as such after using reasonable diligence, such promisor is bound to compensate the promisee for any loss he may suffer through the non-performance of the promise in spite of the agreement being void ab-initio (Section 56, para 3).

(f) Discharge by Supervening Impossibility

A contract will be discharged by subsequent or supervening impossibility in any of the following ways:

- (a) Where the subject-matter of the contract is destroyed without the fault of the parties, the contract is discharged.
- (b) When a contract is entered into on the basis of the continued existence of a certain state of affairs, the contract is discharged if the state of things changes or ceases to exist.
- (c) Where the personal qualifications of a party is the basis of the contract, the contract is discharged by the death or physical disablement of that party.

Cases in which there is no supervening impossibility

In the following cases contracts are not discharged on the ground of supervening impossibility—

(a) Difficulty of performance: The mere fact that performance is more difficult or expensive than the parties anticipated does not discharge the duty to perform.

(b) Commercial impossibilities do not discharge the contract. A contract is not discharged merely because expectation of higher profits is not realised.

(c) Strikes, lockouts and civil disturbance like riots do not terminate contracts unless there is a clause in the contract providing for non-performance in such cases.

(g) Discharge by Breach

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract.

The breach of contract may be

- (i) actual; or
- (ii) anticipatory.

The actual breach may take place either at the time the performance is due, or when actually performing the contract.

Anticipatory breach means a breach before the time for the performance has arrived. This may also take place in two ways – by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it. Anticipatory Breach of Contract may occur, before the time for performance is due. This may happen where one of the parties definitely renounces the contract and shows his intention not to perform it or does some act which makes performance impossible. The other party, on such a breach being committed, has a right of action for damages. He may either sue for breach of contract immediately after repudiation or wait till the actual date when performance is due and then sue for breach. If the promisee adopts the latter course, i.e., waits till the date when performance is due, he keeps the contract alive for the benefit of the promisor as well as for his own. He remains liable under it and enables the promisor not only to complete the contract in spite of previous repudiation, but also to avail himself of any excuse for non-performance which may have come into existence before the time fixed for performance.

Remedies for breach**(i) Remedies for Breach of Contract**

Where a contract is broken, the injured party has several courses of action open to him. The appropriate remedy in any case will depend upon the subject-matter of the contract and the nature of the breach.

- ❖ Rescind the contract and refuse further performance of the contract;
- ❖ Sue for damages;
- ❖ Sue for specific performance;
- ❖ Sue for an injunction to restrain the breach of a negative term; and
- ❖ Sue on quantum meruit

(ii) Damages for Breach of Contract

When a contract has been broken, a party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage, caused to him thereby Liquidated and Un liquidated damages:

Where the contracting parties agree in advance the amount payable in the event of breach, the sum payable is called liquidated damages.

Where the amount of compensation claimed for a breach of contract is left to be assessed by the Court, damages claimed are called unliquidated damages.

Unliquidated Damages

Those are of the following kinds:

(a) general or ordinary damages : These are restricted to pecuniary compensation to put the injured party in the position he would have been had the contract been performed. It is the estimated amount of loss actually incurred.

(b) special damages : Special Damages Special damages are those resulting from a breach of contract under some peculiar circumstances. If at the time of entering into the contract, the party has notice of special circumstances which

makes special loss the likely result of the breach in the ordinary course of things, then upon his-breaking the contract and the special loss following this breach, he will be required to make good the special loss.

(c) exemplary or punitive damages - These damages are awarded to punish the defendant and are not, as a rule, granted in case of breach of contract. In two cases, however, the court may award such damages, viz., (i) breach of promise to marry; and (ii) wrongful dishonour of a customers cheque by the banker. In a breach of promise to marry, the amount of the damages will depend upon the extent of injury to the partys feelings. In the bankers case, the smaller the amount of the cheque dishonoured, larger will be damages as the credit of the customer would be injured in a far greater measure, if a cheque for a small amount is wrongfully dishonoured.

(d) Nominal damages - Nominal damages consist of a small token award, e.g., a rupee of even 25 paise, where there has been an infringement of contractual rights, but no actual loss has been suffered. These damages are awarded to establish the right to decree for breach of contract.

(iii) Specific Performance

It means the actual carrying out by the parties of their contract, and in proper cases the Court will insist upon the parties carrying out this agreement. Where a party fails to perform the contract, the Court may, at its discretion, order the defendant to carry out his undertaking according to the terms of the contract. A decree for specific performance may be granted in addition to or instead of damages.

Specific performance is usually granted in contracts connected with land, e.g., purchase of a particular plot or house, or to take debentures in a company.

Specific performance will not be ordered:

- (a) where monetary compensation is an adequate remedy;
- (b) where the Court cannot supervise the execution of the contract, e.g., a building contract;
- (c) where the contract is for personal service; and
- (d) where one of the parties is a minor.

(iv) Injunction

An injunction, is an order of a Court restraining a person from doing a particular act. It is a mode of securing the specific performance of a negative term of the contract, (i.e., where he is doing something which he promises not to do), the Court may in its discretion issue an order to the defendant restraining him from doing what he promised not to do.

Contract of Indemnity And Guarantee (Sections 124 to 147)

Meaning of Indemnity

1. A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person (Section 124).
For example, A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of 300 rupees. This is a contract of indemnity.
2. The contract of indemnity may be express or implied.
3. The person who promises to indemnify or make good the loss is called the indemnifier and the person whose loss is made good is called the indemnified or the indemnity holder.
4. A contract of insurance is an example of a contract of indemnity according to English Law. In consideration of premium, the insurer promises to make good the loss suffered by the assured on account of the destruction by fire of his property insured against fire.

Rights of Indemnity Holder

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- 1) Right to recover costs of suit: the indemnity holder has the right to recover all the costs which he is compelled to pay in bringing or defending such suit.
- 2) Right to recover damages: the indemnity holder has the right to recover all the damages which he is compelled to pay in any suit in respect of any matter covered by the contract of indemnity

3) Right to recover all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor

Meaning of Contract of Guarantee

- A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default.
- The person who gives the guarantee is called the Surety, the person for whom the guarantee is given is called the Principal Debtor, and the person to whom the guarantee is given is called the Creditor (Section 126).
- A guarantee may be either oral or written, although in the English law, it must be in writing. Illustration A advances a loan of Rs. 5,000 to B and C promises to A that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, A is the creditor and C is the surety or guarantor.
- Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract.

Distinction between Indemnity and Guarantee

A contract of indemnity differs from a contract of guarantee in the following ways:

- (a) In a contract of indemnity there are only two parties: the indemnifier and the indemnified. In a contract of guarantee, there are three parties; the surety, the principal debtor and the creditor.
- (b) In a contract of indemnity, the liability of the indemnifier is primary. In a contract of guarantee, the liability of the surety is secondary. The surety is liable only if the principal debtor makes a default, the primary liability being that of the principal debtor.
- (c) The indemnifier need not necessarily act at the request of the debtor; the surety gives guarantee only at the request of the principal debtor.
- (d) In the case of a guarantee, there is an existing debt or duty, the performance of which is guaranteed by the surety, whereas in the case of indemnity, the possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.

6. The surety, on payment of the debt when the principal debtor has failed to pay is entitled to proceed against the principal debtor in his own right, but the indemnifier cannot sue third-parties in his own name, unless there be assignment. He must sue in the name of the indemnified.

Extent of Surety's Liability

The liability of the surety is co-extensive with that of the principal debtor unless the contract otherwise provides (Section 128). A creditor is not bound to proceed against the principal debtor. He can sue the surety without suing the principal debtor. As soon as the debtor has made default in payment of the debt, the surety is immediately liable. But until default, the creditor cannot call upon the surety to pay. In this sense, the nature of the surety's liability is secondary.

Illustration A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Kinds of Guarantees

A contract of guarantee may be for an existing debt, or for a future debt. It may be a specific guarantee, or it may be a continuing guarantee.

A specific guarantee is given for a single debt and comes to an end when the debt guaranteed has been paid.

A continuing guarantee is one which extends to a series of transactions (Section 129).

The liability of surety in case of a continuing guarantee extends to all the transactions contemplated until the revocation of the guarantee. As for instance, S, in consideration that C will employ P in collecting the rents of C's Zamindari, promises C to be responsible to the amount of Rs. 5,000 for the due collection and payment by P of these rents. This is a continuing guarantee.

Revocation of Continuing Guarantee

A continuing guarantee is revoked in the following circumstances:

(a) By notice of revocation by the surety (Section 130): The notice operates to revoke the surety's liability as regards future transactions. He continues to be liable for transactions entered into prior to the notice (*Offord v. Davies* (1862) 6 L.T.S. 79).

(b) By the death of the surety: The death of the surety operates, in the absence of contract (*Lloyds v. Harper* (188) 16 Ch. D. 290) as a revocation of a continuing guarantee, so far as regards future transactions (Section 131). But for all the transactions made before his death, the surety's estate will be liable.

Rights of Surety

A surety has certain rights against the creditor, (Section 141) the principal debtor (Sections 140 and 145) and the co-securities (Sections 146 and 147).

Those are—

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

(b) Rights against the principal debtor: After discharging the debt, the surety steps into the shoes of the creditor or is subrogated to all the rights of the creditor against the principal debtor. He can then sue the principal debtor for the amount paid by him to the creditor on the debtors default; he becomes a creditor of the principal debtor for what he has paid.

(c) Surety's rights gains co-sureties: When a surety has paid more than his share of debt to the creditor, he has a right of contribution from the co-securities who are equally bound to pay with him.

Discharge of Surety

A surety may be discharged from liability under the following circumstances:

(a) By notice of revocation in case of a continuing guarantee as regards future transaction (Section 130.)

(b) By the death of the surety as regards future transactions, in a continuing guarantee in the absence of a contract to the contrary (Section 131).

(c) Any variation in the terms of the contract between the creditor and the principal debtor, without the consent of the surety, discharges the surety as regards all transactions taking place after the variation (Section 133)

(d) A surety will be discharged if the creditor releases the principal debtor, or acts or makes an omission which results in the discharge of the principal debtor (Section 134). But where the creditor fails to sue the principal debtor within the limitation period, the surety is not discharged.

(e) Where the creditor, without the consent of the surety, makes an arrangement with the principal debtor for composition, or promises to give time or not to sue him, the surety will be discharged (Section 135).

(f) If the creditor does any act which is against the rights of the surety, or omits to do an act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (Section 139).

(g) If the creditor loses or parts with any security which at the time of the contract the debtor had given in favour of the creditor, the surety is discharged to the extent of the value of the security, unless the surety consented to the release of such security by creditor in favour of the debtor. It is immaterial whether the surety was or is aware of such security or not (Section 141).

Contract of bailment and pledge

(a) Bailment

1. A bailment is a transaction whereby one person delivers goods to another person for some purpose, upon a contract that they are, when the purpose is accomplished to be returned or otherwise disposed of according to the directions of the person delivering them (Section 148).

2. The person who delivers the goods is called the bailor and the person to whom they are delivered is called the bailee.

3. Bailment is a voluntary delivery of goods for a temporary purpose on the understanding that they are to be returned in specie in the same or altered form.
4. The ownership of the goods remains with the bailor, the bailee getting only the possession.
5. Delivery of goods may be actual or constructive, e.g., where the key of a godown is handed over to another person, it amounts to delivery of goods in the godown.

Gratuitous Bailment

1. A gratuitous bailment is one in which neither the bailor nor the bailee is entitled to any remuneration.
2. Such a bailment may be for the exclusive benefit of the bailor, e.g., when A leaves his dog with a neighbour to be looked after in A's absence on a holiday. It may again be for exclusive benefit of the bailee, e.g., where you lend your book to a friend of yours for a week.
3. In neither case any charge is made.
4. A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).
5. Under Section 159 the lender of a thing for use may at any time require its return if the loan was gratuitous, even though he lent it for a specified time or purpose. But if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower the amount in which the loss so occasioned exceeds the benefit so derived.

Duties of Bailee

The bailee owes the following duties in respect of the goods bailed to him:

- (a) The bailee must take as much care of the goods bailed to him as a man of ordinary prudence would take under similar circumstances of his own goods of the same bulk, quality and value as the goods bailed (Section 151). If he takes

this much care he will not be liable for any loss, destruction or deterioration of the goods bailed (Section 152).

(b) The bailee is under a duty not to use the goods in an unauthorised manner or for unauthorised purpose (Section 153). If he does so, the bailor can terminate the bailment and claim damages for any loss or damage caused by the unauthorised use (Section 154).

(c) He must keep the goods bailed to him separate from his own goods (Sections 155- 157). If the bailee without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation, and any damages arising from the mixture. If the bailee without the consent of the bailor mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of goods.

d) He must not set up an adverse title to the goods.

(e) It is the duty of the bailee to return the goods without demand on the expiry of the time fixed or when the purpose is accomplished (Section 160). If he fails to return them, he shall be liable for any loss, destruction or deterioration of the goods even without negligence on his part (Section 161).

7. In the absence of any contract to the contrary, the bailee must return to the bailor any increase, or profits which may have accrued from the goods bailed; for example, when A leaves a cow in the custody of B to be taken care of and the cow gets a calf, B is bound to deliver the cow as well as the calf to A (Section 163).

Bailees Particular Lien (Section 170)

Where the goods are bailed for a particular purpose and the bailee in due performance of bailment, expends his skill and labour, he has in the absence of an agreement to the contrary a lien on the goods, i.e., the bailee can retain the goods until his charges in respect of labour and skill used on the goods are paid by the bailor.

Particular and General Lien

Lien is of two kinds: Particular lien and General lien.

A particular lien is one which is available only against that property of which the skill and labour have been exercised. A bailee's lien is a particular lien.

A general lien is a right to detain any property belonging to the other and in the possession of the person trying to exercise the lien in respect of any payment lawfully due to him. Thus, a general lien is the right to retain the property of another for a general balance of accounts but a particular lien is a right to retain only for a charge on account of labour employed or expenses bestowed upon the identical property detained.

Duties of bailor

The bailor has the following duties:

- (a) The bailor must disclose all the known faults in the goods; and if he fails to do that, he will be liable for any damage resulting directly from the faults (Section 150). For example, A delivers to B, a carrier, some explosive in a case, but does not warn B. The case is handled without extraordinary care necessary for such articles and explodes.
- (b) It is the duty of the bailor to pay any extraordinary expenses incurred by the bailee. For example, if a horse is lent for a journey, the expense of feeding the horse would, of course, subject to any special agreement be borne by the bailee. If however the horse becomes ill and expenses have been incurred on its treatment, the bailor shall have to pay these expenses (Section 158).
- (c) The bailor is bound to indemnify the bailee for any cost or costs which the bailee may incur because of the defective title of the bailor of the goods bailed (Section 164).

Termination of bailment

1. Where the bailee wrongfully uses or dispose of the goods bailed, the bailor may determine the bailment (Section 153.)
2. As soon as the period of bailment expires or the object of the bailment has been achieved, the bailment comes to an end, and the bailee must return the goods to the bailor (Section 160).
3. Bailment is terminated when the subject matter of bailment is destroyed or by reason of change in its nature, becomes incapable of use for the purpose of bailment.
4. A gratuitous bailment can be terminated by the bailor at any time, even before the agreed time, subject to the limitation that where termination before the agreed period causes loss in excess of benefit, the bailor must compensate the bailee (Section 159).
5. A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

(b) Pledge

1. Pledge or pawn is a contract whereby an article is deposited with a lender of money or promisee as security for the repayment of a loan or performance of a promise. The bailor or depositor is called the Pawnor and the bailee or deposittee the "Pawnee" (Section 172).
2. Since pledge is a branch of bailment, the pawness is bound to take reasonable care of the goods pledged with him.
3. Any kind of goods, valuables, documents or securities may be pledged. The Government securities, e.g., promissory notes must, however, be pledged by endorsement and delivery.

The following are the essential ingredients of a pledge:

- (i) The property pledged should be delivered to the pawnee.
- (ii) Delivery should be in pursuance of a contract.
- (iii) Delivery should be for the purpose of security.
- (iv) Delivery should be upon a condition to return.

Rights of the Pawnee

(i) No property in goods pawned passes to the pawnee, but the pawnee gets a “special property to retain possession even against the true owner until the payment of the debt, interest on the debt, and any other expense incurred in respect of the possession or for preservation of the goods pledged” (Section 173).

(ii) The pawnee must return the goods to the pawnor on the tender of all that is due to him.

(iii) The pawnee cannot confer a good title upon a bona fide purchaser for value.

(iv) Should the pawnor make a default in payment of the debt or performance of the promise at the stipulated time, the pawnee may-

(a) file a suit for the recovery of the amount due to him while retaining the goods pledged as collateral security; or

(b) sue for the sale of the goods and the realisation of money due to him; or

(c) himself sell the goods pawned, after giving reasonable notice to the pawnor, sue for the deficiency, if any, after the sale. If the sale is made in execution of a decree, the pawnee may buy the goods at the sale. But he cannot sell them to himself in a sale made by himself under

(d) above. If after sale of the goods, there is surplus, the pawnee must pay it to the pawnor (Section 176).

Rights of Pawnor

(i) On default by pawnor to repay on the stipulated date, the pawnee may sell the goods after giving reasonable notice to the pawnor.

(ii) If the pawnee makes an unauthorised sale without giving notice to the pawnor, the pawnor has the following rights—

(a) He can file a suit for redemption of goods by depositing the money treating the sale as if it had never taken place; or

(b) He can ask for damages on the ground of conversion.

Pledge by Non-owners

Ordinarily, the owner of the goods would pledge them to secure a loan but the law permits under certain circumstances a pledge by a person who is not the

owner but is in possession of the goods. Thus, a valid pledge may be created by the following non-owners.

(a) A mercantile agent: Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner of the goods to make the same. But the pledge is valid only if the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not the authority to pledge (Section 178).

(b) Pledge by seller or buyer in possession after sale: A seller, left in possession of goods sold, is no more the owner, but pledge by him will be valid, provided the pawnee acted in good faith and had no notice of the sale of goods to the buyer (Section 30 of The Sale of Goods Act 1930).

(c) Pledge where pawnor having limited interest: When the pawnor is not the owner of the goods but has a limited interest in the goods which he pawns, e.g., he is a mortgagee or he has a lien with respect of these goods, the pledge will be valid to the extent of such interest.

(d) Pledge by co-owner in possession: One of the several co-owners of goods in possession thereof with the assent of the other co-owners may create a valid pledge of the goods.

(e) Pledge by person in possession under a voidable contract: A person may obtain possession under a contract which is voidable at the option of the lawful owner on the ground of misrepresentation, fraud, etc. The person in possession may pledge the goods before the contract is avoided by the other party (Section 178A).

Law Of Agency

An agent is a person employed to do any act for another or represents another in dealings with third persons.

Two parties:

a) Principal – for whom an act is done by the agent

b) Agent

Test of Agency

Where a person has the capacity to create contractual relation between the principal and a third party and it binds the principal by his own acts, there exists a relationship of agency.

Modes Of Creating Agency

a) Express agency: a person may employ other person as his agent by entering into an express agreement with him, the agreement may be either written or oral

b) Implied agency : Implied agency may arise by conduct

i) **Agency by Estoppel:** where P allows third-parties to believe that A is acting as his authorized agent, he will be estopped from denying the agency if such third-parties relying on it make a contract with A even when A had no authority at all.

ii) **Wife as agent:** Where a husband and wife are living together, the wife is presumed to have her husband's authority to pledge his credit for the purchase of necessities of life suitable to their standard of living.

iii) **Agency of Necessity:** a person, who has been entrusted with another's property, may have to incur unauthorized expenses to protect or preserve it. Such an agency is called an agency of necessity. For example, A sent a horse by railway and on its arrival at the destination there was no one to receive it. The railway company, being bound to take reasonable steps to keep the horse alive, was an agent of necessity of A.

iv) **Agency by ratification:** Where a person having no authority purports to act as agent, or a duly appointed agent exceeds his authority; the principal is not bound by the contract supposedly based on his behalf. But the principal may ratify the agent's transaction and so accept liability. In this way an agency by ratification arises. This is also known as ex post facto agency—agency arising after the event.

Classes Of Agents

AGENTS MAY BE SPECIAL OR GENERAL:

Special agent: A special agent is one who is appointed to do a specified act, or to perform a specified function and the act of the agent beyond his authority will not bind the principal

General Agent: A general agent is appointed to do anything within the authority given to him by the principal in all transactions, The third party may assume that such an agent has power to do all that is usual for a general agent to do in the business involved

SUB-AGENT

A person who is appointed by the agent and to whom the principal's work is delegated to known as sub-agent. As between themselves, the relation of sub-agent and original agent is that of agent and the principal. A sub agent is bound by all the duties of the original agent. The sub-agent is not directly responsible to the principal except for fraud and willful wrong.

The sub-agent is responsible to the original agent. The original agent is responsible to the principal for the acts of the sub-agent.

MERCANTILE AGENTS

IT MEANS AN AGENT HAVING AUTHORITY TO :

- ✓ Sell the goods
- ✓ Consign the goods for the purpose of sale
- ✓ Buy the goods
- ✓ Raise money on the security of the goods
- ✓ This definition covers factors, brokers, auctioneers, and commission agents.

FACTOR

A commercial agent employed by a principal to sell merchandise consigned to him for that purpose for and in behalf of the principal, but usually in his own name being entrusted with the possession and control of the goods and being remunerated by a commission, commonly called as 'Factorage'

BROKERS

A broker is a mercantile agent whose ordinary course of business is to make contracts with other parties for the sale and purchase of goods and securities of which he is not entrusted with the possession for a commission called brokerage.

DEL CREDERE AGENT

A del credere agent is a mercantile agent, who in consideration of an extra remuneration guarantees to his principal that the purchasers who buy on credit will pay for the goods they take. In the event of a third party failing to pay, the del credere agent is bound to pay his principal the sum owed by third-party.

AUCTIONEERS

An auctioneer is an agent who sells goods by auction, i.e., to the highest bidder in public competition.

Duties Of The Agent

- ✚ To conduct the business in accordance with the direction given by the principal
- ✚ To work with reasonable diligence care and skill
- ✚ To render proper accounts to the principal on demand
- ✚ To communicate with his principal in case of difficulty and seek his instructions
- ✚ Not to deal on his own account unless all the material facts have been disclosed to the principal and consent of the principal has been obtained

IF THE AGENT WITHOUT THE KNOWLEDGE OF THE PRINCIPAL DEALS IN THE BUSINESS OF AGENCY ON HIS OWN ACCOUNT, THE PRINCIPAL HAS

THE FOLLOWING RIGHTS:

- a) He may repudiate the contract
- b) He may claim from the agent the benefits derived
- f) Not to make any secret profit
- g) To remit all the money received on behalf of the employer to the employer
- h) Not to use information obtained in the course of agency.

RIGHTS OF AN AGENT

- To retain money out of the sums received in agency business for advances made or expenses incurred and remuneration due to him,

- To receive the agreed remuneration if the remuneration is not fixed, then he has the right to received such remuneration as is usual and customary in such business.
- Right of lien on principal's goods, papers and other property until the remuneration due to him is paid.
- Agent has the right to be indemnified by the principal against the consequences of all lawful acts done in exercise of the authority conferred on him.
- An agent has the right to be indemnified by the principal against consequences of acts done in good faith that caused an injury to third person.
- To claim for compensation for injury caused because of principal's negligence or want of skill.

TERMINATION OF AGENCY

a) By the Act of Parties.

1. By Agreement: -

The principal and the agent may mutually agree to terminate the agency at any time.

2. By revocation: -

- When the agency is coupled with interest the principal cannot revoke the agency to the prejudice of such interest.
- The principal can revoke the authority at any time before the authority has been exercised so as to bind the principal.
- The principal cannot revoke the authority given to his agent after the authority has been partly exercised.
- When Agency is for a fixed period, the principal must make compensation to the agent for premature revocation of agency without sufficient cause.
- Revocation may be expressed or implied from the conduct of the principal.

3) By the Agent renouncing the business of agency.

- Renunciation may be express or implied from the conduct of the agent.
- When agency is for fixed period the agent must make compensation to the principal for premature renunciation of agency without sufficient cause.

b) By operation of law

- Completion of business of agency.
- Death or insanity of principal or agent.
- Where the principal or agent being a company, is dissolved
- Destruction of subject matter of agency,
- Principal becoming insolvent,
- Expiration of period of agency.

CHAP 17 : Law relating to Sale of Goods

INTRODUCTION

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of contract. Initially, this was part of Indian Contract Act itself. Later, this was deleted in Contract Act, and separate Sale of Goods Act was passed in 1930. Sale of Goods Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of Sale of Goods Act also. Basic requirements of contract i.e. Offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract; free consent, lawful object, consideration etc. apply to contract of Sale of Goods Act also. This lesson is to be taught after the students have been made familiar with the general principles of contract in which the emphasis is on understanding and appreciating the basic essentials of a valid contract and on the existence of contractual relationship in various instances. In today's era, the need for awareness of buyers and sellers rights is of utmost importance.

Scope:

- Governs transfer of property in goods of Movable property.
- Does not govern transfer of Immovable property.

Contract Of Sale [Section 4]

A contract of sale of goods is a contract whereby

- The seller,
- Transfers, or
- Agrees to transfer,
- The property (Ownership) in goods,
- To the buyer,
- For a money consideration called the price.

Essentials of a Valid Contract of Sale

1. Two parties involved: A contract of sale is bilateral i.e. made between two parties. They are known as 'buyer' and 'seller'.

2. Transfer of Property: It involves transfer of property (meaning ownership) in goods from one person to another. Therefore, transfer of property here means transfer of ownership of goods from seller to buyer.

3. Goods: The subject matter of sale is good. Goods means every kind of movable property.

It includes:

- Stock and hares
- Growing crops
- Grass
- Things attached to or forming part of the land which are agreed to be severed before sale or agreement to sell.

It does not include:

- Actionable claims, and
- Money.
- Actionable claim is a claim enforceable by court of law.
- Money means legal tender of money.
- Old coins are not legal tender of money.

4. Price: Price means monetary consideration. Therefore, goods should be exchanged for money. Exchange of goods for goods will be it would amount to barter and not sale. Similarly, if no consideration is involved it amounts to gift and not sale.

5. All essential elements of a valid contract: The contract of sale should have all the elements of a valid contract given under section 10 of the Indian Contract Act.

Distinction between Sale and Agreement to Sell Basis	Sale	Agreement to Sell
Transfer of ownership	Transfer of ownership take place immediately	Transfer of ownership takes place at a future date or no completion of some dates
Executed/Executory	It is an Executed Contract	It is an Executory Contract
Nature	It is absolute	It may be conditional

Transfer of Risk	Risk of loss of goods is immediately transferred to the buyer	Risk of loss of goods is not transferred to buyer as the goods are not yet transferred to him
Rights of seller against buyer breach	Seller can sue the buyer for the price even though the goods are in his possession	Seller can sue the buyer only for damages
Rights of buyer against seller	Buyer can sue the seller for damages as well as sue the third party who bought those goods i.e. he can claim proprietary remedy as well	Buyer can sue the seller for damages only

Distinction between Sale and Bailment

Basis	Sale	Bailment
Meaning	Sale involves transfer of property in goods from seller to buyer for a price	A "bailment" is a transaction under which goods are delivered by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they be returned or disposed of as directed after the purpose is accomplished.

Ownership	Transfer of ownership is a must	Does not involve transfer of possession
Possession	Transfer of possession of goods from seller to buyer is not mandatory	Possession is transferred from bailor to bailee.
Governed by	Sales of Goods Act, 1930	Indian Contract Act, 1872 (Section 148).

Hire purchase and Sale

A "hire purchase agreement" is an agreement to give goods on hire but in addition, it gives the hirer an option to purchase the goods at the end of the hiring period on payment of last instalment. Therefore, the possession of goods transfers immediately but the ownership in goods transfer only on the payment of last instalment.

The hirer has the option to terminate the contract any time before the ownership transfer. Option to terminate the contract is also treated as true test of hire purchase agreement.

Distinction between Hire Purchase and Sale Basis	Sale	Hire Purchase Agreement
Nature	It is a contract of sale	It is a contract of hiring and an agreement to sell.
Possession of goods	Possession of goods need not necessarily be transfer immediately	Possession transfers immediately

Ownership	Transfer of ownership of goods from seller to buyer immediately is a must	Ownership is transferred only on payment of last instalment.
Termination Right	The buyer has no right to terminate the contract of sale	The hirer has right to terminate the contract before payment of last instalment.
Right to re-possess goods on default of payment	Seller cannot re-possess goods if amount remains unpaid, he can sue the buyer	The hirer vendor has right to re-possess the goods if the hirer fails to pay an instalment.
Written Agreement	Sale agreement may or may not be in writing	Hire purchase agreement must be in writing.

Sale and Contract for work and labour

In contract for work and labour rendering of services and application of skill is the essence of contract, there may or may not be delivery of goods. Whereas, in case of sale delivery of goods is the essence of contract.

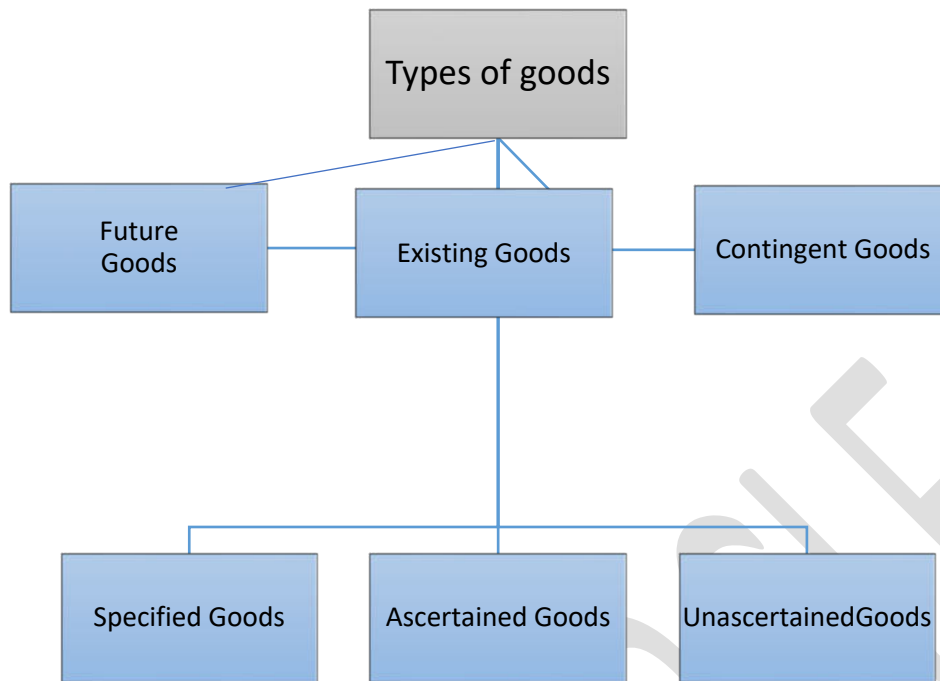
GOODS - DEFINITION & TYPE

The subject matter of sale is goods.

Definition [Section 2(7)]

already covered above

TYPES OF GOODS



■ Existing Goods

Existing goods are goods which are owned or possessed by the seller at the time of making contract or sale.

These can be:-

- Specific Goods
- Ascertained Goods
- Unascertained Goods

■ Specific Goods

Specific goods are goods which are identified and agreed upon at the time of the contract of sale. In simple words these are goods whose individuality has been found out at the time of making the contract of sale.

Example: If Michael agrees to buy 'Red Avon cycle' of Rosy and Rosy has only one Red Avon cycle, then the goods are treated as specific goods.

■ Ascertained Goods

Goods which are extracted and identified or earmarked or kept aside for sale then such goods are known as ascertained goods.

Example: If out of 10 coffee mugs, Mr. Addicted chooses one then the 1 mug he chose becomes

an ascertained goods coz it is identified now, and will become specific goods once it is agreed upon after identification.

■ Unascertained Goods

Unascertained goods are goods which are not specifically identified but are indicated by description at the time of sale.

Example: If a merchant agrees to supply a radio set from his stock of radio sets, it is a contract of sale of unascertained goods because it is not known which set will be delivered.

■ Future Goods

Future goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. In case of future goods there can be only an 'agreement to sell' and not 'sale' as the goods do not exist on the date of contract.

Example: Ramlal agrees to sell Shyam all the apples that will grow in his orchids in the upcoming season. Here apples are future goods as they do not exist and are not in possession of the goods on the day of agreement to sell.

■ Contingent Goods

These are the goods which will be acquired by seller on the happening of some contingency which may or may not happen.

Example: If Amar agrees to sell to Akbar all the apples of Anthony's orchid, only if Anthony sells it to Akbar, these are Contingent goods for Akbar.

DESTRUCTION OF SPECIFIC GOODS

Goods perishing before making contract [Section 7]

A contract of sale is void if all the following 3 conditions are satisfied: -

- The contract is of specified goods.
- The goods are perished.
- The seller does not have any knowledge of the destruction of goods at the

time of contract of sale.

Exception:

- Where the seller has knowledge of the destruction of the goods.
- Where the contract of sale is not for specific goods but for generic or unascertained goods.

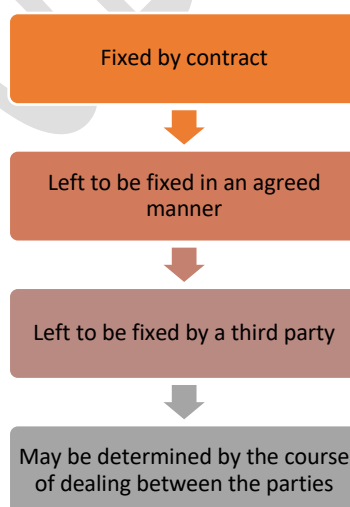
Goods perishing after making the agreement [Section 8]

Where there is an agreement to sell specific goods, and subsequently the goods without any fault of any party perish or damaged the agreement is thereby avoided.

Special Note: The provision applies only to sale of specific goods. If the sale is of unascertained goods, the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver.

Price is the money consideration for the sale of goods is the essence for a contract of sale. There cannot be sale without a price. Price can be money actually paid or promised to be paid.

MODES OF FIXING PRICE



- **Consequences of not determining the price**

If the price is not determined in accordance with the above, the buyer must pay a reasonable price to the seller. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case. Generally, the market price would be a reasonable price.

- **Consequences if price is not fixed by the third party**

The agreement to sell becomes void if the agreement provides that the price is to be determined by the third party, and the third party cannot or does not make such valuation, then the agreement to sell will become void.

Note: If the third party is prevented from making the valuation by the fault of seller or buyer, the innocent party can sue for damages.

CONDITIONS AND WARRANTIES

Condition

A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to repudiate a contract. The non-fulfilment of it defeats the very purpose for which the contract was made.

Warranties

A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods & treat the contract as repudiated. The person cannot reject the goods on breach of warranties.

Example: If Ms. Jalpari, a national swimmer asks a shopkeeper to give her a water-proof watch.

Shopkeeper provides a watch to her claiming it to be water proof, but the watch stopped working when she used it while swimming. This will be a breach of condition, as providing a water proof watch was the precondition of the contract.

But if in this case, the watch broke due to falling, then it will be treated as breach of warranty, as unbreakable watch was not an essential condition but a collateral to the main purpose of contract.

Difference between Conditions & Warranties

Basis	Condition	Warranties
Meaning / Nature	A condition is stipulation that is essential to the main purpose of the contract.	A warranty is a stipulation that is collateral to the main purpose of the contract.
Significance	It is essential to the very purpose of the contract that it is non-performance may be considered as failure to perform the contract.	It is not treated as failure to perform the contract.
Consequence of Breach	The aggrieved party may repudiate the contract.	The aggrieved party cannot repudiate the contract, can only claim damages.
Treatment Vice versa	A breach of condition may be treated as breach of warranty. Example: In the above example Ms. Jalpari can chose to keep the watch even after she get to know that the watch is not water-proof, by just getting the repairs done from the seller.	A breach of warranty can never be treated as breach of condition. Example: Ms. Jalpari in no case can treat breach of warranty (un-breakable) as a breach of condition.

	In this way she treated breach of condition as a breach of warranty.	

When will Condition be treated as warranty?

- Where the buyer waives a condition.
E.g. If he accepts defective goods then it is treated as condition.
- Where the buyer elects to treat breach of the condition as a breach of warranty. And instead of repudiating the contract he only claims damages.
- Where the contract is indivisible and the buyer has accepted the goods or part thereof, the breach of condition can only be treated as breach of warranty. The buyer can only claim damages and cannot reject the goods or treat the contract as repudiated.

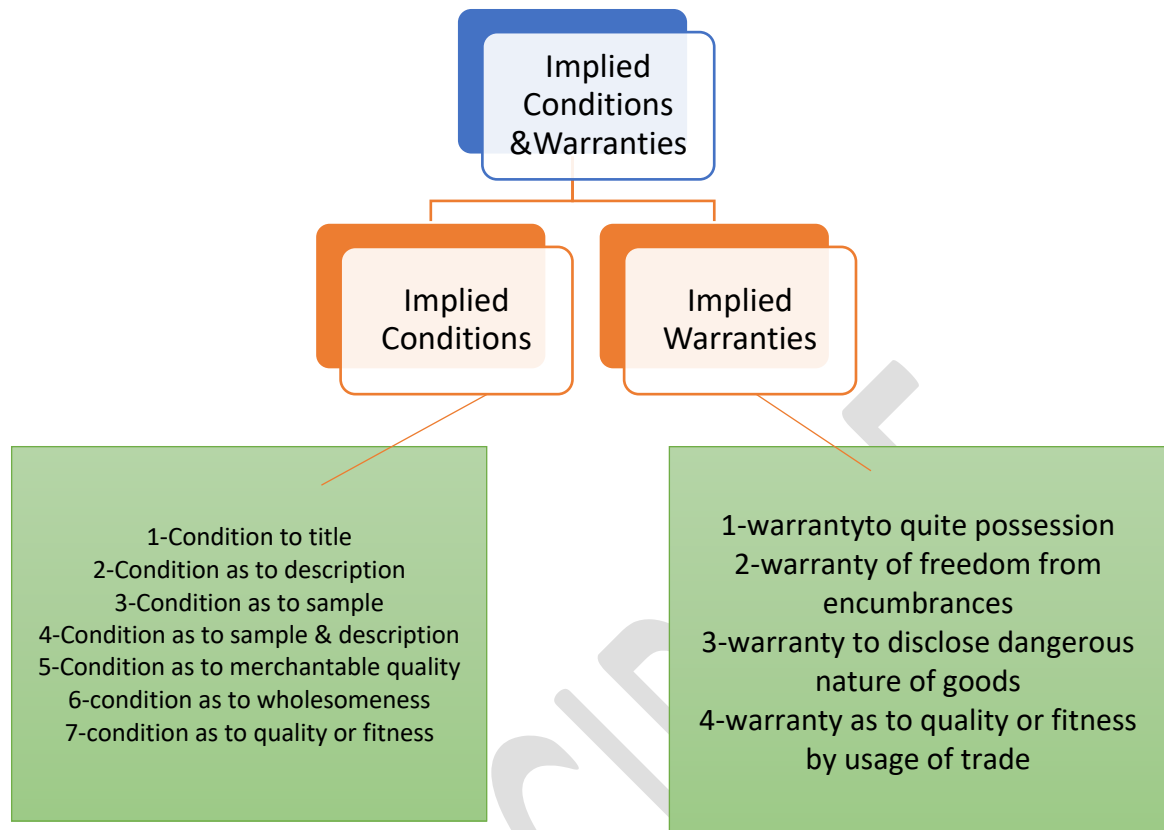
Express and Implied Conditions and Warranties

Express Conditions & Warranties

These are the conditions & warranties which are expressly provided in the contract. Like in above example water-proof watch was an express condition.

Implied Conditions & Warranties

These are the conditions & warranties that are implied by law in every contract of sale. These are discussed as follows:-



IMPLIED CONDITIONS

Condition as to Title [Section 14(a)]

In a contract of sale, there is an implied condition on part of the seller * In case of Sale - He has a right to sell

■ In case of Agreement to Sell - He will have a right to sell the goods at the time when the property is to pass

In Rowland v. Divall, 'A' had bought a second hand motor car from 'B' and paid for it. After he had used it for 6 months, he was deprived of it because the seller had no title to it. It was held that 'B' had broken the condition as to title and 'A' was therefore, entitled to recover the purchase money from 'B'.

Condition as to Description [Section15]	When there is a sale of goods by description, there is an implied condition that the goods shall correspond with description. Example : If Noddy placed an order for a red levies t-shirt of Small size on an online website and received size Medium, then it will be treated as breach of condition as to description as the goods supplied do not meet the description.
Condition as to Sample [Section 17]	* The bulk shall correspond with the sample in quality. ■The buyer shall have a reasonable opportunity of comparing the bulk with the sample. Note: The goods given in bulk shall be free from defect which would not be apparent on reasonable examination of the sample. If the defect can be discovered on inspection, the seller cannot be held liable for the same. Example : Bob the builder purchased 10,000 pieces of bricks after seeing the sample. The bulk i.e. 10,000 pieces should correspond to the sample.
Condition as to sale by Sample &Description [Section15]	If the sale is by sample as well as by description, the goods must correspond with the both. Case Law: Nichol v. Godts Facts: There was a sale of "foreign refined rape-oil having warranty only equal to sample". The oil tendered was the same as the sample, but it was not "foreign

	refined rape-oil" having a mixture of it and other oil. Judgement: It was held that the seller was liable, and the buyer could refuse to accept.
Condition as to Merchantable Quality [Section 16(2)]	If the goods are bought by description from dealer of goods of that description, then there is an implied condition that the goods shall be of that merchantable quality. Merchantable quality means that the goods must be of such quality and conditions that will be acceptable by a person having common prudence. They should be free from defects. Example: T' bought black yarn from 'D' and, when delivered, found it damaged by the white ants. The condition of merchantability was broken. Case Law: Morelli v. Fitch Gibbons Facts: A person brought a bottle of wine. While opening its cork in the normal manner, the bottle broke and the buyer was injured. Judgement: The buyer can claim damages as the goods does not meet the condition of merchantable quality.

Condition as to Wholesomeness	■ This applies only in the case of eatables. ■ The eatables and foodstuff should be wholesome i.e. it should be fit for human consumption. Case Law: Frost v. Aylesbury Dairy Co. Ltd. Facts: 'F' bought milk from 'A' and the milk contained typhoid germs. 'F's wife became infected and died. Judgement: 'A' was liable for damages, as the goods were not fit for consumption.
Condition as to Quality or Fitness	Getteral Rule: The General Rule is that there is no implied condition as to quality or fitness for any particular purpose of goods supplied. Exception Rule: There is an implied condition that the goods are reasonably fit for the purpose for which they are required if: ■ The buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required. ▪ The buyer relies on the seller's skill or judgement. ▪ Seller deals in such goods in ordinary course.
	<i>Non-applicability of condition:</i> The condition of fitness or quality does not apply in the following cases, even if the buyer has made

	known to the seller the purpose of purchase: The goods sold are specified article under its patent or trademark. Where the product is used only for a particular purpose but the buyer uses it for some abnormal purpose without disclosing. Where the goods can be used for more than one purpose & buyer fails to tell the seller for which purpose he is buying it. The seller will not be liable.

IMPLIED WARRANTIES

Warranty as to quite possession [Section 14(b)]	There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.
Warranty of freedom from encumbrances [Section 14(c)]	There is an implied warranty that the goods are free from any encumbrances or charge. The breach of such warranty gives the buyer a right to claim damages from the seller.
Warranty to disclose dangerous nature of goods	If the goods are of dangerous nature, the seller must disclose it to the buyer. If the seller fails to disclose it he will be liable for payment of damages.
Warranty as to quality or fitness by usage of trade [Section 16(3)]	An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

STUDY CIRCLE

DOCTRINE OF CAVEAT EMPTOR [Section 16]

Meaning of the Doctrine

The term "caveat emptor" is a Latin word which means "let the buyer beware". This principle states that it is the responsibility of the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. He must satisfy himself that the goods are fit for the intended purpose. It is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose.

Case Law: Ward v. Hobbs

Facts: Certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and one died of typhoid fever. They also infected some of the buyer's own pigs.

Judgement: It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

Exception to Caveat Emptor

Where the seller makes a false representation and the buyer relies on it.

When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.

When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.

Where goods are bought by description from a seller who deals in goods of that description.

Q.3 Avdesh contracts to sell a piece of silk to Bupesh. Bupesh thinks it is Chinese silk.

Avdesh knows that Bupesh thinks so, but Avdesh knows that it is English silk.

Avdesh

does not correct Bupesh's impression. Subsequently, Bupesh discovers that it is not

Chinese silk. Can he repudiate the contract? Discuss.

(5 marks) (June 2009)

A.3 Hint: The sale was not by the description and therefore there cannot be an implied condition as to description, since it is not a condition the contract cannot be repudiated.

Further on application of Caveat Emptor, it is the duty of the buyer to be sure about what he is buying.

PASSING OF PROPERTY OR TRANSFER OF OWNERSHIP

The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. The general rule is that the risk follows the ownership, whether the delivery has been made or not.

Therefore, it becomes important to determine the exact point of time when the ownership

transfers from seller to buyer.

Why determination of precise time of transfer of ownership is essential?

To decide who will bear the risk	Right of seller to sue for price	■ To take action against third party	Insolvency of either the seller or the buyer
•The owner has to bear the risk and therefore time of transfer of ownership is required to be determined	•A seller can sue the buyer for price only if the ownership is transferred, therefore it is essential to determine the date of transfer of ownership	•Only an owner has right to take action against the third party.	•It is necessary to know whether the goods can be taken over by the official assignee or the official receiver. It will depend upon whether the property in the goods was with the party adjudged insolvent.

TRANSFER OF OWNERSHIP OF SPECIFIC GOODS OR ASCERTAINED GOODS	
General Rule [Section 19(1)]	The ownership of specific or ascertained goods transfers to the buyer as and when the parties intended to pass. Note: The intention is determined from following: • Terms of the contract, • Conduct of the parties , and • Circumstances of the case.
Specific goods in Deliverable State [Section 20]	The ownership transfers when the contract is made. Example: Ramukaka sells 1000 kg. of cotton to Shyamukaka on 1st February. The price of which will be paid on 7th February and Shyamukaka will take the possession on 3rd February. Due to heavy rainfall

	on 2nd February, the cotton got destroyed. Ramukaka cannot be held liable for loss caused to Shyamukaka as the ownership got transferred as and when the contract was entered on 1st February
Specific goods to be put in Deliverable State [Section 21]	The ownership transfers when the following 2 conditions are satisfied:- Goods are bought to the deliverable state and Buyer has a notice of it. Example: Ramukaka sells 1000 kg. of cotton to Shyamukaka on 1st February to be packed in 100 bags of 10 kgs. each. Ramukaka is yet to pack the bags as desired by Shyamukaka. Due to heavy rainfall on 2nd February, the cotton got destroyed. Ramukaka will be liable for loss as the ownership did not get transferred yet. The ownership gets transfer only if cotton is packed in 100 bags of 10 kgs. each and the same is communicated to the buyer Shyamukaka.
Specified goods in a deliverable state but the seller has to do carry out some act to determine the price, like weighing and measuring [Section 22]	The ownership transfers when the following 2 conditions are satisfied The seller has carried out such activity to determine the price and buyer has a notice of it.

Example: Ramukaka sells all the cotton he had to Shyamukaka @ Rs. 125/- per kg. Ramukaka is yet to weigh the cotton. Before weighing due to heavy rainfall the cotton got destroyed, Shyamukaka is not liable as the ownership has not yet transferred.

TRANSFER OF OWNERSHIP OF UNASCERTAINED GOODS OR FUTURE GOODS [Sections 18-23]

Conditions :

The ownership of unascertained goods transfer to buyer when the following conditions are satisfied:-

- The goods should be appropriated to the contract either by the seller or by the buyer and agreed by the other party.
- The appropriated goods must be of same description as mentioned in the contract.

The goods appropriated should be in a deliverable state.

The appropriation should be unconditional.

Note:

1. Appropriation of goods: It is a process by which the goods to be delivered under the contract are identified and set apart with the mutual consent of the seller & buyer. It is bilateral act of the seller & the buyer to the identity & set apart the goods.

2. Deemed appropriation of goods: Where the seller delivers the goods

- to Buyer
- to a Carrier
- to a Bailee

for the purpose of transmission to the buyer without reserving the right of disposal he is deemed to have appropriated the goods unconditionally.

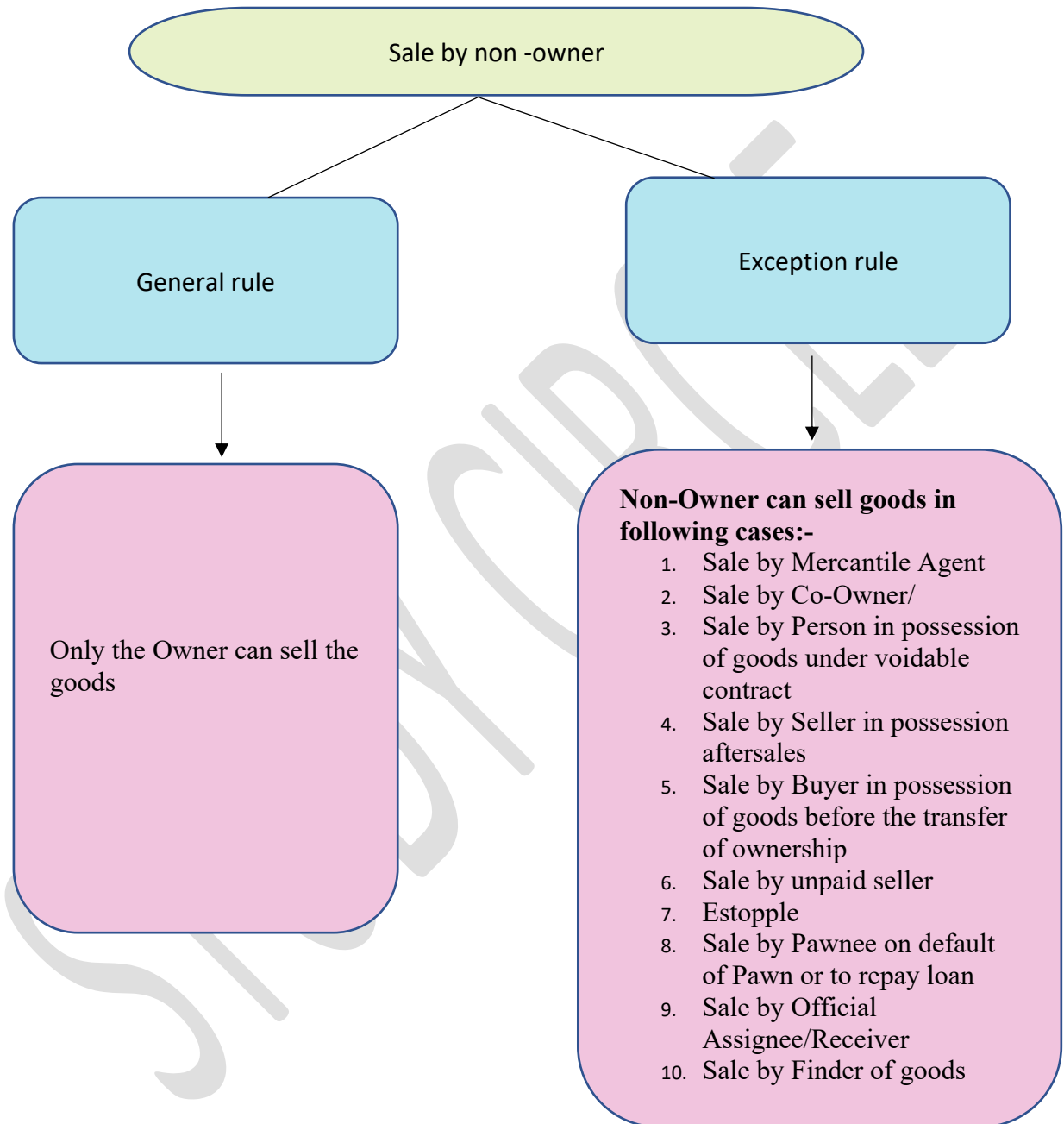
TRANSFER OF OWNERSHIP OF GOODS SENT 'ON APPROVAL BASIS' OR 'SALE RETURN BASIS' [Section 24]

Goods sent on approval basis	Goods sent on approval basis are goods in respect of which the buyer has option to return or retain.
Rules of transfer of ownership	The ownership transfer in case of goods sent on approval basis in any of the following circumstances:- - When the buyer signifies his approval. - When the buyer adopts the goods by his acts. - Buyer retain the goods without signifying approval. - Buyer makes the return of the goods impossible.

RESERVATION OF RIGHT OF DISPOSAL

- The property in goods, whether specific or unascertained, does not pass if the seller reserves the right of disposal of the goods. Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal in the following two cases:-
- Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, the goods are deliverable to the order of the seller or his agent.
- When the seller sends the bill of exchange for the price of the goods to the buyer for this acceptance, together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill of exchange.

SALE BY NON-OWNER/TRANSFER OF TITLE BY NON-OWNER



General Rule
The general rule is that nobody can give what he himself a seller cannot transfer a better title than what he himself does not have. In context of a sale it means has.

Exception Rule	
Sale by a mercantile agent	A buyer will get a good title if he buys from a mercantile agent if following conditions are satisfied: Goods are purchased from mercantile agent who is in possession of the goods or documents of title to the goods with the consent of the owner. The mercantile agent sells the goods in the ordinary course of his business. The buyer acted in good faith.
Sale by a co-owner/joint owner	A buyer will get a good title if he buys from a joint owner if following conditions are satisfied: Goods are owned by joint owners. Any one joint owner had the sole possession The buyer acted in good faith.
Sale by a person in possession under a voidable contract	The sale by a person who possessed goods under a voidable contract will be valid if following conditions are satisfied: Goods are possessed under a voidable contract. Contract must not have rescinded at the time of sale. The buyer acted in good faith. Example: If A acquires goods from B by doing a fraud, which is voidable, B has not yet rescinded the

	contract and meanwhile A transferred it to C who acted in good faith. Then C will get a good title.
Sale by seller in possession aftersales	Sale by seller who is in possession of goods will give a good title to the new buyer if the following conditions are satisfied: Goods are sold by the seller to buyer but are still in possession of the seller. With the consent of buyer the seller again sells them by himself or through his mercantile agent to a new buyer. The new buyer acted in good faith. Example: Ms. Sona purchased a gold brick from a gold dealer and instructed the gold dealer to keep the possession with himself and sell it to some other party if he gets higher prices. The goldsmith sold that brick to Ms. Mona, who acted in good faith. Ms. Mona will get a good title.
Sale by buyer in possession of goods before the transfer of ownership	Sale by buyer who is in possession of goods will give a good title to the new buyer if the following conditions are satisfied: Goods are in possession of the buyer. The possession is with the consent of original seller. The new buyer acted in good faith. Example: If Baghira purchased furniture from Kak on sale on approval basis. Before acceptance made to Kak, Baghira sold the furniture to Ballu, who acted in good faith. Ballu will get a good title.
Sale by an unpaid seller	An unpaid seller can resell the goods to second buyer who shall have a good title if following conditions are satisfied:

	The unpaid seller has possession of the goods. The unpaid seller has exercised his right of lien or stoppage in transit.
Estoppel	If the true owner stands by and allows an innocent buyer to pay over money to a third party, who professes to have the right to sell an article, the true owner will be estopped from denying the third-party's right to sell.
Sale by Pawnee on default of Pawn or to repay loan	A pawnee, on default of the pawn or to repay, has a right to sell the goods, pawned and the buyer of the goods gets a good title to the goods. Example: Dhaniram gives loan to Fakir Chand on security of gold pledged by Fakir Chand in favour of Dhaniram. Fakir Chand defaults in repayment of loan and in consequence of which Dhaniram sells the gold to Kuber. Kuber will have a good title on gold even if the sale was done by non-owner.
Sale by Official Receiver/Assignee/Liquidator	The Official Assignee or Official Receiver, Liquidator, Officers of Court selling under a decree, Executors, and Administrators, all these persons are not owners, but they can convey better title than they have. Example: Divaalia Singh became insolvent and the court appointed official assignee to sell the assets and settle the liability. The official receiver will be able to deliver a good title to the buyer even if he is not the owner of the goods.
Sale by Finder of goods	The sale of goods by the finder of the goods will be considered appropriate and the buyer of the goods will get a good title in the following cases: Owner could not be found with reasonable diligence. Goods are of perishable nature.

	The owner who is found refuses to pay the lawful charges to the finder. The lawful charges of the finder, in respect of goods found, amount to 2/3rd of its value.

RULES OF DELIVERY AND ACCEPTANCE

Delivery is the voluntary transfer of possession from one person to another.
[Section 2(2)]

Methods of Delivery



- Actual Delivery: When the goods are physically handed over to the buyer or his authorised agent, it is termed as an actual delivery.

Example: If Banjo sells 500 chairs to Bingo which are kept at Jojo's warehouse. Banjo actually physically get the chairs delivered to Bingo. It is actual delivery

- Symbolic Delivery: When the goods are not physically handed over but some symbol is handed over to the buyer or his authorised agent, it is termed as symbolic delivery.

Example: If Banjo sells 500 chairs to Bingo which are kept at Jojo's warehouse. Banjo hands over keys of the warehouse to Bingo. It is symbolic delivery

- Constructive Delivery: When the person who possesses the goods acknowledge to hold it for the buyer, it is termed as a constructive delivery.

Example: If Banjo sells 500 chairs to Bingo which are kept at Jojo's warehouse. Jojo agrees to hold the chairs on behalf of Bingo. It is constructive delivery.

Modes of Delivery (Section 33)	- Delivery should have the effect of putting the buyer in possession. delivery of goods may be made: - By doing anything to which the parties have agreed. - By doing anything which has the effect of putting buyer or his authorised agent into possession of goods.
Payment & Delivery to be Concurrent (Section 32)	Unless otherwise agreed by the parties payment & delivery has to be concurrent. Means seller should be ready to give the possession of goods & the buyer should be ready to pay for it. Note: The parties may also agree otherwise.
Buyer should apply for delivery (Section 35)	A seller of goods is not bound to deliver until the buyer applies for delivery.
Part Delivery	A part delivery of the goods with an intention of giving the delivery of the whole, will amount to delivery of whole with respect to ownership of the goods. But if the part delivery is with an intention of separating or severing it

	from the whole, it does not amount to whole delivery.
Place of Delivery [Section 36(1)]	- If the contract specifies the place of delivery at the agreed place - If the contract does not specify the place of delivery - In case of Sale: At the place at which the goods are at the time of sale. - In case of agreement to sell: If goods are existing : At the place at which the goods are at the time of agreement to sell. If goods are future goods : Place of manufacturing or production of goods.
Time of Delivery [Section 36(2)]	- If the contract specifies the time of delivery at the agreed time - If the contract does not specify the time of delivery within reasonable time
Delivery when goods are in possession of the 3rd party [Section 36(3)]	Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his behalf.
When demand of delivery is treated ineffectual [Section 36(4)]	The demand of delivery will be treated as ineffectual if done at any time other than reasonable business

	hours. Reasonable business hours will be a question of fact.
Cost of Delivery [Section 36(5)]	In the absence of an agreement to the contrary, the expenses of and incidental to making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer.
Delivery of wrong quantity	- Short delivery (When seller delivers goods lesser than the quantity contracted) Buyer may accept goods which are delivered, or buyer may reject the goods. - Excess Delivery (When seller delivers goods more than the quantity contracted) Buyer may accept goods which are delivered, or Buyer may reject the goods, or Buyer may accept the contracted quantity and reject the excessive goods. - Mixed Delivery (When seller delivers goods of different description mixed with the goods contracted) Buyer may reject the whole, or Buyer may accept the goods contracted and reject the goods of other description. Note: 1. Buyer cannot reject the goods on negligible shortage or excess of goods.

	2. The mixing of goods with inferior quality of goods is not treated as mixing of goods.
Delivery in instalment	The buyer of the goods will be bound to accept delivery in instalment only if it is specified in the contract. The contract can state that the instalments are to be separately paid for. If the buyer or the seller commits a breach of contract, it depends on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

- When the seller becomes unpaid? [Section 45]

The seller of goods is deemed to be unpaid seller:

When the whole of the price has not been paid or tendered

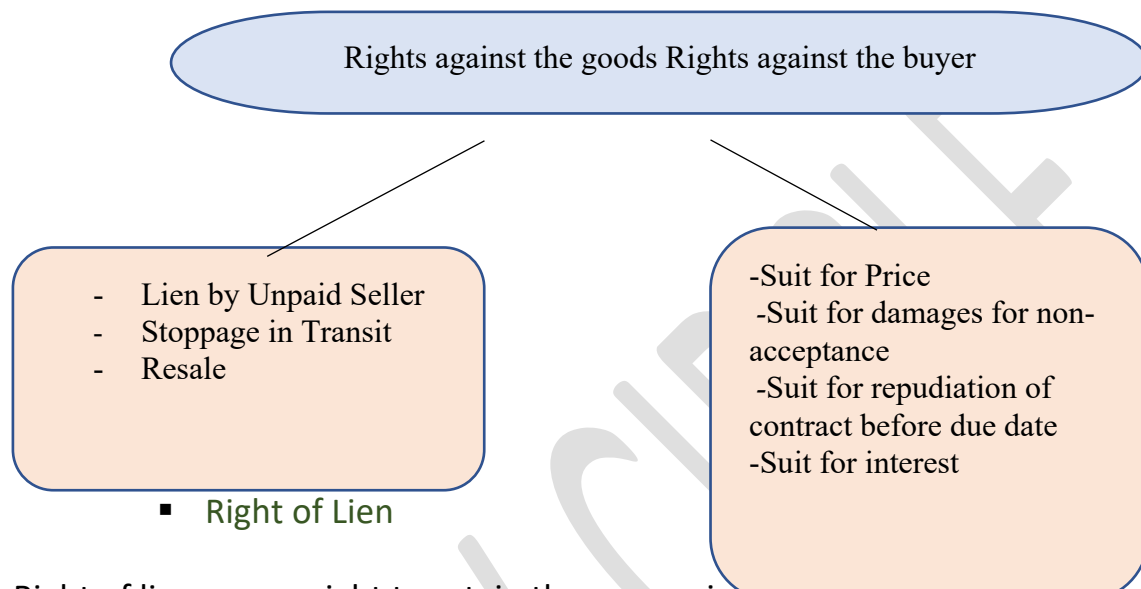
When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonored.

Example: Shakti sold a laptop to Bhakti for Rs. 50,000/-, Bhakti paid only Rs. 30,000/- to Shakti. Is Shakti an unpaid seller? Will the answer be different if Bhakti paid Rs. 49,995/?

Shakti will be treated as unpaid seller in both the cases as the contracted price was Rs. 50,000/- and in both the cases he has not received the whole amount which is contracted.

▪ Rights of Unpaid Seller

In addition to the rights given under Indian Contract Act related to suing the buyer, an unpaid seller has the following rights as well.



Right of lien means right to retain the possession of the goods until whole payment with respect to goods is received.

When can right of Lien be used?

- When goods are sold without any stipulation as to credit.
- When goods are sold on credit but the credit period has expired.
- Where the buyer becomes insolvent.

Conditions:

- Lien can be exercised when the goods are sold to the buyer but the possession of goods is still with the seller.
- If the seller has done part delivery of goods he can use right of lien against the remainder goods only if part delivery is not intended as delivery of the whole.

- Buyer can use this right even if he has received the decree for payment of price of goods.

Termination of Right of Lien:

The right of lien of the seller will come to an end in the following circumstances:

- Deemed appropriation of goods.
- When the buyer or his agent lawfully obtains the possession of goods.
- When the seller waives this right whether express or implied.

▪ Stoppage in Transit

Right of stoppage in transit means right to regain the possession of the goods by stopping the goods while they are in transit, and retain it until whole payment with respect to goods is received.

- The possession of the goods is not with the seller.
- The possession of the goods is not with the purchaser or his authorised agent.
- The possession of the goods is with the middle men who can be carrier services , courier services, etc.

Conditions to exercise stoppage in transit:

1. Seller is an unpaid seller.
2. Seller must have parted the possession of the goods. In simple words seller do not have possession of the goods.
3. The goods have not yet reached the buyer or his authorised agent.
4. The goods are in transit
5. The buyer must have become insolvent.

Termination of Right of Stoppage in Transit:

Situation	Right of Stoppage in Transit terminates	Example

If buyer takes delivery before the final destination	The stoppage in transit rights terminates or comes to an end at the station where the buyer takes the delivery.	Goods are sent from Kanyakumari to Chandigarh but the buyer collected it at Delhi station itself, so the stoppage in transit will end at Delhi.
If the goods arrived the final destination and the carrier acknowledges to hold it for the buyer	The right of stoppage in transit will come to an end at the destination station even if the buyer indicates further destination for the goods to the carrier.	Goods are sent from Kanyakumari to Chandigarh. The goods reach Chandigarh station and the carrier service acknowledges to buyer to hold it on buyer's behalf. The buyer instructs the carrier services to deliver it further to Amritsar. The stoppage in transit right will come to an end at Chandigarh
Delivery to ship (which is chartered by the buyer)	When ship is chartered by the buyer, the transit ends as soon as the goods are loaded on the ship.	Goods are to be delivered from Mumbai to Goa on a ship which is chartered by the buyer, the transit will deem to end as soon as the goods are loaded on ship in Mumbai port.
Wrong denial to deliver goods by carrier services/ bailee	The transit will deemed to come to an end on denial by carrier services.	

Sub-sale by the buyer with the seller's consent	The loss of right of stoppage in transit will come to an end.	
If the goods are rejected by the buyer and carrier or bailee continues the possession of goods	The transit is NOT deemed to be at an end.	

DISTINCTION BETWEEN RIGHT OF LIEN & RIGHT OF STOPPAGE IN TRANSIT

Particulars	Right of Lien	Right of stoppage in transit
Possession	Seller	Carrier or Bailee.
Nature of the right	Seller via right of lien retain the goods.	Seller via right of stoppage in transit Regain the goods.
Availability of the right	When the buyer fails to pay.	When the buyer becomes insolvent.
Relation between two	Right of lien ends when goods are handed over to bailee/carrier.	Right of stoppage in transit starts when goods are handed over to bailee/carrier.

RIGHT TO RESALE

The seller has a right to resale the goods in the following circumstances:

- **Perishable goods:** If the goods are of perishable nature, the unpaid seller can resale the goods without any notice to the buyer.
- **No payment within reasonable time:** If the seller has given a notice to the buyer of his intention to resale the goods, he may resale it if the buyer does not pay the price within that time.
- **When seller reserves right of resale:** When a seller expressly reserves the right to resale goods in case of default, he may resale it.

Who will bear the profit/loss in case of resale of goods?

Re-sale with or without notice	Profit	Loss
With the Notice	Seller	Buyer
Without the Notice	Buyer	Seller

MISCELLANEOUS

Auction Sale [Section 64]

- A sale by auction is a public sale where goods are offered to be taken by bidders. It is a proceeding at which people are invited to compete for the purchase of property by successive offer of advancing sums.
- Where goods are put up for sale in lots, each, lot is prima facie deemed to be the subject of a separate contract of sale. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid.
- A right to bid may be reserved expressly by or on behalf of the seller. Where such right is expressly so reserved, the seller or any other person on his behalf may bid at the auction. Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or

for the auctioneer knowingly to take any bid from the seller or any such person.

STUDY CIRCLE

Salient features of auction sales:

Any sale in contravention of this rule may be treated as fraudulent by the buyer.

The sale may be notified to be subject to a reserved price. Where there is such notification, every bid is a conditional offer subject to its being up to the reserve price.

Where an auctioneer inadvertently knocks down to a bidder who has bid less than the reserved price, there is no contract of sale.

If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Terminologies used in Ship/Rail Transit

F.O.B. (Free on Board): Under an F.O.B. contract, it is the duty of the seller to put the goods on board a ship at his own expenses. The property in goods passes to the buyer only after the goods have been put on board the ship, and they are at buyer's risk as soon as they are put on board the ship, usually named by the buyer. The seller must notify the buyer immediately that the goods have been delivered on board, so that the buyer may insure them. If he fails to do so the goods shall be deemed to be at seller's risk during such sea transit.

F.O.R. (Free on Rail): Similar position prevails in these contracts as in the case of F.O.B. contracts.

In such cases, the seller is required to insure the goods. **C.I.F. or C.F.I. (Cost Insurance and Freight):** A CIF contract is a contract for the sale of insured goods lost or not lost to be implemented by transfer of proper documents. The seller is required to pay freight and insurance charges. He will arrange for an insurance of the goods for the benefit of the buyer. On the tender of documents, the buyer is required to

pay and then take delivery. He has a right to reject the goods if they are not according to the contract.

Ex-Ship: Here the seller is bound to arrange the shipment of the goods to the port of destination, and to such further inland destination as the buyer may stipulate. The buyer is not bound to pay until the goods are ready for unloading from the ship and all freight charges paid. The goods travel at the seller's risk, but he is not bound to insure .

CHAP 18 : Law relating to Negotiable Instruments

DEFINITION OF A NEGOTIABLE INSTRUMENT

A negotiable instrument may be defined as “an instrument, the property in which is acquired by anyone who takes it bona fide, and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of instrument”

Negotiability involves two elements namely, transferability free from equities and transferability by delivery or endorsement (Mookerjee J. In Tailors Priya vs. Gulab Chand, AIR 1965 Cal).

But the Act recognises only three types of instruments viz., a Promissory Note, a Bill of Exchange and a Cheque as negotiable instruments. However, it does not mean that other instruments are not negotiable instruments provided that they satisfy the following conditions of negotiability:

The instrument should be freely transferable by the custom of trade. Transferability may be by
(i) delivery
(ii) endorsement and delivery

The person who obtains it in good faith and for consideration gets it free from all defects and can sue upon it in his own name

The holder has the right to transfer. The negotiability continues till the maturity

The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. It is an Act to define and amend the law relating to promissory notes, bills of exchange and cheques. The Act does not affect the custom or local usage relating to an instrument in oriental language i.e., a Hundi.

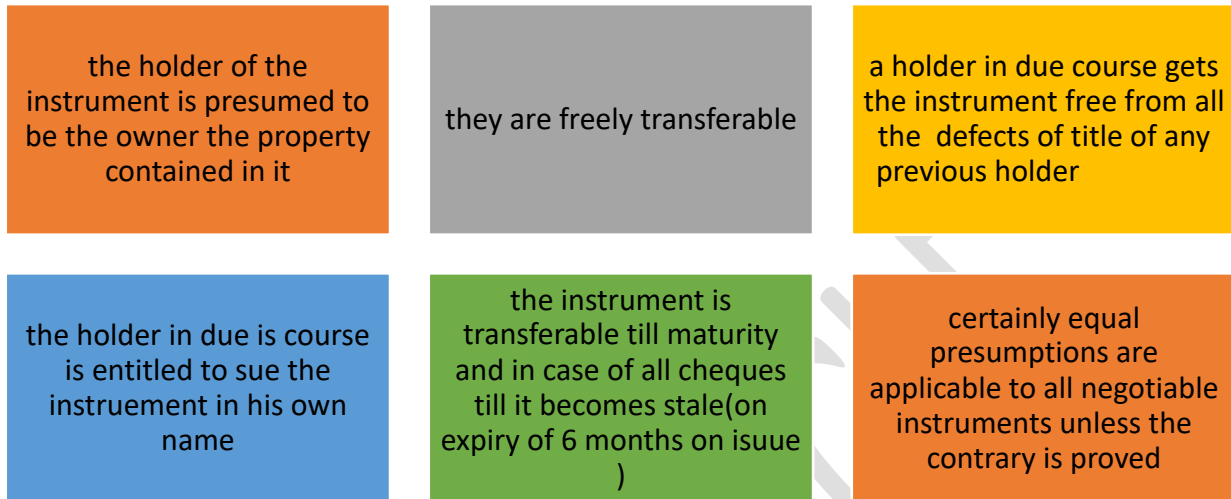
Effect of Negotiability

The general principle of law relating to transfer of property is that no one can pass a better title than he himself has (nemo dat quod non-habet). The exceptions to this general rule arise by virtue of statute or by a custom.

A negotiable instrument is one such exception which is originally a creation of mercantile custom. Thus a bona fide transferee of negotiable instrument for consideration without notice of any defect of title, acquires the instrument free of any defect, i.e., he acquires a better title than that of the transferor.

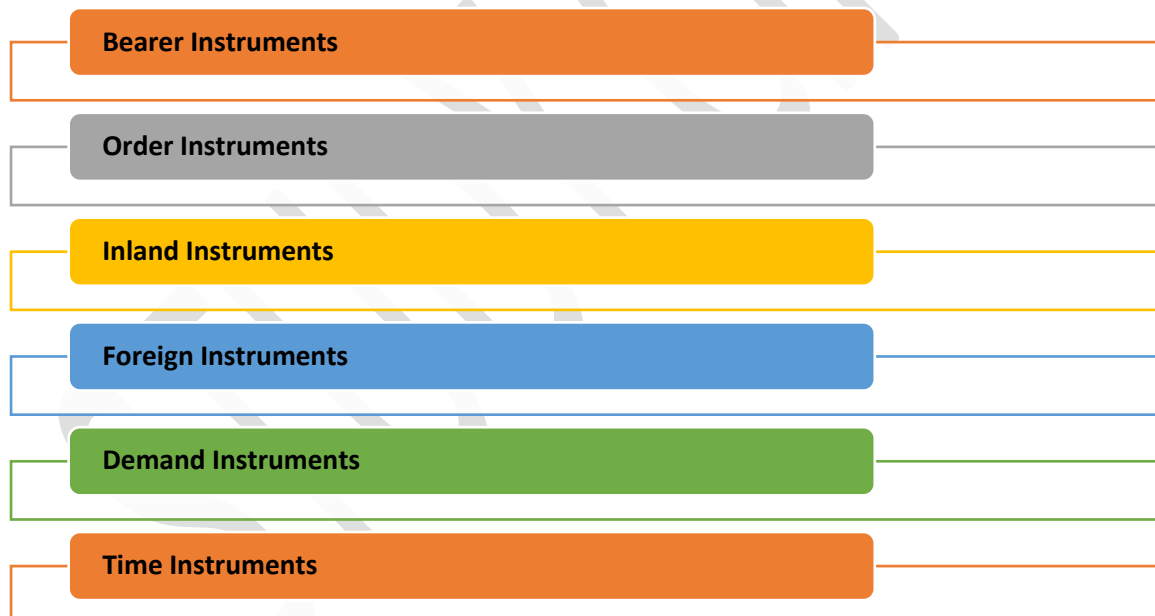
IMPORTANT CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

Following are the important characteristics of negotiable instruments:



Classification of Negotiable Instruments

The negotiable instruments may be classified as under:



- 1. Bearer Instruments** A promissory note, bill of exchange or cheque is payable to bearer when
 - (i) it is expressed to be so payable,
 - (ii) the only or last endorsement on the instrument is an endorsement in blank. person who is a holder of a bearer instrument can obtain the payment of the instrument.

2. Order Instruments A promissory note, bill of exchange or cheque is payable to order :

- (i) which is expressed to be so payable
- (ii) which is expressed to be payable to a particular person, and does not contain any words prohibiting transfer or indicating an intention that it shall not be transferable.

3. Inland Instruments (Section 11) A promissory note, bill of exchange or cheque drawn or made in India, and made payable, or drawn upon any person, resident in India shall be deemed to be an inland instrument. Since a promissory note is not drawn on any person, an inland promissory note is one which is made payable in India. Subject to this exception, an inland instrument is one which is either: (i) drawn and made payable in India, or (ii) drawn in India upon some persons resident therein, even though it is made payable in a foreign country.

4. Foreign Instruments An instrument which is not an inland instrument, is deemed to be a foreign instrument. The essentials of a foreign instrument include that:

- (i) it must be drawn outside India and made payable outside or inside India;
- (ii) it must be drawn in India and made payable outside India and drawn on a person resident outside India.

5. Demand Instruments (Section 19) A promissory note or a bill of exchange in which no time for payment is specified is an instrument payable on demand.

6. Time Instruments Time instruments are those which are payable at some time in the future. Therefore, a promissory note or a bill of exchange payable after a fixed period, or after sight, or on specified day, or on the happening of an event which is certain to happen, is known as a time instrument. The expression "after sight" in a promissory note means that the payment cannot be demanded on it unless it has been shown to the maker. In the case of bill of exchange, the expression "after sight" means after acceptance, or after noting for non-acceptance or after protest for non- acceptance.

▪ **Ambiguous Instruments**

(Section 17) An instrument, which in form is such that it may either be treated by the holder as a bill or as a note, is an ambiguous instrument. Section 5(2) of the English Bills of Exchange Act provides that where in a bill, the drawer and the drawee are the same person or where the drawee is a fictitious person or a person incompetent to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note. Bill drawn to or to

the order of the drawee or by an agent on his principal, or by one branch of a bank on another or by the direction of a company or their cashier are also ambiguous instruments. A promissory note addressed to a third person may be treated as a bill by such person by accepting it, while a bill not addressed to any one may be treated as a note. But where the drawer and payee are the same, e.g., where A draws a bill payable to A's order, it is not an ambiguous instrument and cannot be treated as a promissory note. Once an instrument has been treated either as a bill or as a note, it cannot be treated differently afterwards.

▪ **Inchoate or Incomplete Instrument (Section 20)**

When one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein, and not exceeding the amount, covered by the stamp. Such an instrument is called an inchoate instrument. The person so signing shall be liable upon such instrument, in the capacity in which he signs the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereon. The authority to fill up a blank or incomplete instrument may be exercised by any "holder" and not only the first holder to whom the instrument was delivered. The person signing and delivering the paper is liable both to a "holder" and a "holder-in-due-course". But there is a difference in their respective rights. A "holder" can recover only what the person signing and delivering the paper agreed to pay under the instrument, while a "holder-in-due-course" can recover the whole amount made payable by the instrument provided that it is covered by the stamp, even though the amount authorised was smaller.

KINDS OF NEGOTIABLE INSTRUMENTS

The Act recognises only three kinds of negotiable instruments under Section 13 but it does not exclude any other negotiable instrument provided the instrument entitles a person to a sum of money and is transferable by delivery. Instruments written in oriental languages i.e. hundis are also negotiable instruments. These instruments are discussed below:

- (i) **Promissory Notes** : A "promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum

of money to, or to the order of, a certain person, or only to bearer of the instrument. (Section 4)

Essentials of a Promissory Note:

To be a promissory note, an instrument must possess the following essentials:

- (a) It must be in writing. An oral promise to pay will not do.
- (b) It must contain an express promise or clear undertaking to pay. A promise to pay cannot be inferred. A mere acknowledgement of debt is not sufficient. If A writes to B "I owe you (I.O.U.) Rs. 500", there is no promise to pay and the instrument is not a promissory note.
- (c) The promise or undertaking to pay must be unconditional. A promise to pay "when able", or "as soon as possible", or "after your marriage to D", is conditional. But a promise to pay after a specific time or on the happening of an event which must happen, is not conditional, e.g. "I promise to pay Rs. 1,000 ten days after the death of B", is unconditional.
- (d) The maker must sign the promissory note in token of an undertaking to pay to the payee or his order.
- (e) The maker must be a certain person, i.e., the note must show clearly who the person is engaging himself to pay.
- (f) The payee must be certain. The promissory note must contain a promise to pay to some person or persons ascertained by name or designation or to their order.
- (g) The sum payable must be certain and the amount must not be capable of contingent additions or subtractions. If A promises to pay Rs. 100 and all other sums which shall become due to him, the instrument is not a promissory note.
- (h) Payment must be in legal money of the country. Thus, a promise to pay Rs. 500 and deliver 10 quintals of rice is not a promissory note.
- (i) It must be properly stamped in accordance with the provisions of the Indian Stamp Act, 1899. Each stamp must be duly cancelled by maker's signature or initials.
- (j) It must contain the name of place, number and the date on which it is made. However, their omission will not render the instrument invalid, e.g. if it is undated, it is deemed to be dated on the date of delivery.

- (ii) **Bills of Exchange** : A “bill of exchange” is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument. (Section 5)

The definition of a bill of exchange is very similar to that of a promissory note and for most of the cases the rules which apply to promissory notes are in general applicable to bills. There are however, certain important points of distinction between the two. Parties to bills of exchange The following are parties to a bill of exchange:

- (a) **The Drawer**: the person who draws the bill.
- (b) **The Drawee**: the person on whom the bill is drawn.
- (c) **The Acceptor**: one who accepts the bill. Generally, the drawee is the acceptor but a stranger may accept it on behalf of the drawee
- (d) **The payee**: one to whom the sum stated in the bill is payable, either the drawer or any other person may be the payee.
- (e) **The holder**: is either the original payee or any other person to whom, the payee has endorsed the bill. In case of a bearer bill, the bearer is the holder.
- (f) **The endorser**: when the holder endorses the bill to any one else he becomes the endorser.
- (g) **The endorsee**: is the person to whom the bill is endorsed.
- (h) **Drawee in case of need**: Besides the above parties, another person called the “drawee in case of need”, may be introduced at the option of the drawer. The name of such a person may be inserted either by the drawer or by any endorser in order that resort may be had to him in case of need, i.e., when the bill is dishonoured by either non-acceptance or non-payment.
- (i) **Acceptor for honour**: Further, any person may voluntarily become a party to a bill as acceptor. A person, who on the refusal by the original drawee to accept the bill or to furnish better security, when demanded by the notary, accept the bill supra protest in order to safeguard the honour of the drawer or any endorser, is called the acceptor for honour.

Distinction between Bill of Exchange and Promissory Note :

The following are the important points of distinction between a bill of exchange and a promissory note:

(a) A promissory note is a two-party instrument, with a maker (debtor) and a payee (creditor).

In a bill there are three parties—drawer, drawee and payee, though any two out of the three capacities may be filled by one and the same person. In a bill, the drawer is the maker who orders the drawee to pay the bill to a person called the payee or to his order. When the drawee accepts the bill he is called the acceptor.

(b) A note cannot be made payable to the maker himself, while in a bill, the drawer and payee may be the same person.

(c) A note contains an unconditional promise by the maker to pay to the payee or his order; in a bill there is an unconditional order to the drawee to pay according to the directions of the drawer.

(d) A note is presented for payment without any prior acceptance by the maker. A bill payable after sight must be accepted by the drawee or someone else on his behalf before it can be presented for payment.

(e) The liability of the maker of a pro-note is primary and absolute, but the liability of the drawer of a bill is secondary and conditional.

(f) Foreign bill must be protested for dishonour but no such protest is necessary in the case of a note.

(g) When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate endorsee, but no such notice need to be given in the case of a note.

(h) A bill can be drawn payable to bearer provided it is not payable on demand. A promissory note cannot be made payable to bearer, even if it is made payable otherwise than on demand

Inland Bills (Sections 11 and 12)

A bill of exchange is an inland instrument if it is (i) drawn or made and payable in India, or (ii) drawn in India upon any person who is a resident in India, even though it is made payable in a foreign country. But a promissory note to be an inland should be drawn and payable in India, as it has no drawee. Two essential conditions to make an inland instrument are: (i) the

instrument must have been drawn or made in India; and (ii) the instrument must be payable in India or the drawee must be in India.

Foreign Bills

All bills which are not inland are deemed to be foreign bills. Normally foreign bills are drawn in sets of three copies.

Trade Bill

A bill drawn and accepted for a genuine trade transaction is termed as a trade bill. When a trader sells goods on credit, he may make use of a bill of exchange.

Accommodation Bill

All bills are not genuine trade bills, as they are often drawn for accommodating a party. An accommodation bill is a bill in which a person lends or gives his name to oblige a friend or some person whom he knows or otherwise. In other words, a bill which is drawn, accepted or endorsed without consideration is called an accommodation bill. The party lending his name to oblige the other party is known as the accommodating or accommodation party, and the party so obliged is called the party accommodated. An accommodation party is not liable on the instrument to the party accommodated because as between them there was no consideration and the instrument was merely to help. But the accommodation party is liable to a holder for value, who takes the accommodation bill for value, though such holder may not be a holder in due course. Thus, A may be in need of money and approach his friends B and C who, instead of lending the money directly, propose to draw an "Accommodation Bill" in his favour in the following form:

"Three months after date pay A or order, the sum of Rupees one thousand only	
To	B.
	C.

If the credit of B and C is good, this device enables A to get an advance of Rs. 1,000 from his banker at the commercial rate of discount. The real debtor in this case is not C, but A the payee who promises to reimburse C before the period of three months only. A is here the principal debtor and B and C are mere sureties. This inversion of liability affords a good definition of an accommodation bill: "If as between the original parties to the bill the one who

should prima facie be principal is in fact the surety whether he be drawer, acceptor, or endorser, that bill is an accommodation bill”.

Bills in Sets (Section 132 and 133)

Foreign bills are usually drawn in sets to avoid the danger of loss. They are drawn in sets of three, each of which is called “Via” and as soon as any one of them is paid, the others become inoperative. All these parts form one bill and the drawer must sign and deliver all of them to the payee. The stamp is affixed only on one part and one part is required to be accepted. But if the drawer mistakenly accepts all the parts of the same bill, he will be liable on each part accepted as if it were a separate bill.

Right to Duplicate

Bill Where a bill of exchange has been lost before it was overdue, the person who was the holder to it may apply to the drawer, to give him another bill of the same tenor. It is only the holder who can ask for a duplicate bill, promissory note or cheque.

Bank Draft

A bill of exchange is also sometimes spoken of as a draft. It is called as a bank draft when a bill of exchange drawn by one bank on another bank, or by itself on its own branch, and is a negotiable instrument. It is very much like the cheque with three points of distinction between the two. A bank draft can be drawn only by a bank on another bank, usually its own branch. It cannot so easily be counter-manded. It cannot be made payable to bearer.

Specimen of a Bank Draft

A.B.C.	
Bank X.Y.Z.	
Branch No.....	
Date.....	On demand pay 'A' or order the sum of rupees one thousand five hundred only for value received.
	Rs.1,500/-
	Sd./- Manager
To	
'B' Branch, (Place)	
In the above demand draft, the drawer is X.Y.Z. Branch, the drawee is 'B' branch and the payee is 'A'.	

(iii) Cheques : The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 and Negotiable Instrument (Amendment) Act, 2015 have broadened, the definition of cheque to include the electronic image of a truncated cheque and a cheque in the electronic form. Section 6 of the Act provides that a 'cheque' is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Despite the amendment as is evident the basic definition of the cheque has been retained and the definition has only been enlarged to include cheques in the above form as well. As per explanation appended to the section, the expression:

- (i) "a cheque in the electronic form" means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case may be
- (ii) "a truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Essentials of a Cheque :

(1) It is always drawn on a banker.

(2) It is always payable on demand.

(3) It does not require acceptance. There is, however, a custom among banks to mark cheques as good for purposes of clearance.

(4) A cheque can be drawn on bank where the drawer has an account.

(5) Cheques may be payable to the drawer himself. It may be made payable to bearer on demand unlike a bill or a note.

(6) The banker is liable only to the drawer. A holder has no remedy against the banker if a cheque is dishonoured.

(7) A cheque is usually valid for fix months. However, it is not invalid if it is post dated or ante-dated.

(8) No Stamp is required to be affixed on cheques.

A cheque is a bill of exchange drawn on a specified banker and always payable on demand. A cheque is always drawn on a particular banker and is always payable on demand. Consequently, all cheques are bills of exchange but all bills are not cheques.

Specimen of a Cheque

A.B.C. Bank X.Y.Z. Branch		Date.....
Pay 'A' or the bearer sum of rupees only.		
A/c No..... LF.....		
		Rs. /- Sd/-
No.....		

Banker

A banker is one who does banking business. Section 5(b) of the Banking Regulation Act, 1949 defines banking as, “accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft or otherwise.” This definition emphasises two points:

- (1) that the primary function of a banker consists of accepting of deposits for the purpose of lending or investing the same
- (2) that the amount deposited is repayable to the depositor on demand or according to the agreement. The demand for repayment can be made through a cheque, draft or otherwise, and not merely by verbal order.

Customer

The term “customer” is neither defined in Indian nor in English statutes. The general opinion is that a customer is one who has an account with the bank or who utilises the services of the bank. The special features of the legal relationship between the banker and the customer may be termed as the obligations and rights of the banker. These are:

1. Obligation to honour cheques of the customers.
2. Obligation to collect cheques and drafts on behalf of the customers.
3. Obligation to keep proper record of transactions with the customer.

4. Obligation to comply with the express standing instructions of the customer.
5. Obligation not to disclose the state of customer's account to anyone else.
6. Obligation to give reasonable notice to the customer, if the banker wishes to close the account.
7. Right of lien over any goods and securities bailed to him for a general balance of account.
8. Right of set off and right of appropriation.
9. Right to claim incidental charges and interest as per rules and regulations of the bank, as communicated to the customer at the time of opening the account.

Liability of a Banker

By opening a current account of a customer, the banker becomes liable to his debtor to the extent of the amount so received in the said account and undertakes to honour the cheques drawn by the customer so long as he holds sufficient funds to the customer's credit. If a banker, without justification, fails to honour his customer's cheques, he is liable to compensate the drawer for any loss or damage suffered by him. But the payee or holder of the cheque has no cause of action against the banker as the obligation to honour a cheque is only towards the drawer.

The banker must also maintain proper and accurate accounts of credits and debits. He must honour a cheque presented in due course. But in the following circumstances, he must refuse to honour a cheque and in some others he may do so.

When Banker must Refuse Payment

In the following cases the authority of the banker to honour customer's cheque comes to an end, he must refuse to honour cheques issued by the customer:

- (a) When a customer countermands payment i.e., where or when a customer, after issuing a cheque issues instructions not to honour it, the banker must not pay it.
- (b) When the banker receives notice of customer's death.
- (c) When customer has been adjudged an insolvent.

- (d) When the banker receives notice of customer's insanity.
- (e) When an order (e.g., Garnishee Order) of the Court, prohibits payment.
- (f) When the customer has given notice of assignment of the credit balance of his account.
- (g) When the holder's title is defective and the banker comes to know of it.
- (h) When the customer has given notice for closing his account.

When Banker may Refuse Payment

In the following cases the banker may refuse to pay a customer's cheque:

- (a) When the cheque is post-dated
- (b) When the banker has no sufficient funds of the drawer with him and there is no communication between the bank and the customer to honour the cheque.
- (c) When the cheque is of doubtful legality.
- (d) When the cheque is not duly presented, e.g., it is presented after banking hours.
- (e) When the cheque on the face of it is irregular, ambiguous or otherwise materially altered.
- (f) When the cheque is presented at a branch where the customer has no account.
- (g) When some persons have joint account and the cheque is not signed jointly by all or by the survivors of them.
- (h) When the cheque has been allowed to become stale, i.e., it has not been presented within six months of the date mentioned on it.

Protection of Paying Banker (Sections 10, 85 and 128)

Section 85 lays down that where a cheque payable to order purports to be endorsed by or on behalf of the payee the banker is discharged by payment in due course. He can debit the account of the customer with the amount even though the endorsement turns out subsequently to have been forged, or the

agent of the payee without authority endorsed it on behalf of the payee. It would be seen that the payee includes endorsee. This protection is granted because a banker cannot be expected to know the signatures of all the persons in the world. He is only bound to know the signatures of his own customers. Therefore, the forgery of drawer's signature will not ordinarily protect the banker but even in this case, the banker may debit the account of the customer, if it can show that the forgery was intimately connected with the negligence of the customer and was the proximate cause of loss.

In the case of bearer cheques, the rule is that once a bearer cheque, always a bearer cheque. Where, therefore, a cheque originally expressed by the drawer himself to be payable to bearer, the banker may ignore any endorsement on the cheque. He will be discharged by payment in due course. But a cheque which becomes bearer by a subsequent endorsement in blank is not covered by this Section. A banker is discharged from liability on a crossed cheque if he makes payment in due course.

Payment in due Course (Section 10)

Any person liable to make payment under a negotiable instrument, must make the payment of the amount due thereunder in due course in order to obtain a valid discharge against the holder. A payment in due course means a payment in accordance with the apparent tenor of the instrument, in good faith and without negligence to any person in possession thereof Under Sections 10 and 128, a paying banker making payment in due course is protected.

Collecting Banker

Collecting Banker is one who collects the proceeds of a cheque for a customer. Although a banker collects the proceeds of a cheque for a customer purely as a matter of service, yet the Negotiable Instruments Act, 1881 indirectly imposes statutory obligation, statutory in nature.

This is evident from Section 126 of the Act which provides that a cheque bearing a "general crossing" shall not be paid to anyone other than banker and a cheque which is "specially crossed" shall not be paid to a person other than the banker to whom it is crossed. Thus, a paying banker must pay a generally crossed cheque only to a banker thereby meaning that it should be collected by another banker. While so collecting the cheques for a customer, it is quite possible that the banker collects for a customer, proceeds of a cheque to which the customer had no title in fact. In such cases, the true owner may sue the collecting banker for "conversion". At the same time, it cannot be expected of a banker to know or to ensure that all the signatures appearing in

endorsements on the reverse of the cheque are genuine. The banker is expected to be conversant only with the signatures of his customer.

A customer to whom a cheque has been endorsed, would request his banker to collect a cheque. In the event of the endorser's signature being proved to be forged at later date, the banker who collected the proceeds should not be held liable for the simple reason that he has merely collected the proceeds of a cheque.

Section 131 of the Negotiable Instruments Act affords statutory protection in such a case where The Amendment Act, 2002 has added a new explanation to Section 131 which provides that it shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him, to verify the prima facie genuineness of the cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified with due diligence and ordinary care. The requisites of claiming protection under Section 131 are as follows:

The collecting banker should have acted in good faith and without negligence. An act is done in good faith when it is done honestly. The plea of good faith can be rebutted on the ground of recklessness indicative of want of proper care and attention. Therefore, much depends upon the facts of the case. The burden of proving that the cheque was collected in good faith and without negligence is upon the banker claiming protection. Failure to verify the regularity of endorsements, collecting a cheque payable to the account of the company to the credit of the director, etc. are examples of negligence

The banker should have collected a crossed cheque, i.e., the cheque should have been crossed before it came to him for collection

The proceeds should have been collected for a customer, i.e., a person who has an account with him.

That the collecting banker has only acted as an agent of the customer. If he had become the holder for value, the protection available under Section 131 is forfeited—Where for instance, the banker allows the customer to withdraw the amount of the cheque before the cheque is collected or where the cheque has been accepted in specific reduction of an overdraft, the banker is deemed to have become the holder for value and the protection is lost. But the explanation to Section 131 says that the mere crediting of the amount to the account does not imply that the banker has become a holder for value because due to accounting conveniences the banker may credit the account of the cheque to the customer's account even before proceeds thereof are realised.

Overdue, Stale or Out-of-date

Cheques A cheque is overdue or becomes statute-barred after three years from its due date of issue. A holder cannot sue on the cheque after that time. Apart from this provision, the holder of a cheque is required to present it for payment within a reasonable time, as a cheque is not meant for indefinite circulation. In India, a cheque, which has been in circulation for more than six months, is regarded by bankers as stale. If, as a result of any delay in presenting a cheque, the drawer suffers any loss, as by the failure of the bank, the drawer is discharged from liability to the holder to the extent of the damage.

Liability of Endorser

In order to charge an endorser, it is necessary to present the cheque for payment within a reasonable time of its delivery by such endorser

Rights of Holder against Banker

A banker is liable to his customer for wrongful dishonour of his cheque but it is not liable to the payee or holder of the cheque. The holder has no right to enforce payment from the banker except in two cases, namely, (i) where the holder does not present the cheque within a reasonable time after issue, and as a result the drawer suffers damage by the failure of the banker in liquidation proceedings; and (ii) where a banker pays a crossed cheque by mistake over the counter, he is liable to the owner for any loss occasioned by it.

Modes of Crossing (Sections 123-131A)

There are two types of crossing which may be used on cheque, namely:

- (i) General,
- (ii) Special.

To these may be added another type, i.e. Restrictive crossing.

It is general crossing where a cheque bears across its face an addition of two parallel transverse lines and/ or the addition of the words "and Co." between them, or addition of "not negotiable". As stated earlier, where a cheque is crossed generally, the paying banker will pay to any banker. Two transverse parallel lines are essential for a general crossing (Sections 123-126).

In case of general crossing, the holder or payee cannot get the payment over the counter of the bank but through a bank only. The addition of the words "and Co." do not have any significance but the addition of the words "not

negotiable" restrict the negotiability of the cheque and in case of transfer, the transferee will not give a better title than that of a transferor.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable" that addition constitutes a crossing and the cheque is crossed specially and to that banker. The paying banker will pay only to the banker whose name appears across the cheque, or to his collecting agent. Parallel transverse lines are not essential but the name of the banker is the insignia of a special crossing.

In case of special crossing, the paying banker is to honour the cheque only when it is prescribed through the bank mentioned in the crossing or its agent bank.

Account Payee's Crossing: Such crossing does, in practice, restrict negotiability of a cheque. It warns the collecting banker that the proceeds are to be credited only to the account of the payee, or the party named, or his agent. If the collecting banker allows the proceeds of a cheque bearing such crossing to be credited to any other account, he will be guilty of negligence and will not be entitled to the protection given to collecting banker under Section 131. Such crossing does not affect the paying banker, who is under no duty to ascertain that the cheque is in fact collected for the account of the person named as payee.

Not Negotiable Crossing

A cheque may be crossed not negotiable by writing across the face of the cheque the words "Not Negotiable" within two transverse parallel lines in the case of a general crossing or along with the name of a banker in the case of a special crossing. Section 130 of the Negotiable Instruments Act provides "A person taking a cheque crossed generally or specially bearing in either case with the words "not negotiable" shall not have and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had". The crossing of cheque "not negotiable" does not mean that it is non-transferable. It only deprives the instrument of the incident of negotiability. Normally speaking, the essential feature of a negotiable instrument as opposed to chattels is that a person who takes the instrument in good faith, without negligence, for value, before maturity and without knowledge of the defect in the title of the transferor, gets a good title to the instrument. In other words, he is called a holder in due course who acquires an indisputable title to the cheque. (When the instrument passes through a holder-in-due course, it is purged of all defects and the subsequent holders also get good title). It is exactly this important feature which is taken away by crossing the cheque "not negotiable". In other words, a cheque crossed "not

negotiable” is like any other chattel and therefore the transferee gets same title to the cheque which his transferor had. That is to say that the transferee cannot claim the rights of a holder-in-due-course. So long as the title of the transferors is good, the title of the transferees is also good but if there is a taint in the title to the cheque of one of the endorsers, then all the subsequent transferees’ title also become tainted with the same defect they cannot claim to be holders- in-due-course.

The object of this Section is to afford protection to the drawer or holder of a cheque who is desirous of transmitting it to another person, as much protection as can reasonably be afforded to him against dishonestly or actual miscarriage in the course of transit. For example, a cheque payable to bearer is crossed generally and is marked “not negotiable”. It is lost or stolen and comes into the possession of X who takes it in good faith and gives value for it, X collects the cheque through his bank and paying banker also pays. In this case, both the paying and the collecting bankers are protected under Sections 128 and 131 respectively. But X cannot claim that he is a holder-in-due course which he could have under the normal circumstances claimed. The reason is that cheque is crossed “not negotiable” and hence the true owner’s (holder’s) right supercedes the rights of the holder-in-due-course. Since X obtained the cheque from a person who had no title to the cheque (i.e. from one whose title was defective) X can claim no better title solely because the cheque was crossed “not negotiable” and not for any other reason. Thus “not negotiable” crossing not only protects the rights of the true owner of the cheque but also serves as a warning to the endorsees’ to enquire thoroughly before taking the cheque as they may have to be answerable to the true owner thereof if the endorser’s title is found to be defective.

“Not negotiable” restricts the negotiability of the cheque and in case of transfer, the transferee will not get a better title than that of a transferor.

If the cheque becomes “not negotiable” it lacks negotiability. A cheque crossed specially or generally bearing the words “not negotiable”, lacks negotiability and therefore is not a negotiable instrument in the true sense. It does not restrict transferability but restricts negotiability only.

Maturity

Cheques are always payable on demand but other instruments like bills, notes, etc. may be made payable on a specified date or after the specified period of time. The date on which payment of an instrument falls due is called its

maturity. According to Section 22 of the Act, “the maturity of a promissory note or a bill of exchange is the date at which it falls due”. According to Section 21 a promissory note or bill of exchange payable “at sight” or “on presentment” is payable on demand. It is due for payment as soon as it is issued. The question of maturity, therefore, arises only in the case of a promissory note or a bill of exchange payable “after date” or “after sight” or at a certain period after the happening of an event which is certain to happen. instrument payable at a specified period after date or after sight is entitled to three days of grace. Such a bill or note matures or falls due on the last day of the grace period, and must be presented for payment on that day and if dishonoured, suit can be instituted on the next day after maturity. If an instrument is payable by instalments, each instalment is entitled to three days of grace. No days of grace are allowed for cheques, as they are payable on demand.

Where a note or bill is expressed to be payable on the expiry of specified number of months after sight, or after date, the period of payment terminates on the day of the month which corresponds with the date of instrument, or with the date of acceptance if the bill be accepted or presented for sight, or noted or protested for nonacceptance.

If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month. If the day of maturity falls on a public holiday, the instrument is payable on the preceeding business day. Thus, if a bill is at maturity on a Sunday. It will be deemed due on Saturday and not on Monday.

The ascertainment of the date of maturity becomes important because all these instruments must be presented for payment on the last day of grace and their payment cannot be demanded before that date. Where an instrument is payable by instalments, it must be presented for payment on the third day after the day fixed for the payment of each instalment.

Holder

According to Section 8 of the Act a person is a holder of a negotiable instrument who is entitled in his own name to the possession of the instrument, and (ii) to recover or receive its amount from the parties thereto. It is not every person in possession of the instrument who is called a holder. To be a holder, the person must be named in the instrument as the payee, or the endorsee, or he must be the bearer thereof. A person who has obtained possession of an instrument by theft, or under a forged endorsement, is not a holder, as he is not entitled to recover the instrument. The holder implies de jure (holder in law) holder and not de facto (holder in fact) holder. An agent

holding an instrument for his principal is not a holder although he may receive its payment.

Holder in Due Course

Section 9 states that a holder in due course is (i) a person who for consideration, obtains possession of a negotiable instrument if payable to bearer, or (ii) the payee or endorsee thereof, if payable to order, before its maturity and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

A holder in due course is in a privileged position. He is not only himself protected against all defects of the persons from whom he received the instrument as current coin, but also serves as a channel to protect all subsequent holders. A holder in due course can recover the amount of the instrument from all previous parties, although, as a matter of fact, no consideration was paid by some of the previous parties to the instrument or there was a defect of title in the party from whom he took it. Once an instrument passes through the hands of a holder in due course, it is purged of all defects. It is like current coin. Whoever takes it can recover the amount from all parties previous to such holder.

Capacity of Parties

Capacity to incur liability as a party to a negotiable instrument is co-extensive with capacity to contract. According to Section 26, every person capable of contracting according to law to which he is subject, may bind himself and be bound by making, drawing, acceptance, endorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. Negatively, minors, lunatics, idiots, drunken person and persons otherwise disqualified by their personal law, do not incur any liability as parties to negotiable instruments. But incapacity of one or more of the parties to a negotiable instrument in no way, diminishes the abilities and the liabilities of the competent parties. Where a minor is the endorser or payee of an instrument which has been endorsed all the parties accepting the minor are liable in the event of its dishonour.

Liability of Parties

The provisions regarding the liability of parties to negotiable instruments are laid down in Sections 30 to 32 and 35 to 42 of the Negotiable Instruments Act. These provisions are as follows:

1. Liability of Drawer (Section 30) The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to or received by the drawer. The nature of drawer's liability is that by drawing a bill, he undertakes that

(i) on due presentation, it shall be accepted and paid according to its tenor, (ii) in case of dishonour, he will compensate the holder or any endorser, provided notice of dishonour has been duly given. However, in case of accommodation bill no notice of dishonour to the drawer is required. The liability of a drawer of a bill of exchange is secondary and arises only on default of the drawee, who is primarily liable to make payment of the negotiable instrument.

2. Liability of the Drawee of Cheque (Section 31) The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required to do so and, or in default of such payment, he shall compensate the drawer for any loss or damage caused by such default. If the banker is unjustified in refusing to honour the cheque of its customer, it shall be liable for damages.

3. Liability of "Maker" of Note and "Acceptor" of Bill (Section 32) In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity, according to the apparent tenor of the note or acceptance respectively. The acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. It follows that the liability of the acceptor of a bill corresponds to that of the maker of a note and is absolute and unconditional but the liability under this Section is subject to a contract to the contrary (e.g., as in the case of accommodation bills) and may be excluded or modified by a collateral agreement. Further, the payment must be made to the party named in the instrument and not to any-one else, and it must be made at maturity and not before.

4. Liability of endorser (Section 35) Every endorser incurs liability to the parties that are subsequent to him. Whoever endorses and delivers a negotiable instrument before maturity is bound thereby to every subsequent holder in case of dishonour of the instrument by the drawee, acceptor or maker, to compensate such holder of any loss or damage caused to him by such dishonour provided

- (i) there is no contract to the contrary
- (ii) he (endorser) has not expressly excluded, limited or made conditional his own liability;
- (iii) due notice of dishonour has been given to, or received by, such endorser.

Every endorser after dishonour, is liable upon the instrument as if it is payable on demand. He is bound by his endorsement notwithstanding any previous alteration of the instrument. (Section 88)

5. Liability of Prior Parties (Section 36) Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Prior parties may include the maker or drawer, the acceptor and all the intervening endorsers to a negotiable instrument. The liability of the prior parties to a holder in due course is joint and several. The holder in due course may hold any or all prior parties liable for the amount of the dishonoured instrument.

6. Liability inter se Various parties to a negotiable instrument who are liable thereon stand on a different footing with respect to the nature of liability of each one of them.

7. Liability of Acceptor of Forged Endorsement (Section 41) An acceptor of a bill of exchange already endorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill.

8. Acceptor's Liability on a Bill drawn in a Fictitious Name An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Negotiation (Section 14)

A negotiable instrument may be transferred by negotiation or assignment. Negotiation is the transfer of an instrument (a note, bill or cheque) for one person to another in such a manner as to convey title and to constitute the transferee the holder thereof. When a negotiable instrument is transferred by negotiation, the rights of the transferee may rise higher than those of the transferor, depending upon the circumstances attending the negotiation. When the transfer is made by assignment, the assignee has only those rights which the assignor possessed. In case of assignment, there is a transfer of ownership by means of a written and registered document.

Negotiability and Assignability Distinguished

A transfer by negotiation differs from transfer by assignment in the following respects:

(a) Negotiation requires mere delivery of a bearer instrument and endorsement and delivery of an order instrument to effectuate a transfer. Assignment requires a written document signed by the transferor.

(b) Notice of transfer of debt (actionable claim) must be given by the assignee to the debtor in order to complete his title; no such notice is necessary in a transfer by negotiation.

(c) On assignment, the transferee of an actionable claim takes it subject to all the defects in the title of, and subject to all the equities and defences available against the assignor, even though he took the assignment for value and in good faith. In case of negotiation the transferee, as holder-in-due course, takes the instrument free from any defects in the title of the transferor.

Importance of Delivery

Negotiation is effected by mere delivery of a bearer instrument and by endorsement and delivery of an order instrument. This shows that “delivery” is essential in negotiable instruments. Section 46 expressly provides that making acceptance or endorsement of negotiable instrument is not complete until delivery, actual or constructive, of the instrument. Delivery made voluntarily with the intention of passing property in the instrument to the person to whom it is given is essential.

Negotiation by Mere Delivery

A bill or cheque payable to bearer is negotiated by mere delivery of the instrument. An instrument is payable to bearer:

Where it is made so payable

Where it is originally made payable to order but the only or the last endorsement is in blank.

Where the payee is a fictitious or a non-existing person.

These instruments do not require signature of the transferor. The person who takes them is a holder, and can sue in his own name on them. Where a bearer negotiates an instrument by mere delivery, and does not put his signature thereon, he is not liable to any party to the instrument in case the instrument is dishonoured, as he has not lent his credit to it. His obligations are only towards his immediate transferee and to no other holders.

A cheque, originally drawn payable to bearer remains bearer, even though it is subsequently endorsed in full. The rule is once a bearer cheque always a bearer cheque.

Negotiation by Endorsement and Delivery

An instrument payable to a specified person or to the order of a specified person or to a specified person or order is an instrument payable to order. Such an instrument can be negotiated only by endorsement and delivery. Unless the holder signs his endorsement on the instrument, the transferee does not become a holder. Where an instrument payable to order is delivered without endorsement, it is merely assigned and not negotiated and the holder thereof is not entitled to the rights of a holder in due course, and he cannot negotiate it to a third person.

Endorsement (Sections 15 and 16)

Where 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 (called Allonge), or so, signs for the same purpose, a stamped paper intended to be completed as a negotiable instrument, he is said to endorse the same (Section 15), the person to whom the instrument is endorsed is called the endorsee. In other words, 'endorsement' means and involves the writing of something on the back of an instrument for the purpose of transferring the right, title and interest therein to some other person

Classes of endorsement

An endorsement may be :

- (a) Blank or General:** An endorsement is to be blank or general where the endorser merely writes his signature on the back of the instrument, and the instrument so endorsed becomes payable to bearer, even though originally it was payable to order. Thus, where bill is payable to “Mohan or order”, and he writes on its back “Mohan”, it is an endorsement in blank by Mohan and the property in the bill can pass by mere delivery, as long as the endorsement continues to be a blank. But a holder of an instrument endorsed in blank may convert the endorsement in blank into an endorsement in full, by writing above the endorser’s signature, a direction to pay the instrument to another person or his order.
- (b) Special or Full:** If the endorser signs his name and adds a direction to pay the amount mentioned in the instrument to, or to the order of a specified person, the endorsement is said to be special or in full. A bill made payable to Mohan or Mohan or order, and endorsed “pay to the order of Sohan” would be specially endorsed and Sohan endorses it further. A blank endorsement can be turned into a special one by the addition of an order making the bill payable to the transferee.
- (c) Restrictive:** An endorsement is restrictive which prohibits or restricts the further negotiation of an instrument. Examples of restrictive endorsement: “Pay A only” or “Pay A for my use” or “Pay A on account of B” or “Pay A or order for collection”.
- (d) Partial:** An endorsement partial is one which purports to transfer to the endorsee a part only of the amount payable on the instrument. A partial endorsement does not operate as negotiation of the instrument. A holds a bill for Rs. 1,000 and endorses it as “Pay B or order Rs. 500”. The endorsement is partial and invalid.
- (e) Conditional or qualified:** An endorsement is conditional or qualified which limits or negatives the liability of the endorser. An endorser may limit his liability in any of the following ways:

 - (i) By sans recourse endorsement, i.e. by making it clear that he does not incur the liability of an endorser to the endorsee or subsequent holders and they should not look to him in case of dishonour of instrument. The endorser excludes his liability by adding the words “sans recourse” or “without recourse”, e.g., “pay A or order sans recourse”

- (ii) By making his liability depending upon happening of a specified event which may never happen, e.g., the holder of a bill may endorse it thus: "Pay A or order on his marrying B". In such a case, the endorser will not be liable until A marries B. It is pertinent to refer to Section 52 of the Negotiable Instruments Act, 1881 here. It reads "The endorser of a negotiable instrument may, by express words in the endorsement exclude his own liability thereon, or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen".

Negotiation Back

Where an endorser negotiates an instrument and again becomes its holder, the instrument is said to be negotiated back to that endorser and none of the intermediary endorsees are then liable to him. The rule prevents a circuity of action. Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all the intermediate endorsers are liable to him. "the italicised portion of the above Section is important".

Negotiation of Lost Instrument or that Obtained by Unlawful Means

When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee, who claims through the person who found or obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor, or holder from any party prior to such holder unless such possessor or endorsee is, or some person through whom he claims was, a holder in due course.

Forged Endorsement

The case of a forged endorsement is worth special notice. If an instrument is endorsed in full, it cannot be negotiated except by an endorsement signed by the person to whom or to whose order the instrument is payable, for the endorsee obtains title only through his endorsement. Thus, if an instrument be negotiated by means of a forged endorsement, the endorsee acquires no title even though he be a purchaser for value and in good faith, for the endorsement is a nullity. Forgery conveys no title. But where the instrument is a bearer instrument or has been endorsed in blank, it can be negotiated by mere delivery, and the holder derives his title independent of the forged

endorsement and can claim the amount from any of the parties to the instrument.

Acceptance of a Bill of Exchange

The drawee of a bill of exchange, as such, has no liability on any bill addressed to him for acceptance or payment. A refusal to accept or to pay such bill gives the holder no rights against him. The drawee becomes liable only after he accepts the bill.

The acceptor has to write the word 'accepted' on the bill and sign his name below it. Thus, it is the acceptor who is primarily liable on a bill. The acceptance of a bill is the indication by the drawee of his assent to the order of the drawer. Thus, when the drawee writes across the face of the bill the word "accepted" and signs his name underneath he becomes the acceptor of the bill.

An acceptance may be either general or qualified. A general acceptance is absolute and as a rule, an acceptance has to be general. Where an acceptance is made subject to some condition or qualification, thereby varying the effect of the bill, it is a qualified acceptance. The holder of the bill may either refuse to take a qualified acceptance or non-acquiescence in it. Where he refuses to take it, he can treat the bill as dishonoured by non-acceptance, and sue the drawer accordingly.

Acceptance for Honour

When a bill has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. The stranger so accepting, will declare under his hand that he accepts the protested bill for the honour of the drawer or any particular endorser whom he names. The acceptor for honour is liable to pay only when the bill has been duly presented at maturity to the drawee for payment and the drawee has refused to pay and the bill has been noted and protested for non-payment. Where a bill has been protested for non-payment after having been duly accepted, any person may intervene and pay it supra protest for the honour of any party liable on the bill. When a bill is paid supra protest, it ceases to be negotiable. The stranger, on paying for honour, acquires all the right of holder for whom he pays.

Presentment for Acceptance

It is only bills of exchange that require presentment for acceptance and even these of certain kinds only. Bills payable on demand or on a fixed date need

not be presented. Thus, a bill payable 60 days after due date on the happening of a certain event may or may not be presented for acceptance. But the following bills must be presented for acceptance otherwise, the parties to the bill will not be liable on it:

A bill payable after sight. Presentment is necessary in order to fix maturity of the bills

A bill in which there is an express stipulation that it shall be presented for acceptance before it is presented for payment.

Section 15 provides that the presentment for acceptance must be made to the drawee or his duly authorised agent. If the drawee is dead, the bill should be presented to his legal representative, or if he has been declared an insolvent, to the official receiver or assigner.

The presentment must be made before maturity, within a reasonable time after it is drawn, or within the stipulated period, if any, on a business day within business hours and at the place of business or residence of the drawee. The presentment must be made by exhibiting the bill to the drawee; mere notice of its existence in the possession of holder will not be sufficient. When presentment is compulsory and the holder fails to present for acceptance, the drawer and all the endorsers are discharged from liability to him.

Presentment for Acceptance when Excused

Compulsory presentment for acceptance is excused and the bill may be treated as dishonoured in the following cases :

Where the drawee cannot be found after reasonable search.

Where drawee is a fictitious person or one incapable of contracting

Where although the presentment is irregular, acceptance has been refused on some other ground.

Presentment for Payment

Section 64 lays down the general rule as to presentment of negotiable instruments for payment. It says all notes, bills and cheques must be presented for payment thereof respectively by or on behalf of the holder during the usual

hours of business and of the maker or acceptor, and if at banker's within banking hours. [Section 64(1)]

As mentioned earlier, the definition of cheque has been broadened to include the electronic image of a truncated cheque and a cheque in the electronic form. Thus, the section has also been suitably amended to provide rules as to presentment of truncated cheque. The amendment, despite recognising electronic image of a truncated cheque, has made provision for the drawee bank to call for the truncated cheque in original if it is not satisfied about the instrument.

Section 64(2) stipulates, where an electronic image of a truncated cheque is presented for payment, the drawee bank is entitled to demand any further information regarding the truncated cheque from the bank holding the truncated cheque in case of any reasonable suspicion about the genuineness of the apparent tenor of instrument, and if the suspicion is that of any fraud, forgery, tampering or destruction of the instrument, it is entitled to further demand the presentment of the truncated cheque itself for verification

Provided that the truncated cheque so demanded by the drawee bank shall be retained by it, if the payment is made accordingly.

Presentment for Payment when Excused

No presentment is necessary and the instrument may be treated as dishonoured in the following cases:

- (a) Where the maker, drawer or acceptor actively does something so as to intentionally obstruct the presentment of the instrument, e.g., deprives the holder of the instrument and keeps it after maturity
- (b) Where his business place is closed on the due date.
- (c) Where no person is present to make payment at the place specified for payment.
- (d) Where he cannot, after due search be found. (Section 61)
- (e) Where there is a promise to pay notwithstanding non-presentment.
- (f) Where the presentment is express or impliedly waived by the party entitled to presentment.
- (g) Where the drawer could not possibly have suffered any damage by non-presentment.
- (h) Where the drawer is a fictitious person, or one incompetent to contract.

- (i) Where the drawer and the drawee are the same person.
- (j) Where the bill is dishonoured by non-acceptance.
- (k) Where presentment has become impossible, e.g., the declaration of war between the countries of the holder and drawee.
- (l) Where though the presentment is irregular, acceptance has been refused on some other grounds.

Dishonour and its Remedies

Dishonour by Non-payment (Section 92)

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

Also, a negotiable instrument is dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid. If the bill is dishonoured either by non-acceptance or by non-payment, the drawer and all the endorers of the bill are liable to the holder, provided he gives notice of such dishonour. The drawee is liable only when there is dishonour by non-payment.

Notice of Dishonour (Sections 91-98 and Sections 105-107)

When a negotiable instrument is dishonoured either by non-acceptance or by non-payment, the holder or some party liable thereon must give notice of dishonour to all other parties whom he seeks to make liable. Each party receiving notice of dishonour must in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time after he has received it. The object of giving notice is not to demand payment but to whom the party notified of his liability and in case of drawer to enable him to protect himself as against the drawee or acceptor who has dishonoured the instrument issued by him.

Notice of dishonour is so necessary that an omission to give it discharges all parties other than the maker or acceptor. These parties are discharged not only on the bill or note, but also in respect of the original consideration. Notice may be oral or in writing, but it must be actual formal notice. It must be given within a reasonable time of dishonour.

NOTING AND PROTEST (SECTIONS 99-104 A)

Noting

Where a note or bill is dishonoured, the holder is entitled after giving due notice of dishonour, to sue the drawer and the endorsers. Section 99 provides a convenient method of authenticating the fact of dishonour by means of "Noting". Where a bill or note is dishonoured, the holder may, if he so desires, cause such dishonour to be noted by a notary public on the instrument, or on a paper attached thereto or partly on each. The noting or minute must be recorded by the notary public within a reasonable time after dishonour and must contain the fact of dishonour, the date of dishonour, the reason, if any, assigned for such dishonour if the instrument has not been expressly dishonoured the reasons why the holder treats it dishonoured and notary's charges.

Protest

The protest is the formal notarial certificate attesting the dishonour of the bill, and based upon the noting which has been effected on the dishonour of the bill. After the noting has been made, the formal protest is drawn up by the notary and when it is drawn up it relates back to the date of noting.

Where the acceptor of a bill has become insolvent, or has suspended payment, or his credit has been publicly impeached, before the maturity of the bill, the holder may have the bill protested for better security. The notary public demands better security and on its refusal makes a protest known as "protest for better security". Foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn.

Foreign promissory notes need not be so protested. Where a bill is required by law to be protested, then instead of a notice of dishonour, notice of protest must be given by the notary public.

A protest to be valid must contain on the instrument itself or a literal transcript thereof, the names of the parties for and against whom protest is made, the fact and reasons for dishonour together with the place and time of dishonour and the signature of the notary public. Protest affords an authentic evidence of dishonour to the drawer and the endorsee.

Discharge

The discharge in relation to negotiable instrument may be either

discharge of the instrument

discharge of one or more parties to the instrument from liability.

Discharge of the Instrument

A negotiable instrument is discharged:

by payment in due course

when the principal debtor becomes the holder

by an act that would discharge simple contract

by renunciation

by cancellation.

Discharge of a Party or Parties

When any particular party or parties are discharged, the instrument continues to be negotiable and the undischarged parties remain liable on it. For example, the non-presentment of a bill on the due date discharges the endorsers from their liability, but the acceptor remains liable on it. A party may be discharged in the following ways

By cancellation by the holder of the name of any party to it with the intention of discharging him

By release, when the holder releases any party to the instrument

Discharge of secondary parties, i.e., endorsers.

By the operation of the law, i.e., by insolvency of the debtor

By allowing drawee more than 48 hours to accept the bill, all previous parties are discharged.

By non-presentment of cheque promptly the drawer is discharged

By taking qualified acceptance, all the previous parties are discharged.

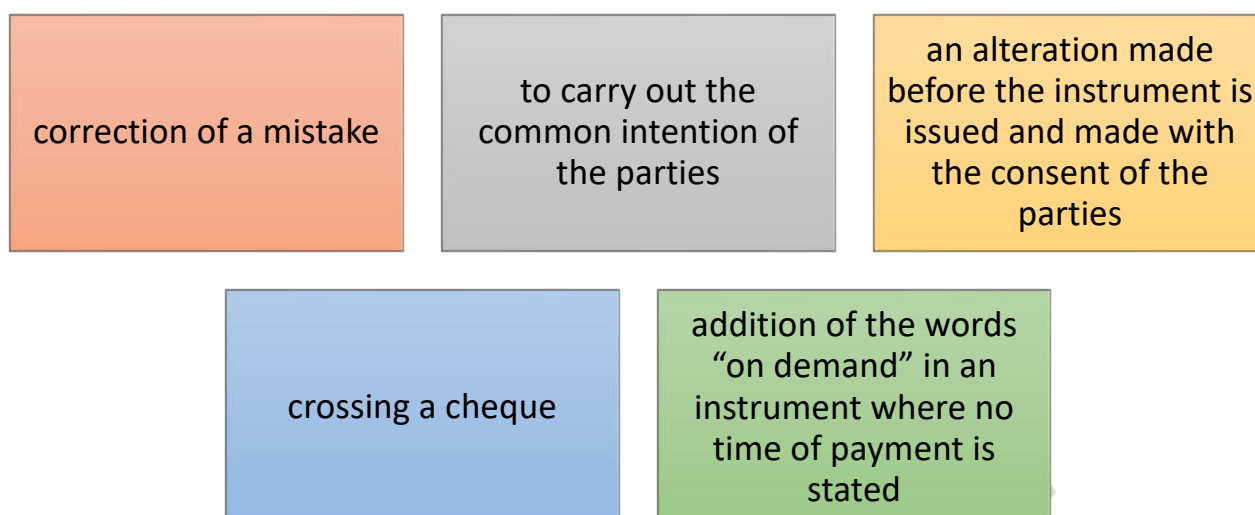
By material alteration.

MATERIAL ALTERATION (SECTION 87)

An alteration is material which in any way alters the operation of the instrument and the liabilities of the parties thereto. Therefore, any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, or which changes legal character of the instrument is a material alteration.

A material alteration renders the instrument void, but it affects only those persons who have already become parties at the date of the alteration. Those who take the altered instrument cannot complain. Section 88 provides that an acceptor or endorser of a negotiable instrument is bound by his acceptance or endorsement notwithstanding any previous alteration of the instrument.

There is no material alteration and the instrument is not vitiated in the following cases:



Section 89 has been amended to provide for the amendment in the definition of cheque so as to provide for electronic image of a truncated cheque. The section provides that any bank or a clearing house which receives a transmitted electronic image of a truncated cheque, shall verify from the party who transmitted the image to it, that the image so transmitted to it and received by it, is exactly the same. Where there is any difference in apparent tenor of such electronic image and the truncated cheque, it shall be a material alteration. In such a case, it shall be the duty of the bank or the clearing house, as the case may be, to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting the image. If the bank fails to discharge this duty, the payment made by it shall not be regarded as good and it shall not be afforded protection.

Retirement of a Bill under

Rebate An acceptor of a bill may make payment before maturity, and the bill is then said to be retired, but it is not discharged and must not be cancelled except by the acceptor when it comes into his hands. It is customary in such a case to make allowance of interest on the money to the acceptor for the remainder of the time which the bill has to run. The interest allowance is known as rebate.

Hundis

Hundis are negotiable instruments written in an oriental language. They are sometimes bills of exchange and sometimes promissory notes, and are not covered under the Negotiable Instruments Act, 1881. Generally, they are governed by the customs and usages in the locality but if custom is silent on the point in dispute before the Court, this Act applies to the hundis. The term "hundi" was formerly applicable to native bills of exchange. The promissory

notes were then called “teep”. The hundis were in circulation in India even before the present Negotiable Instrument Act, 1881 came into operation. The usages attached to these hundis varied with the locality in which they were in circulation.

Generally understood, the term “hundi” includes all indigenous negotiable instruments whether they are bills of exchange or promissory notes. An instrument in order to be a hundi must be capable of being sued by the holder in his own name, and must by the custom of trade be transferred like cash by delivery. Obviously the customs relating to hundis were many. In certain parts of the country even oral acceptance was in vogue.

The following types of hundis are worth mentioning :

1. Shah Jog Hundi “Shah” means a respectable and responsible person or a man of worth in the bazar. Shah Jog Hundi means a hundi which is payable only to a respectable holder, as opposed to a hundi payable to bearer. In other words the drawee before paying the same has to satisfy himself that the payee is a ‘SHAH’.

2. Jokhmi Hundi A “jokhmi” hundi is always drawn on or against goods shipped on the vessel mentioned in the hundi. It implies a condition that money will be paid only in the event of arrival of the goods against which the hundi is drawn. It is in the nature of policy of insurance. The difference, however, is that the money is paid before hand and is to be recovered if the ship arrives safely.

3. Jawabee Hundi According to Macpherson, “A person desirous of making a remittance writes to the payee and delivers the letter to a banker, who either endorses it on to any of his correspondents near the payee’s place of residence, or negotiates its transfer. On the arrival, the letter is forwarded to the payee, who attends and gives his receipt in the form of an answer to the letter which is forwarded by the same channel of the drawer or the order.” Therefore, this is a form of hundi which is used for remitting money from one place to another.

4. Nam jog Hundi It is a hundi payable to the party named in the bill or his order. The name of the payee is specifically inserted in the hundi. It can also be negotiated like a bill of exchange. Its alteration into a Shah Jog hundi is a material alteration and renders it void.

5. Darshani Hundi This is a hundi payable at sight. It is freely negotiable and the price is regulated by demand and supply. They are payable on demand and must be presented for payment within a reasonable time after they are received by the holder.

6. Miadi Hundi This is otherwise called muddati hundi, that is, a hundi payable after a specified period of time. Usually money is advanced against these hundis by shroffs after deducting the advance for the period in advance. There are other forms of hundis also like.

Dhani Jog Hundi - A hundi which is payable to "dhani" i.e., the owner.
Firman Jog Hundi - which is payable to order if can be negotiated by endorsement and delivery

Presumptions of Law

A negotiable instrument is subject to certain presumptions. These have been recognised by the Negotiable Instruments Act under Sections 118 and 119 with a view to facilitate the business transactions.

These are described below: It shall be presumed that :



However these legal presumptions are rebuttable by evidence to the contrary. The burden to prove to the contrary lies upon the defendant to the suit and not upon the plaintiff.

Payment of Interest in case of dishonour

The Negotiable Instruments Act, 1881 was amended in the year 1988, revising the rate of interest as contained in Sections 80 and 117, from 6 per cent to 18 per cent per annum payable on negotiable instruments from the due date in case no rate of interest is specified, or payable to an endorser from the date of payment on a negotiable instrument on its dishonour with a view to discourage the withholding of payment on negotiable instruments on due dates.

Penalties in case of dishonour of cheques

1. Chapter XVII of the Negotiable Instruments Act provides for penalties in case of dishonour of certain cheques for insufficiencies of funds in the accounts. Sections 138 to 147 deal with these aspects.
2. Chapter XVII has been amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The amendments have provided the drawer with more time to send notice, made the punishment for the offence more stringent, given power to court for condonation of delay in filing of complaint, excluded liability of government nominated directors, made provision for summary trial of cases under the Chapter and time bound disposal of cases, have relaxed the rules of evidence, and made the offences under the Act compoundable.
3. Further Chapter XVII amended by the Negotiable Instruments (Amendment) Act, 2015. The amendment focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the Negotiable Instruments Act, 1881. The Negotiable Instruments (Amendment) Act, 2015, facilitates filing of cases only in a court within whose local jurisdiction the bank branch of the payee, where the payee delivers the cheque for payment through his account, is situated, except in case of bearer cheques, which are presented to the branch of the drawee bank and in that case the local court of that branch would get jurisdiction. The Negotiable Instruments (Amendment) Act, 2015 provides for retrospective validation for the new scheme of determining the jurisdiction of a court to try a case under Section 138 of the Negotiable Instruments Act, 1881. The Negotiable Instruments (Amendment) Act, 2015 also mandates centralisation of cases against the same drawer.
4. With a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation,

Parliament enacted the Negotiable Instruments (Amendment) Act, 2018 and notified by the Central Government on 1st September, 2018. The Amendments Act strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy. The Negotiable Instruments (Amendment) Act, 2018 inserted two new sections i.e. Section 143A dealing with Power to direct interim compensation and Section 148 dealing with Power of Appellate Court to order payment pending appeal against conviction.

Dishonour of Cheque for Insufficiency, etc., of Funds in the Account

Section 138 of the Act provides that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both.

Presumption in Favour of Holder

As per Section 139 of the Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability. Once the execution of cheque is admitted, Section 139 creates a presumption that the holder of a cheque receives the cheque in discharge, in whole or in part, of any debt or other liability, Basalingappa vs. Mudibassapa, 2019 SCC OnLine SC 491

Defence which may not be Allowed in any Prosecution under Section 138

Section 140 states that it shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in section 138.

Offences by Companies

- a. According to Section 141(1) of the Act, if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- b. Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.
- c. Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under Chapter XVII.
- d. Further Section 141(2) states that notwithstanding anything contained in sub-section(1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Cognizance of Offences

As per Section 142(1) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973 –

- 1) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
- 2) such complaint is made within one month of the date on which the cause of action arises under clause of the proviso to Section 138. Clause (c) of the proviso to Section 138 provides that the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

- 3) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138. Further, Section 142(2) provides that the offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction—
 - (i) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated;
 - (ii) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Validation for Transfer of Pending Cases

1. Section 142A(1) of the Negotiable Instrument Act states that notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under section 142(2), as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.
2. As per Section 142A(2), notwithstanding anything contained in Section 142(2) or Section 142(1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under section 142(2) or the case has been transferred to that court under Section 142(1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.
3. Section 142A(3) states that if, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under Section 142(2), as amended by the Negotiable Instruments

(Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.

Power of Court to try Cases Summarily

1. Section 143(1) of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences under Chapter XVII of the Act shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the Code of Criminal Procedure, 1973 shall, as far as may be, apply to such trials.
2. Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees.
3. Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the Code of Criminal Procedure, 1973
4. As per Section 143(2), the trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.
5. Section 143(3) states that every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

Power to Direct Interim Compensation

Section 143A(1) Negotiable Instruments Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 of the Negotiable Instrument Act, 1881 (Dishonour of cheque for insufficiency, etc., of funds in the account) may order the drawer of the cheque to pay interim compensation to the complainant—

in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint

in any other case, upon framing of charge.

- Section 143A(2) states that the interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.
- Section 143A(3), the interim compensation shall be paid within sixty days from the date of the order under subsection (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque. As per
- Section 143A(4), if the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.
- Section 143A(5) provides that the interim compensation payable section 143A may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973.
- As per Section 143A(6), the amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation under this section.

Mode of Service of Summons

According to Section 144 of the Act, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such courier services as are approved by a Court of Session.

Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

Evidence on Affidavit

Section 145 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the Code of Criminal Procedure, 1973. The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

Bank's Slip Prima Facie Evidence of Certain Facts

According to Section 146, the Court shall, in respect of every proceeding under this Chapter, on production of Bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

Offences to be Compoundable

Section 147 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under the Negotiable Instrument Act shall be compoundable.

Power of Appellate Court to Order Payment

1. Pending Appeal against Conviction Section 148(1) provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138 of the Negotiable Instrument Act, 1881 (Dishonour of cheque for insufficiency, etc., of funds in the account), the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent. of the fine or compensation awarded by the trial Court.
2. The amount payable shall be in addition to any interim compensation paid by the appellant under section 143A.
3. Section 148(2) states that the amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.
4. As per Section 148(3) the Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:
5. It may be noted that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with

interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

National Electronic Funds Transfer (NEFT) and Real Time Gross Settlement (RTGS)

- a) National Electronic Funds Transfer (NEFT) is a nation-wide payment system facilitating one-to-one funds transfer. Under this Scheme, individuals, firms and corporates can electronically transfer funds from any bank branch to any individual, firm or corporate having an account with any other bank branch in the country participating in the Scheme.
- b) NEFT is an electronic fund transfer system that operates on a Deferred Net Settlement
- c) (DNS) basis which settles transactions in batches. In DNS, the settlement takes place with all transactions received till the particular cutoff time. These transactions are netted (payable and receivables) in NEFT whereas in RTGS the transactions are settled individually. For example, currently, NEFT operates in hourly batches. Any transaction initiated after a designated settlement time would have to wait till the next designated settlement time. Contrary to this, in the RTGS transactions are processed continuously throughout the RTGS business hours.
- d) The acronym 'RTGS' stands for Real Time Gross Settlement, which can be defined as the continuous (realtime) settlement of funds transfers individually on an order by order basis (without netting). 'Real Time' means the processing of instructions at the time they are received rather than at some later time; 'Gross Settlement' means the settlement of funds transfer instructions occurs individually (on an instruction by instruction basis). Considering that the funds settlement takes place in the books of the Reserve Bank of India, the payments are final and irrevocable.

Advantages of NEFT

1. Round the clock availability on all days of the year.
2. Near-real-time funds transfer to the beneficiary account and settlement in a secure manner.
3. Pan-India coverage through large network of branches of all types of banks.
4. The beneficiary need not visit a bank branch for depositing the paper instruments. Remitter can initiate the remittances from his / her home / place of work using internet banking, if his / her bank offers such service.
5. Positive confirmation to the remitter by SMS / e-mail on credit to beneficiary account.
6. Penal interest provision for delay in credit or return of transactions.
7. No levy of charges by RBI from banks.
8. No charges to savings bank account customers for online NEFT transactions.
9. The transaction charges have been capped by RBI.
10. Besides funds transfer, NEFT system can be used for a variety of transactions including payment of credit card dues to the card issuing banks, payment of loan EMI, inward foreign exchange remittances, etc.
11. The transaction has legal backing.

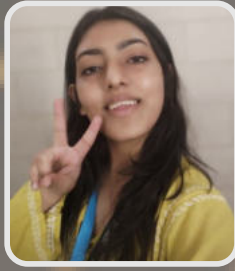
Benefits of RTGS

1. It is a safe and secure system for funds transfer.
 2. RTGS transactions / transfers have no amount cap set by RBI.
 3. The system is available on all days on 24x7x365 basis. There is real time transfer of funds to the beneficiary account.
 4. The remitter need not use a physical cheque or a demand draft.
 5. The beneficiary need not visit a bank branch for depositing the paper instruments.
 6. The beneficiary need not be apprehensive about loss / theft of physical instruments or the likelihood of fraudulent encashment thereof.
 7. Remitter can initiate the remittances from his / her home / place of work using internet banking, if his / her bank offers such service.
 8. The transaction charges have been capped by RBI.
 9. The transaction has legal backing.
-
-
-

Our Rankers



Pulak Bansal



Sidra Khan



Albiya Shaikh



Khushi Dubey



Kushal Todi



Richa Chokhani



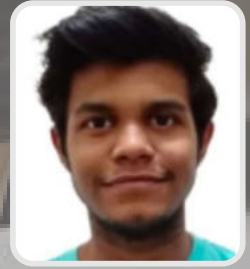
Isha Shah



Kartiki Tulaskar



Mansi Rawat



Deep Patel



Aditya Dakh



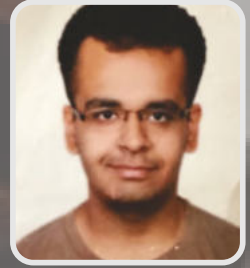
Aditi Menon



Femi Jain



Ibrat Khan



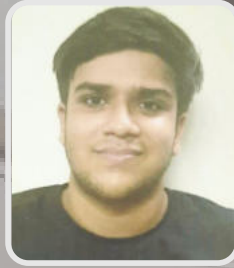
Rahul Lakhwani



Kausha Sheth



Kimaya Sonawdekar



Suyash Kasat



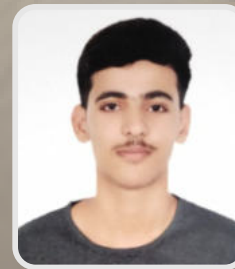
Siddharth Nair



Anjali Vishwakarma



Kedar More



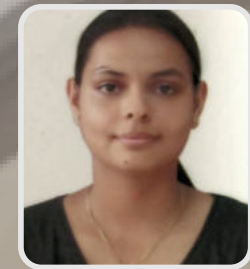
Raj Singh



Dhruvi Patel



Vaibhavi Palkar



Kinjal Solanki

: Address :

Office no 15-16 Bhagwan Bhuvan, Opp Andheri Police Station,
Above Azad Stores Andheri (East) Mumbai - 400069

Phone : 8286881716 / 7738305533

www.studycircleprofessional.com