STUDY MATERIAL

EXECUTIVE PROGRAMME

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

GROUP 1
PAPER 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

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Laser Typesetting by :
AArushi Graphics, Prashant Vihar, New Delhi

EXECUTIVE PROGRAMME

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

This paper consists of three components, namely Jurisprudence, Interpretation and General Laws. 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.

The primary object of the interpretation is to discover the true intention of the Legislature. The necessity of interpretation arises where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute.

The General Laws is an important pre-requisite for professional course like Company Secretary. Reading and understanding of the Law has become an important aspect for professional assignments. Interpretation of Statutes covers the essentials principles of understanding Laws. Constitutional Law deals with powers, functions and responsibilities of various organs of the State; Administrative law deals with day to day governance mechanism, Arbitration Mediation and Conciliation deals with Alternate Dispute Resolution Mechanism and Civil and Criminal Procedure, Information Technology Act, Right to Information Act, 2005, Contract Law, Negotiable Instrument Act etc., spreads into approximately every phase of modern life.

Fundamental objective of this Study Material enable the students to understand and acquire working knowledge of Jurisprudence, Interpretation and General Laws. After studying this study material the student will be able to analyse principles underlying the legal postulates and propositions, and connection between theory of law and practice.

This study material has been published to aid the students in preparing for the Jurisprudence, Interpretation and General Laws paper of the CS Executive Programme. It is part of the educational kit and takes the students step by step through each phase of preparation emphasizing key concepts, principles, pointers and procedures. Company Secretaryship being a professional course, the examination standards are set very high, with focus on knowledge of concepts, their application, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. This study material may, therefore, be regarded as the basic material and must be read alongwith the Bare Acts, Rules, Regulations, Case Law.

The subject of Jurisprudence, Interpretation and General Laws is inherently fundamental to evolution and refinement of legislations, rules and regulations. It, therefore becomes necessary for every student to constantly update with legislative changes made as well as judicial pronouncements rendered from time to time by referring to the Institute's monthly journal 'Chartered Secretary' and e-bulletin 'Student Company Secretary' as well as other law/professional journals and reference books.

The legislative changes made upto November, 2024 have been incorporated in the study material. The students are advised to refer to the updations at the Regulator's website, Supplement relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications. Specifically, students are advised

to read **"Student Company Secretary" e-Journal** which covers regulatory and other relevant developments relating to the subject. In the event of any doubt, students may contact the Directorate of Academics at **academics@icsi.edu.**

The amendments to law made upto 31st May of the Calendar Year for December Examinations and upto 30th November of the previous Calendar Year for June Examinations shall be applicable.

Although due care has been taken in publishing this study material, the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

Important Note:

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

EXECUTIVE PROGRAMME

Group 1

Paper 1

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

SYLLABUS

OBJECTIVES:

- To provide understanding, application and working knowledge of jurisprudence and general laws.
- To inculcate interpretational skills and to teach the manner of reading law.

Level of Knowledge : Working Knowledge

1. **Sources of Law :** ● Meaning of Law and its Significance ● Relevance of Law to Civil Society ● Jurisprudence & Legal Theory ● Schools of Law propounded by Austin, Roscoe Pound, Salmond, Kelsen, Savigny, Bentham and others ● Statutes, Subordinate Legislation, Custom, Common Law, Precedent, *Stare decisis*

2. **Constitution of India :** ● Broad Framework of the Constitution of India ● Fundamental Rights, Directive Principles of State Policy and Fundamental Duties ● Legislative framework and Powers of Union and States ● Judicial framework ● Executive/Administrative framework ● Legislative Process ● ~~Finance Bill and Other Bills~~ ● ~~Parliamentary Standing Committees and their Role~~ ● Writ Jurisdiction of High Courts and the Supreme Court ● Different types of writs

3. **Interpretation of Statutes :** ● Need for interpretation of a statute ● Meanings of Interpretation of Statutes ● A state and the *casus omissus* ● Interpretation of Definition Clause ● Principles of Interpretation including Heydon's Rule of Interpretation, Golden Rule of Interpretation ● Aids to Interpretation ● Legal Terminologies ● Reading a Bare Act & Citation of Cases ● *Pari Materia* ● Harmonious Construction ● Prospective and retrospective operation ● Use of "May" and "Shall" ● Use of "And" and "or" ● Interpretation of proviso ● Latin maxims used to interpret words and phrases ● *Contemporanea Expositio* ● Deeming provisions ● Repugnancy with other statutes ● Conflict between general provision and special provision ● Socially beneficial construction ● Interpretation of Procedural Law ● Interpretation of fiscal and taxing statutes ● Delegated legislations ● Conflict between Statute, Rules and regulations ● Doctrine of substantial compliance ● Doctrine of impossibility of performance ● Strict Construction of penal statutes ● Brief of General Clause Act, 1897 ● Reading Methodology of the Companies Act, 2013 and its Legal Aura

4. **Administrative Laws :** ● Conceptual Analysis ● Source and Need of Administrative Law ● Principle of Natural Justice ● Administrative Discretion ● Judicial Review & Other Remedies ● Liability of Government, Public Corporation

5. **Law of Torts :** ● General conditions of Liability for a Tort ● Strict and Absolute Liability ● Vicarious Liability ● Torts or wrongs to personal safety and freedom ● Liability of a Corporate Entity/Company in Torts ● Remedies in Torts

6. **Law relating to Civil Procedure :** ● Structure and Jurisdiction of Civil Courts ● Basic Understanding of Certain Terms - Order, Judgment and Decree, Stay of Suits, Cause of Action, *Res Judicata, Sub-judice* ● Summary Proceedings/Procedures, Appeals, Reference, Review and Revision ● Powers of Civil Court and their exercise by Tribunals ● Institution of Suit ● Law relating to Commercial Courts

7. **Laws relating to Crime and its Procedure :** ● Introduction ● Classes of Criminal Courts ● Power of Courts ● Arrest of Persons ● *Mens Rea and Actus Reus* ● Cognizable and Non-Cognizable Offences ● Bail ● Continuing Offences ● Compounding of Offences ● Summons and Warrants ● Searches ● Summary Trial ● Offences against Property ● Criminal Breach of Trust ● Cheating, Fraudulent Deeds and Dispositions of Property ● Offences relating to Documents and Property Marks ● Forgery ● Defamation

8. **Law relating to Evidence :** ● Concept of Relevant Evidence and Admissible Evidence ● Statements about the facts to be proved ● Relevancy of facts connected with the fact to be proved ● Opinion of Third Persons ● Facts of which evidence cannot be given ● Oral, Documentary and Circumstantial Evidence ● Burden of proof ● Presumptions ● Estoppel ● Witness ● Improper admission & rejection of evidence ● e-evidence

9. ~~**Law relating to Specific Relief :** ● Specific reliefs and defense ● Specific performance and defense ● Unenforceable contracts ● Rescission of Contracts ● Cancellation of Instruments ● Declaratory Decrees ● Preventive Reliefs~~

10. **Law relating to Limitation :** ● Computation of the Period of Limitation ● Bar of Limitation ● Effect of acknowledgment ● Acquisition of ownership by Possession ● Classification of Period of Limitation

11. **Law relating to Arbitration, Mediation and Conciliation :** ● Arbitration Law in India ● Appointment of Arbitrators ● Judicial Intervention ● Award ● Recourse against Award ● Commencement of conciliation proceedings ● Laws relating to conduct of conciliation proceedings ● Termination of conciliation proceedings ● Role of conciliator in other proceedings ● ~~Power of High Court to make rules~~ ● Development of Mediation Law ● ~~Mediation rules made by Higher Courts~~

12. ~~**Indian Stamp Law :** ● Key Definitions ● Principles of Levy of Stamp Duty ● Determination, Mode and timing of Stamp Duty ● Person responsible ● Consequences of Non-Stamping and Under-Stamping ● Allowance and Refund ● Concept of E-Stamping ● Payment and Adjudication of Duty~~

13. ~~**Law relating to Registration of Documents :** ● Registration of Documents: Compulsory, Optional ● Time and Place of Registration ● Consequences of Non-Registration ● Prerequisites for Registration ● Provisions of Transfer of Property Act, 1882 and registration of Documents ● Properties which cannot be Transferred ● Rule Against Perpetuities ● *Lis Pendens* ● Provisions Relating to Sale, Mortgage, Charge, Lease, Gift and Actionable Claim ● Easement Rights~~

14. **Right to Information Law :** ● Key Definitions ● Public Authorities & their Obligations ● Role of Central/ State Governments ● Central Information Commission ● State information Commission

15. **Law relating to Information Technology :** ● Introduction, definition, important terms under the IT Act ● Digital Signatures, Electronic Record, Certifying Authority, Digital Signature Certificate ● Cyber Regulation Appellate Tribunal ● Offences and Penalties ● Rules relating to sensitive personal data under IT Act ● Development and Law of Data Protection

16. **Contract Law :** ● Formation of an Agreement, Intention to create legal relationship ● Offer and invitation to offer ● Kinds of offer, communication, acceptance and revocation of offer and acceptance ● Modes of revocation of offer ● Consideration ● Basis and the nature of consideration ● Doctrine of Privity of Contract and of consideration ● Exceptions of consideration ● Capacity to Contract ● Free Consent ● Void and Voidable Contracts ● Discharge of Contracts ● Remedies for breach of Contract ● Quasi Contracts ● e-contracts

~~17. **Law relating to Sale of Goods :** ● Important definitions ● Essentials of a Contract of Sale ● Sale Distinguished from Agreement to Sell ● Bailment, Contract for Work and Labour and Hire-Purchase ● Conditions and Warranties ● Doctrine of *Caveat Emptor* ● Performance of the Contract of Sale ● Effects of the Contract ● Rights of unpaid seller against the goods ● Suits for breach of the contract~~

18. **Law relating to Negotiable Instruments :** ● Negotiable Instruments and Parties ● Material Alteration ● Crossing and bouncing of Cheques ● Dishonour of Cheques & its Remedies ● Presumption of Law as to Negotiable Instruments

For details: https://www.icsi.edu/media/webmodules/ICSI_Syllabus_2022.pdf

ARRANGEMENT OF STUDY LESSONS
JURISPRUDENCE, INTERPRETATION & GENERAL LAWS
GROUP 1 • PAPER 1

S. No.	Lesson Title
1.	Sources of Law
2.	Constitution of India
3.	Interpretation of Statutes
4.	Administrative Laws
5.	Law of Torts
6.	Law relating to Civil Procedure
7.	Laws relating to Crime and its Procedure
8.	Law relating to Evidence
~~9.~~	~~Law relating to Specific Relief~~
10.	Law relating to Limitation
11.	Law relating to Arbitration, Mediation and Conciliation
~~12.~~	~~Indian Stamp Law~~
~~13.~~	~~Law relating to Registration of Documents~~
14.	Right to Information Law
15.	Law relating to Information Technology
16.	Contract Law
~~17.~~	~~Law relating to Sale of Goods~~
18.	Law relating to Negotiable Instruments

LESSON WISE SUMMARY

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

Lesson 1: Sources of Law

Law is not static. As circumstances and conditions in a society change, laws are also changed to fit the requirements of society. At any given point of time the prevailing law of a society must be in conformity with the general statements, customs and aspirations of its people. The object of law is to form an order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the socio-economic structure and to play special role in the task of achieving various socio-economic goals enshrined in our Constitution. It has to serve as a vehicle of social change and as a harbinger of social justice.

The objective of the lesson is to introduce the students regarding:

- Meaning of law and its significance;
- Relevance of Law to Civil Society;
- School of Laws
- Jurisprudence; and
- Legal Theory.

Lesson 2: Constitution of India

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution. The preamble declares India to be a Sovereign, Socialist, Secular, Democratic, Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people. All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to:

- Understand Broad Framework of the Constitution of India;
- Fundamental Rights;
- Directive Principles of State Policy;
- Fundamental Duties;
- Powers of Union and States;
- Judicial framework;
- Legislative Process;
- ~~Parliamentary Standing Committees and their Role;~~

- Writ Jurisdiction of High Courts and the Supreme Court; and
- Different types of writs.

Lesson 3: Interpretation of Statutes

The primary object of the interpretation of statutes is to discover the true intention of the Legislature; and where the intention can be undoubtedly ascertained the courts are bound to give effect to it regardless of their opinion about its wisdom. 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 and State Legislatures. 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.

The lesson aims at:

- Familiarizing students with Need for interpretation of a statute;
- Help students learn the Principles of Interpretation; and
- Equip the students with the Aids to Interpretation.
- Rules applicable while interpreting different type of legislations

Lesson 4: Administrative Laws

The modern state typically has three organs- legislative, executive and judiciary. Traditionally, the legislature was tasked with the making of laws, the executive with the implementation of the laws and judiciary with the administration of justice and settlement of disputes. This has led to an all pervasive presence of administration in the life of a modern citizen. In such a context, a study of administrative law assumes great significance.

The objective of this lesson is to introduce the students regarding:

- Source and Need of Administrative Law;
- Principle of Natural Justice;
- Rule of Law
- Administrative Discretion; and
- Judicial Review.

Lesson 5: Law of Torts

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be a wrongful act or omission of the defendant; the wrongful act must result in causing legal damage to another and the wrongful act must be of such a nature as to give rise to a legal remedy.

It is expected that, at the end of this lesson, students will, *inter alia*, be in a position to understand:

- The general conditions of Liability for a Tort;
- Strict and Absolute Liability;
- Vicarious Liability;
- Relation of Law of Torts and Consumer Protection

- Torts or wrongs to personal safety and freedom; and
- Liability of a Corporate Entity/Company in Torts; Remedies in Torts.

Lesson 6: Law relating to Civil Procedure

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.

The objective of the lesson is to familiarize the students with:

- Structure and jurisdiction of Civil Courts;
- Basic Understanding of Certain Terms Order, Judgment and Decree;
- Stay of Suits;
- Cause of Action;
- *Res Judicata*;
- Summary Proceedings;
- Appeals;
- Review and Revision; and
- Summary Procedure.

Lesson 7: Laws relating to Crime and its Procedure

Bharatiya Nyaya Sanhita, 2023 (BNS) is the substantive law of crimes. In India, the base of the crime and punitive provision has been laid down in BNS. With the proliferation in juristic persons and a growth in their activities which increasingly touch upon the daily lives of ordinary people, criminal law has evolved to bring such persons within its ambit. For example, according to section 2(26) of the BNS, the word "person" includes any company or association or body of persons, whether incorporated or not. Thus companies are covered under the provisions of the BNS. The procedural part of the Law of Crimes in contained in the Bharatiya Nagarik Suraksha Sanhita that creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person. The Sanhita enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand:

- Classes of Criminal Courts;
- Power of Courts;
- Cognizable and Non-Cognizable Offences;
- Summons and Warrants;
- Summary Trial;
- Offences against Property;

- Criminal Breach of Trust;
- Cheating;
- Forgery; and
- Defamation

Lesson 8: Law relating to Evidence

The Bharatiya Sakshya Adhiniyam, 2023 is a law to consolidate, define and amend the Law of Evidence. 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, especially 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.

This lesson is designed to familiarize the students with:

- Statements about the facts to be proved;
- Relevancy of facts connected with the fact to be proved;
- Facts of which evidence cannot be given;
- Oral, Documentary and Circumstantial Evidence;
- Burden of proof;
- Improper admission & rejection of evidence; and
- E-evidence

~~Lesson 9: Law relating to Specific Relief~~

~~The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief. It contains provisions, *inter alia*, specific performance of contracts, contracts not specifically enforceable, parties who may obtain and against whom specific performance may be obtained, etc. It also confers wide discretionary powers upon the courts to decree specific performance and to refuse injunction, etc.~~

~~It is expected that, at the end of this lesson, students will, *inter alia*, be in a position to understand:~~

- ~~Specific reliefs and defense;~~
- ~~Specific performance and defense;~~
- ~~Unenforceable contracts; and~~
- ~~Know Decrees and Preventive Reliefs.~~

Lesson 10: Law relating to Limitation

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. Limitation Act prescribes different periods of limitation for suits, petitions or applications. Court may also 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.

The objective of the lesson is to facilitate the students to acquaint with:

- Computation of the Period of Limitation;

- Bar of Limitation;
- Effect of acknowledgment;
- Acquisition of ownership by Possession; and
- Classification of Period of Limitation.

Lesson 11: Law relating to Arbitration, Mediation and Conciliation

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognizes 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. Mediation is another emerging mode for settlement of disputes through Alternate Dispute Resolution. These modes facilitate the resolutions of disputes out of the court.

The objective of this lesson is to facilitate the students to acquaint with:

- Arbitration Law in India;
- Appointment of Arbitrators;
- Judicial Intervention;
- Arbitral Award; and
- Conciliation
- Mediation

~~Lesson 12: Indian Stamp Law~~

~~The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the Schedule.~~

~~The objective of the lesson is to facilitate the students to acquaint with:~~

- ~~Principles of Levy of Stamp Duty;~~
- ~~Mode and timing of Stamp Duty method of Stamping;~~
- ~~Person responsible to pay duty;~~
- ~~Process of payment of stamp duty~~
- ~~Consequences of Non-Stamping and Under-Stamping; and~~
- ~~Concept of E-Stamping.~~

~~Lesson 13: Law relating to Registration of Documents~~

~~The Registration Act, 1908 is the law relating to registration of documents. The object and purpose of the Act among other things is to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Property has, always, been on the fundamental elements of socio economic life of an individual. Transfer of Property is 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 an act. These two laws should be read together *inter alia* to understand the completeness of the transactions and valid transfer of properties.~~

This lesson is designed to familiarize the students with:

- Registerable Documents;
- Documents whose registration is compulsory;
- Documents of which registration is optional;
- Consequences of Non-Registration
- Understand types of Properties;
- Know Rules relating to Transfer of Property;
- Properties which cannot be transferred;
- Lis Pendens; and
- Sale; Mortgage, Charge, Lease.

Lesson 14: Right to Information Law

The Right to Information Act, 2005 is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto. The Act, allowing transparency and autonomy, and access to information in public authorities.

The objective of the lesson is to facilitate the students to acquaint with:

- Public Authorities & their Obligations;
- Right to Information;
- Role of Central/State Governments;
- Central Information Commission; and
- State information Commission.

Lesson 15: Law relating to Information Technology

The General Assembly of the United Nations by resolution A/RES/51/162 dated the 30th January, 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law. The said resolution recommends *inter alia* that all States give favourable consideration to the said Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper based methods of communication and storage of information.

It is considered necessary to give effect to the said resolution and to promote efficient delivery of Government services by means of reliable electronic records, Parliament enacted Information Technology Act, 2000 to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the laws including the Banker’s Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

This lesson is designed to familiarize the students with:

- Digital Signatures;
- Electronic Record;
- Certifying Authority;

- Digital Signature Certificate;
- Appellate Tribunal; and
- Offences and Penalties.

Lesson 16: Contract Law

The Law of Contract constitutes the most important branch of Mercantile or Commercial Law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the modern world. The Indian Contract Act, 1872 regulates all the transactions of a company.

- It lays down the general principles relating to the formation and enforceability of contracts; rules governing the provisions of an agreement and offer;
- Various types of contracts including those of indemnity and guarantee, bailment and pledge and agency; and
- It also contains provisions pertaining to breach of a contract.

~~Lesson 17: Law relating to Sale of Goods~~

~~The law relating to sale of goods is contained in the Sale of Goods Act, 1930. In a sale, the property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfillment of some conditions subject to which the property in the goods is to be transferred.~~

~~The purpose of this lesson is to provide the students understanding of:~~

- ~~Essentials of a Contract of Sale;~~
- ~~Sale Distinguished from Agreement to Sell;~~
- ~~Bailment;~~
- ~~Conditions and Warranties; and~~
- ~~Doctrine of Caveat Emptor.~~

Lesson 18: Law relating to Negotiable Instruments

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.

The objective of the lesson is to introduce the students regarding:

- Negotiable Instruments and Parties;
- Effect of Negotiability;
- Crossing and bouncing of Cheques;
- Dishonour of Cheques & its Remedies; and
- Presumption of Law as to Negotiable Instruments.

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Sources of Law

Lesson 1

KEY CONCEPTS

■ Legislature ■ Codification of Law ■ Interpretation ■ Construction of provision(s) ■ Proviso ■ Stare Decisis ■ Jurisprudence ■ Natural Justice

Learning Objectives

To understand:

- Importance of law for the society
- How the law has evolved
- The legal theory propounded by various jurists and scholars and their criticisms
- Different School of Laws
- Origin of Indian Laws
- Custom as a Source of Law
- 'Statute made law' as Source of Law
- 'Personal laws' as a Source of Law
- Secondary Sources of Law
- The Genesis and coverage of mercantile laws

Lesson Outline

- Introduction
- Meaning of Law
- Significance of Law
- Relevance of Law to Civil Society
- Jurisprudence and Legal theory
- Schools of Law
- Sources of Indian Law
- Mercantile or Commercial Law
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

INTRODUCTION

The nature and meaning of law has been described by various jurists. However, there is no unanimity of opinion regarding the true nature and meaning of law. The reason for lack of unanimity is that the subject has been viewed and dealt with by different jurists at different times and from different point of views, that is to say, from the point of view of nature, source, function and purpose of law, to meet the needs of some given period of legal development. Therefore, it is not practicable to give a precise and definite meaning to law which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to clarify and amplify the term 'law'. The various definitions of law propounded by legal theorists serve to emphasize the different facets of law and build up a complete and rounded picture of the concept of law.

MEANING OF LAW

The term law refers to specific and concrete laws. These laws are laid down by specific legal system. Example: Indian Laws follow Indian legal system. It is precisely a body or cluster of rules and regulations promulgated by governmental bodies. The purpose of making laws is to regulate the human activities and to define what is permissible and what is not permissible.

In broader sense law refers to the whole process, or legal system which is applied by the governmental personnel and bodies in society so as to establish and maintain peaceful and orderly relation between people.

Under the Constitution of India, the inclusive definition of the term "Law" and "Laws in force" has been provided under Article 13(3). Which says:

(a) *"Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;*

(b) *"Laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.*

Jurists/philosophers defined the term "Law" differently as for instance:

Ulpine defined Law as "*the art or science of what is equitable and good*"

Cicero said that Law is "*the highest reason implanted in nature*"

Justinian's Digest defines Law as "*the standard of what is just and unjust*"

So, the meaning of law may differ from person to person but the purpose is to provide a set of rules for regulation human conduct and maintain peaceful and orderly relations between people.

SIGNIFICANCE OF LAW

The law, and the system through which it operates, has developed over many centuries into the present combination of statutes, judicial decisions, customs and conventions. By examining the sources from which we derive our laws and legal system, we gain some insight into the particular characteristics of our laws.

Law is not static. As circumstances and conditions in a society change, laws are also changed to fit the requirements of society. At any given point of time, the prevailing law of a society must be in conformity with the general statements, customs and aspirations of its people.

Modern science and technology have unfolded vast prospects and have aroused new and big ambitions in humans. Materialism and individualism are prevailing at all spheres of life. These developments and changes have tended to transform the law patently and latently. Therefore, law has undergone a vast transformation – conceptual and structural. The idea of abstract justice has been replaced by social justice.

The object of law is to form an order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the said structure and to play special role in the task of achieving various socio-economic goals enshrined in our Constitution. It has to serve as a vehicle of social change and as a harbinger of social justice.

RELEVANCE OF LAW TO CIVIL SOCIETY

Numerous duties are carried out by law to assist civil society. These need to be differentiated in practise as well as theory. The failure to draw the required distinctions—whether deliberate or unintentional—leads to the law's restriction, distorting, or suppression of civil society.

In actuality, for civil society to function to its full potential, an enabling legal environment is required. It promotes and defends civic society. But only if it also supports and empowers. Due to the fact that it obstructs, restricts, and even suppresses people's freedoms, law has a poor reputation in many sectors of civil society.

JURISPRUDENCE & LEGAL THEORY

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. According to *B.E. King*, jurisprudence is not concerned with the exposition of law but with disquisitions about law. For example, substantive laws teach us about our right, duties and obligations and the procedural laws talk about the legal process through which those rights can be enforced or obligations met but jurisprudence would go into the analysis of what rights, duties and obligations are; how and why do they emerge in a society? Jurisprudence also improves the use of law by drawing upon insights from other fields of study.

Different jurists/ legal philosophers have used the term in different ways. The meaning of 'jurisprudence' has changed over a period of time as the boundaries of this discipline are not rigid. This amorphous nature is a subject of intense controversy among the scholars. 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. But as dissatisfaction with their conception of law grew in the later years and alternative conceptions were offered, the term 'jurisprudence' came to acquire a broader meaning but a concrete delineation of the boundary of the subject has proved elusive.

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. However, various theorists define law in their own ways and this leads to a corresponding jurisprudential study. For example, law has two fold aspect: it is an abstract body of rules and also a social machinery for securing order in the community. However, the various schools of jurisprudence, instead of recognizing both these aspects, emphasize on one or the other.

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. One can understand what a thing is only if one examines what it does.

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. Hence, this school seeks to find the supreme ends which law should follow.

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. In a slightly narrower sense, the term jurisprudence applied to the study of the science of civil law. Civil jurisprudence was further divisible into systematic jurisprudence (legal exposition), historical jurisprudence (legal history) and critical jurisprudence (science of legislation). Jurisprudence, in its narrowest sense includes only a part of the science of the civil law, which can also be called the science of the 'first principles' of civil law. These first principles are fundamental concepts and principles which serve as the basis of concrete details of the law.

English jurist *Jeremy Bentham* had used 'jurisprudence' in two sense- one as 'law' referring to the substance and interpretive history of a given legal norm, consisting of case laws, precedents, and other legal commentary and the other as 'theory' or the study of general theoretical questions about the nature of laws and legal systems. Jurisprudence in this use refers to a set of philosophical principles, or interpretive theories, for making sense of laws. Bentham also distinguished between 'expository' and 'censorial jurisprudence'. The former ascertains what the law is, and the latter, what it ought to be. Bentham made a sub-division of expository jurisprudence, distinguishing between its 'authoritative' and 'unauthoritative' modes- the first given by the state and the second by any other authority.

Prof. Julius Stone defined 'jurisprudence' as the lawyer's extraversion. According to him jurisprudence is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law.

According to *Prof. G.W. Paton*, jurisprudence is founded on the attempt, not to find universal principles of law, but to construct a science which will explain the relationship between law, its concepts, and the life of society. Jurisprudence is not primarily interested in cataloguing uniformities, or in discovering rules which all nations accept. In all communities which reach a certain stage of development there springs up a social machinery which is called law and the task of jurisprudence is to study the nature of law, the nature of legal institutions, the development of both the law and the legal institutions and their relationship to society. In each society there is an interaction between the abstract rules, the institutional machinery existing for their application, and the life of the people. Legal systems seem to have developed for the settlement of disputes and to secure an ordered existence for the community. They still exist for those purposes but in addition they are part of the social machinery used to enable planned changes and improvements in the organization of society to take place in an ordered fashion. In order to achieve these ends each legal system develops a certain method, an apparatus of technical words and concepts, and an institutional system which follows those methods and uses that apparatus. The pressure of the social needs which the law must satisfy will vary from one community to another and jurisprudence studies the methods by which these problems are solved, rather than particular solutions.

Legal Theory

Legal theory is a field of intellectual enterprise within jurisprudence that involves the development and analysis of the foundations of law. Two most prominent legal theories are the normative legal theory and the positive legal theory. Positive legal theory seeks to explain what the law is and why it is that way, and how laws affect the world, whereas normative legal theories tell us what the law ought to be. There are other theories of law like the sociological theory, economic theory, historical theory, critical legal theory as well.

JEREMY BENTHAM

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:

1. **Source:** The source of a law is the will of the sovereign, who may conceive laws which he personally issues, or adopt laws previously issued by sovereigns or subordinate authorities, or he may adopt laws to be issued in future by subordinate authorities. Sovereign according to Bentham is any person or assemblage of person to whose will a whole political community is supposed to be in a disposition to pay obedience, and then in preference to the will of any other person.
2. **Subjects:** These may be persons or things. Each of these may be active or passive subjects, i.e., the agent with which an act commences or terminates.
3. **Objects:** The goals of a given law are its objects.
4. **Extent:** Direct extent means that a law covers a portion of land on which acts have their termination; indirect extent refers to the relation of an actor to a thing.
5. **Aspects:** Every law has 'directive' and a 'sanctional' part. The former concerns the aspects of the sovereign will towards an act-situation and the latter concerns the force of a law. The four aspects of the sovereign will are command, prohibition, non-prohibition and non-command and the whole range of laws are covered under it. These four aspects are related to each other by opposition and concomitancy.
6. **Force:** The motivation to obey a law is generated by the force behind the law.
7. **Remedial appendage:** These are a set of subsidiary laws addressed to the judges through which the judges cure the evil (compensation), stop the evil or prevent future evil.
8. **Expression:** A law, in the ultimate, is an expression of a sovereign's will. The connection with will raises the problem of discovering the will from the expression.

Having listed the eight different respects through which a law can be considered, *Bentham* went on to analyse the 'completeness' of law in jurisprudential sense. He said that a complete law would have the features of integrality as well as unity. Integrality means that a law should be complete in expression, connection and design. A law is complete in expression when the actual will of the legislation has been completely expressed. A law is complete when various parts of it dealing with various aspects are well co-ordinated. If a law does not cover a specific situation that it might have wanted to cover while being enacted, it is incomplete in design. According to *Bentham* the unity of a law would depend upon the unity of the species of the act which is the object of the law.

Criticism of Bentham's theory of Law

1. Due to Bentham's strait-jacketing of laws into an imperative theory- all laws have to be either command or permission, it does not take proper account of laws conferring power like the power to make contracts, create title etc.
2. Bentham did not give a fair treatment to custom as a source of law. He said customs could never be 'complete'.
3. Bentham's theory did not allow for judge made laws and hoped that such laws would be gradually eliminated by having 'complete laws'.
4. To judge an action according to the pleasure- pain criterion is to judge it subjectively. The theory did not provide how a subjective criterion of pain and pleasure can be transmuted into an objective one.
5. It is not always true that an increase in the happiness of a certain segment of society will lead to an increase in the overall happiness level because it might be associated with a diminution in the happiness of some other rival section of the society.

JOHN AUSTIN

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:

1. It is a command.
2. It is given by a sovereign authority.
3. 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 and legally superior. He is independent, 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.

Criticism of Austin's Command Theory of Law

1. Welfare states pass a number of social legislations that do not command the people but confer rights and benefits upon them. Such laws are not covered under the command theory.
2. According to Austin the sovereign does not have to obey anyone but the modern states have their powers limited by national and international laws and norms. For example, the Government of India cannot make laws that are violative of the provisions of the Constitution of India.
3. Austin does not provide for judges made laws. He said that judges work under the tacit command of the sovereign but in reality judges make positive laws as well.
4. Since the presence of sovereign is a pre-requisite for a proposition to be called law, Austin did not recognize international laws as such because they are not backed by any sovereign.

JOHN WILLIAM SALMOND

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 Bharatiya Nyaya Sanhita or the Right to Information Act. Law does not consist of the total number of laws in force.

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.

Since law was defined by a reference to the administration of justice, it needs to be understood as well. *Salmond* says that human experience has made it clear that some form of compulsion is required to maintain justice. It is in the nature of things to have conflict, partly real, partly apparent, between the interests of man and man, and between those of individuals and those of society at large; and men cannot be left to do what they believe is right in their own eyes. Therefore, if a just society is to be maintained, it is necessary to add compulsion so as to complement to walk on the desired path. Hence, there exists various regulative or coercive systems, the purpose of which is the upholding and enforcement of right and justice by some instrument of external constraint. One of the most important of such systems is the administration of justice by the state. The administration of justice may therefore be defined as the maintenance of right within a political community by means of physical force of the state. Another is the control exercised over men by the opinion of the society in which they live. Censure, ridicule, contempt are the sanctions by which society (as opposed to the state) enforces the rules of morality.

He 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* further said that the administration of justice is perfectly possible without laws though such a system is not desirable. A court with an unfettered discretion in the absence of laws is capable of delivering justice if guided by equity and good conscience.

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. That great aggregate of rules which constitutes a developed legal system, is not a condition precedent of the administration of justice but a product of fit. Gradually from various sources- precedent, custom, statute—there is a collected body of fixed principles which the courts apply to the exclusion of their private judgment. Justice becomes increasingly justice according to law, and courts of justice become increasingly courts of law.

Criticism of Salmond's theory

1. Salmond's assertion that justice is the end and law is only a medium to realize it does not always hold true because there are a number of laws that can be called 'unjust'.
2. The pursuit of justice is not the only purpose of law, the law of any period serves many ends and these ends themselves change with the passage of time.
3. There is a contradiction when Salmond says that the purpose of law is the administration of justice but limits 'jurisprudence' to the study of the 'first principles' of civil law of a national legal system because justice is a universal concept, the jurisprudential analysis of law should not be constrained by national boundaries.

ROSCOE POUND

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:

1. A recognition of certain interests- individual, public and social.
2. A definition of the limits within which such interest will be legally recognized and given effect to.
3. 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:

1. Preparation of an inventory of interests and their classification.
2. Selection of the interests which should be legally recognized.
3. Demarcation of the limits of securing the interest so selected.

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

Having given various interest recognized by law, Roscoe Pound applied himself to figure out to balance competing interests. He said that interests should be weighed on the same plane. According to him one cannot balance an individual interest against a social interest, since that very way of stating them may reflect a decision already made. Thus all the interests should be transferred to the same place, most preferably to the social plane, which is the most general, for any meaningful comparison.

Criticism of Roscoe Pound's theory of law

1. Pound said that interest pre-exist laws and the function of legal system should be to achieve a balance between competing interests but we see that a lot of interests today are a creation of laws.

2. The theory does not provide any criteria for the evaluation of interest. It is not interests as such, but the yardstick with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself by a society, in which case it, not as an interest, but as an ideal that determine the relative importance between it and other interests.

3. Pound's theory of balancing interests can be effectuated most effectively by judges because the judges get to translate the activity involved in the cases before them in terms of interests and select the ideal with reference to which the competing interests are to be measured. Thus his theory gives more importance to judiciary in comparison to the legislature.

4. Pound's distinction between Public and Social interests is doubtful and even the distinction between Individual and Social Interest is of minor significance. It is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed.

5. The recognition of a new interest is a matter of policy. The mere presence of a list of interests is, therefore, of limited assistance in helping to decide a given dispute.

PROF. HLA HART

Prof. HLA Hart, British Legal Philosopher listed many meanings associated with the term 'positivism' as follows:

- Laws are commands.
- The analysis of legal concepts is
  a) worth pursuing,
  b) distinct from sociological and historical enquiries into law, and
  c) distinct from critical evaluation.
- Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality.
- Moral judgments cannot be established or defended by rational argument, evidence or proof.
- The law as it is laid down should be kept separate from the law that ought to be.

Positivism is most commonly understood as the fifth description above. Natural law theory claims that a proposition is 'law' not merely because it satisfies some formal requirement, but by virtue of an additional minimum moral content. According to it, an immoral rule cannot be 'law' even if it satisfies all the formal requirements.

HANS KELSEN

Hans Kelsen was an Austrian philosopher and jurist who is known for his 'Pure Theory of Law'. *Kelsen* believed that the contemporary study and theories of law were impure as they were drew upon from various other fields like religion and morality to explain legal concepts. *Kelsen*, like *Austin* was a positivist, in that he focused his attention on what the law was and divested moral, ideal or ethical elements from law. He discarded the notion of justice as an essential element of law because many laws, though not just, may still continue as law.

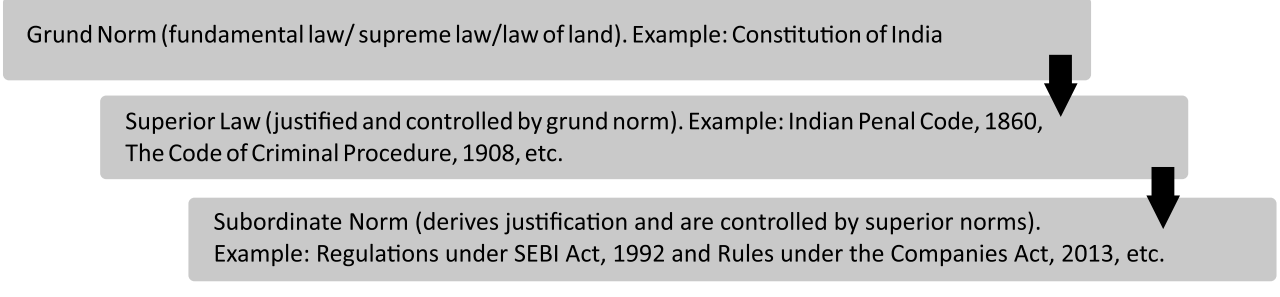
Kelsen described law as a "normative science' as distinguished from natural sciences which are based on cause and effect, such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered whereas the science of law is knowledge of what law ought to be. Like Austin, *Kelsen* also considered sanction as an essential element of law but he preferred to call it 'norm'. According to *Kelsen*, 'law is a primary norm which stipulates sanction'.

According to *Kelsen*, 'norm (sanction) is rules forbidding or prescribing a certain behaviour'. He saw legal order as the hierarchy of norms having sanction, and jurisprudence was the study of these norms which comprised legal order. *Kelsen* distinguished moral norm with legal norm and said that though moral norms are 'ought' prepositions, a violation of it does not have any penal fallout. The 'ought' in the legal norm refers to the sanction to be applied for violation of law.

According to *Kelsen*, we attach legal-normative meaning to certain actions and not to others depending on whether that event is accorded any legal-normative by any other legal norm. This second norm gains its validity from some other norm that is placed above it. The successive authorizations come to an end at the highest possible norm which was termed by *Kelsen* as 'Grundnorm'. Thus, Kelsen's pure theory of law is based on pyramidical structure of hierarchy of norms which derive their validity from the basic norm. Grundnorm or basic norm determines the content and gives validity to other norms derived from it. Under *Kelsen's* pure theory, the Grundnorm does not derive its validity from any other norm and its validity must be presupposed. In his view the basic norm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.

The legal order as conceived by *Kelsen* receives its unity from the fact that the multiple norms which make the legal system can be traced back to a final source. This final source is the basic norm or the Grundnorm he which defined as "the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity. For example, in India a statue or law is valid because it derives its legal authority from being duly passed by the Parliament and receiving the accent of the President, the Parliament and the President, derive their authority from a norm i.e., the Constitution. As to the question from where does the Constitution derive its validity there is no answer and, therefore, it is the Grundnorm, according to *Kelsen's* conception of pure theory of law.

Grundnorms are generally followed by the Superior Norms. Superior norms are laws which govern the subordinate laws. They are inferior to Grundnorm but superior to subordinate laws. Whereas Subordinate Norm are derived or made to assist the superior norm. These norms derives their justification from superior norm.



Criticism of Kelsen's Pure Theory

1. It is difficult to trace 'grundnorm' in every legal system. Also, there is no rule or yardstick to measure the effectiveness of grundnorm. All that Kelsen maintained was that the grundnorm imparts validity as long as the 'total legal order' remains effective, which he later revised to 'by and large' effective. He did not give any measure of 'total' and 'by and large'.
2. The Pure Theory also did not give the timeframe for which the effectiveness should hold for the requirement of validity to be satisfied. Validity is a matter to be determined in the context of a given point of time and depends on what judges are prepared to accept at that moment as imparting law-quality.

3. Kelsen's theory ceases to be 'pure' the moment one tries to analyse the grundnorm because then one will have to draw upon subjects other than law like sociology, history and morality.
4. International law does not sit well with Kelsen's Pure theory. He advocated a monist view of the relationship between international and municipal law and declared that the grundnorm of the international system postulated the primacy of international law. The actual experience has been to the contrary and the countries of the world mostly give primacy to municipal laws over international laws.

SCHOOLS OF LAW

Natural School of Law

Natural law says that certain rights are inherent by virtue of human nature and can be understood universally through human reason. The law of nature, divine law, or the law that exists in all of nature is how the natural school of law is typically understood. Though it was made by man, it is discovered via each person's unique personality. Religion has a significant influence on it. The fundamental tenet of this philosophy is that human law can be judged for its applicability in light of a higher moral rule. There is a notion that certain moral laws cannot be violated without retaining their moral or legal status. There is a fundamental link between morality and the law under this theory.

This school of law is divided into four theories:

1. Ancient Theory
2. Medieval Theory
3. Renaissance Theory
4. Modern theory

1. *ANCIENT THEORY*

There were two groups of philosophers. Under this school fall most of the ancient definitions given by Roman and other ancient jurists.

a) Roman philosopher

b) Greek philosopher

Roman Philosophers

Ulpine defined Law as "the art or science of what is equitable and good."

Cicero said that Law is "the highest reason implanted in nature."

Justinian's Digest defines Law as "the standard of what is just and unjust."

In all these definitions, propounded by Romans, "justice" is the main and guiding element of law.

a) ***Heraclitus*** – He was one of the first Greek philosopher who identified three main features of law of nature- destiny, reason and order. He stated that all these three elements are interconnected and inter-related.

b) ***Socrates*** – He was a prominent Stoic philosopher. He was of the view that just like Natural moral law, there is also 'human insight'. Human sights is what helps a man to distinguish between good and bad.

c) ***Plato –*** He was the disciple of Socrates and his theory on natural law was characterized by two main aspects – wisdom and reason.

d) ***Aristotle*** – He defined natural law as a 'reason unaffected by desires', inherent nature of man, human insight and all this together shape the human will and articulate the actions, justice and morality at the core level.

2. *MEDIEVAL THEORY*

Medieval Theory is based on the theological idea i.e the God. This stage provide a divine based law i.e law of nature is then law of God. And the law of god is actually the true Dharma connecting law with that of god. Thus, 'law' is a part of "Dharma". The major exponents of were-

Thomas Aquinas – He is the major exponent of this theory. He categorized the law into 4 categories:

1) Law of God or *Lex Aeterna*
2) Natural Law or *Lex Naturalis*
3) Divine Law
4) Human Law

3. RENAISSANCE THEORY

This theory is marked by rationalism. Reason is the main foundation of this theory. It has two distinct features –

- *More secular, political and was founded on human reasons*
- *It advocates natural rights of a man and the state.*

Major proponents if this era were –

1. **Hugo Grotius –** He built his theory on 'social contract'. Accordingly to him the duty of sovereign is to safeguard its citizens. The sovereign is bound by natural law.
2. **Immanuel Kant** – He states that a man is guided by his own conscience. According to him, natural law is not only based on reason but right reason.

4. MODERN THEORY

This modern theory rejects then older theories and conceptions. This theory was a Revival of Natural law. Revival was a reaction against the positive and historical approaches but in a modified manner. Stammler, Rawl, Fuller, are major propounder of this theory.

Stammler stated that law of nature means the just law, with harmonious purposes in the society.

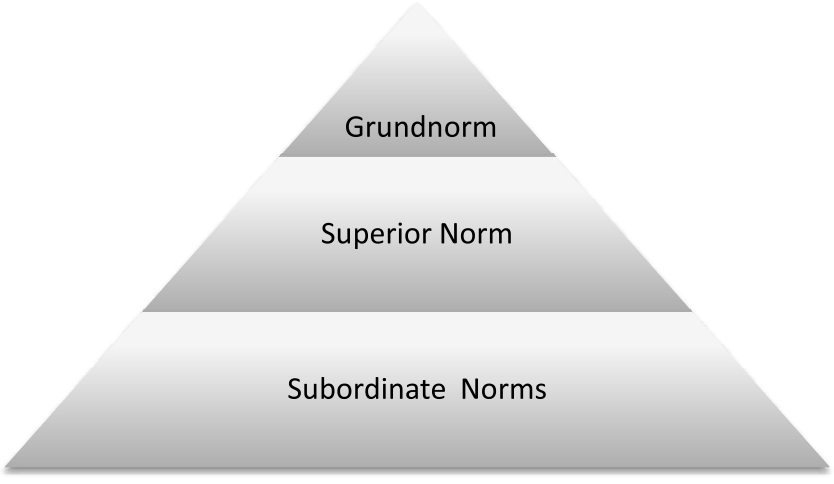
Analytical School of Law

The major exponent of this school was English jurist John Austin. He perceived and considered law in its present form and not what it should be. This school of jurisprudence is also known as the positivist school of law.

According to John Austin, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the three elements of law.

Hans Kelsen gave a 'pure theory of law'. According to him, law is a 'normative science'. The legal norms are 'Ought' norms as distinct from 'Is' norms of physical and natural sciences. Law does not attempt to describe what

actually occurs but only prescribes certain rules. The science of law to Kelsen is the knowledge of hierarchy of normative relations. All norms derive their power from the ultimate norm called 'Grundnorm'.



Grundnorm – It is the fundamental law of land also known as superior law. Every other law has to adhere to this law.

Superior Norm – It is those laws which govern the subordinate laws. They are inferior to Supreme law but superior to subordinate law.

Subordinate Norm –Laws which are derived or made to assist the superior norm. These norms derives their justification from superior norm.

Historical School of Law

The propounders of this school believes that the origin, formation & development of law is the outcome of historical & evolutionary forces. The law originates from long drawn process of customs, ongoing conventions, social habits, traditions etc.

Von Savigny's theory of law can be summarised as follows:

- That law is a matter of unconscious and organic growth. Therefore, law is found and not made.
- Law is not universal in its nature. Like language, it varies with people and age.
- Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.
- Law has its source in the common consciousness (*Volkgeist*) of the people.
- Legislation is the last stage of law making, and, therefore, the lawyer or the jurist is more important than the legislator.

According to ***Sir Henry Maine***, "The word 'law' has come down to us in close association with two notions, the notion of order and the notion of force".

Philosophical/Ethical School

The exponents of this school believe that law and ethical values are co-related. The law, in order to command respect in society must have an element of ethical value and ethical purpose. It considers law as a means to achieve its end by which individual will is to harmonize with the general will.

According to ***Hugo Grotius*** states that the rules of human conduct emerged from the right reason and therefore, they receive public support of the community.

Hegel believed that the purpose of making law is to reconcile the conflicting egos in the society. Law is the means to achieve human perfection and to secure individual liberty in the society.

Sociological School of Law

This school focuses on the effect of law and society on none another. This school treats law as a social phenomenon. It is a synthesis of philosophy, psychology, history, social science etc with law.

Duguit defines law as "essentially and exclusively a social fact."

Ihering defines law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint". There are three essentials of this definition. First, in this definition law is treated as only one means of social control. Second, law is to serve social purpose. Third, it is coercive in character.

Roscoe Pound analysed the term "law" in the 20th century background as predominantly an instrument of social engineering in which conflicting pulls of political, philosophy, economic interests and ethical values constantly struggled for recognition against background of history, tradition and legal technique. Roscoe Pound thinks of law as a social institution to satisfy social wants – the claims and demands and expectations involved in the existence of civilised society by giving effect to as much as may be satisfied or such claims given effect by ordering of human conduct through politically organised society.

Realist School of Law

Realists define law in terms of judicial process.

According to *Holmes*, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts." According to *Cardozo*, "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law."

From the above definitions, it follows that law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases. It thereby avoids the ruin by coordinating the divergent conflicting interests of individuals and of society which, in its turn, enhances the potentialities and viability of the society as a whole. The State, in order to maintain peace and order in society, formulates certain rules of conduct to be followed by people. These rules of conduct are called 'laws'.

To summarise, following are the main characteristics of law and a definition to become universal one, must incorporate all these elements:

- Law pre-supposes a State
- The State makes or authorizes to make, or recognizes or sanctions rules which are called law
- For the rules to be effective, there are sanctions behind them
- These rules (called laws) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

Separate rules and principles are known as 'laws'. Such laws may be mandatory, prohibitive or permissive. A mandatory law calls for affirmative act, as in the case of law requiring the payment of taxes. A prohibitive law requires negative conduct, as in the case of law prohibiting the carrying of concealed weapon or running a lottery. A permissive law is one which neither requires nor forbids action, but allows certain conduct on the part of an individual if he desires to act.

Laws are made effective:

- By requiring damages to be paid for an injury due to disobedience
- By requiring one, in some instances, to complete an obligation he has failed to perform
- By preventing disobedience
- By administering some form of pubishment

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. There is a difference of opinion among the jurists about the origin of law.

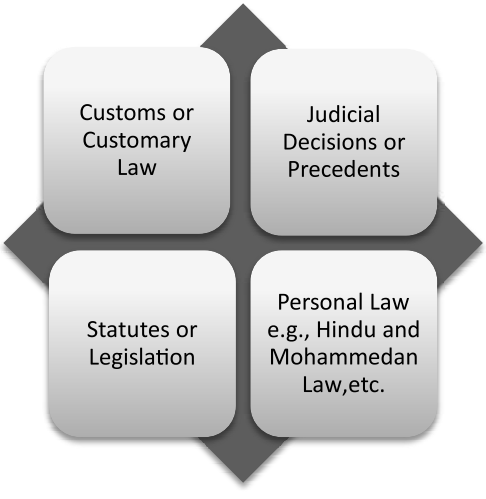
Austin contends that law originates from the sovereign. Savigny traces the origin in Volkgeist (general consciousness of the people). The sociologists find law in numerous heterogeneous factors. For theologians, law originates from God. Vedas and the Quran which are the primary sources of Hindu and Mohammedan Law respectively are considered to have been revealed by God. Precisely, whatever source of origin may be attributed to law, it has emanated from almost similar sources in most of the societies.

The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:

i. Primary sources of Indian Laws.

ii. Secondary sources of Indian Laws.

PRIMARY SOURCES OF INDIAN LAW



1. Customs or Customary Law

As per Collins Dictionary, A custom is an activity, a way of behaving, or an event which is usual or traditional in a particular society or in particular circumstances.

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.

A study of the ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. 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.

Customs have played an important role in moulding the ancient Hindu Law. Most of the law given in Smritis and the commentaries had its origin in customs. The *Smritis* have strongly recommended that the customs should be followed and recognised. Customs worked as a re-orienting force in Indian Law.

Examples

Constitution of India

Article 13 of the Constitution of India defines the term "Law". The definition is as under:

"law" includes any Ordinance, order, bye-law, rule, regulation, notification, **custom** or usage having in the territory of India the force of law.

Hindu Marriage Act, 1955

Hindu Marriage Act, 1955 (HMA) has given ample examples of recognizing the customary laws. Few examples are as under:

According to:

- Section 7 HMA, a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party.
- Section 29(2) HMA, Nothing contained in this Act shall be deemed to affect any right recognised by custom.

Classification of Customs

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.

(i) Legal Customs: These customs operate as a binding rule of law. They have been recognised and enforced by the courts and therefore, they have become a part of the law of land. Legal customs are again of two kinds: (a) Local Customs (b) General Customs.

(a) Local Customs: Local custom is the custom which prevails in some definite locality and constitutes a source of law for that place only. But there are certain sects or communities which take their customs with them wherever they go. They are also local customs. Thus, local customs may be divided into two classes:

- Geographical Local Customs

– Personal Local Customs

These customs are law only for a particular locality, section or community.

(b) General Customs: A general custom is that which prevails throughout the country and constitutes one of the sources of law of the land. The Common Law in England is equated with the general customs of the realm.

(ii) Conventional Customs: These are also known as "usages". These customs are binding due to an agreement between the parties, and not due to any legal authority independently possessed by them. Before a Court treats the conventional custom as incorporated in a contract, following conditions must be satisfied:

– It must be shown that the convention is clearly established and it is fully known to the contracting parties. There is no fixed period for which a convention must have been observed before it is recognised as binding.

– Convention cannot alter the general law of the land.

– It must be reasonable.

Like legal customs, conventional customs may also be classified as general or local. Local conventional customs are limited either to a particular place or market or to a particular trade or transaction.

Requisites of a Valid Custom

A custom will be valid at law and will have a binding force only if it fulfills the following essential conditions:

(i) **Immemorial (Antiquity):** A custom to be valid must be proved to be immemorial; it must be ancient.

According to *Blackstone*, "A custom, in order that it may be legal and binding must have been used so long that the memory of man runs not to the contrary, so that, if any one can show the beginning of it, it is no good custom". English Law places a limit to legal memory to reach back to the year of accession of Richard I in 1189 as enough to constitute the antiquity of a custom. In India, the English Law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient.

(ii) **Certainty:** The custom must be certain and definite, and must not be vague and ambiguous.

(iii) **Reasonableness:** A custom must be reasonable. It must be useful and convenient to the society. A custom is unreasonable if it is opposed to the principles of justice, equity and good conscience.

(iv) **Compulsory Observance:** A custom to be valid must have been continuously observed without any interruption from times immemorial and it must have been regarded by those affected by it as an obligatory or binding rule of conduct.

(v) **Conformity with Law and Public Morality:** A custom must not be opposed to morality or public policy nor must it conflict with statute law. If a custom is expressly forbidden by legislation and abrogated by a statute, it is inapplicable.

(vi) **Unanimity of Opinion:** The custom must be general or universal. If practice is left to individual choice, it cannot be termed as custom.

(vii) **Peaceable Enjoyment:** The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.

(viii) **Consistency:** There must be consistency among the customs. Custom must not come into conflict with the other established customs.

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. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. 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*.

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. The practice of following precedents creates confidence in the minds of litigants. Law becomes certain and known and that in itself is a great advantage. Administration of justice becomes equitable and fair.

High Courts

(i) The decisions of High Court are binding on all the subordinate courts and tribunals within its jurisdiction.

The decisions of one High Court have only a persuasive value in a court which is within the jurisdiction of another High Court. But if such decision is in conflict with any decision of the High Court within whose jurisdiction that court is situated, it has no value and the decision of that High Court is binding on the court.

In case of any conflict between the two decisions of co-equal Benches, generally the later decision is to be followed.

(ii) In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of such a Bench is binding on a Smaller Bench.

One Bench of the same High Court cannot take a view contrary to the decision already given by another co- ordinate Bench of that High Court. Though decision of a Division Bench is wrong, it is binding on a single judge of the same High Court.

Thus, a decision by a Bench of the High Court should be followed by other Benches unless they have reason to differ from it, in which case the proper course is to refer the question for decision by a Full Bench.

(iii) The High Courts are the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and have persuasive value only.

Pre-Constitution (1950) Privy Council decisions are binding on the High Courts unless overruled by the Supreme Court.

(iv) The Supreme Court is the highest court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words "law declared" includes an obiter dictum provided it is upon a point raised and argued (*Bimladevi v. Chaturvedi, AIR 1953 All. 613).*

However, it does not mean that every statement in a judgement of the Supreme Court has the binding effect. Only the statement of ratio of the judgement is having the binding force.

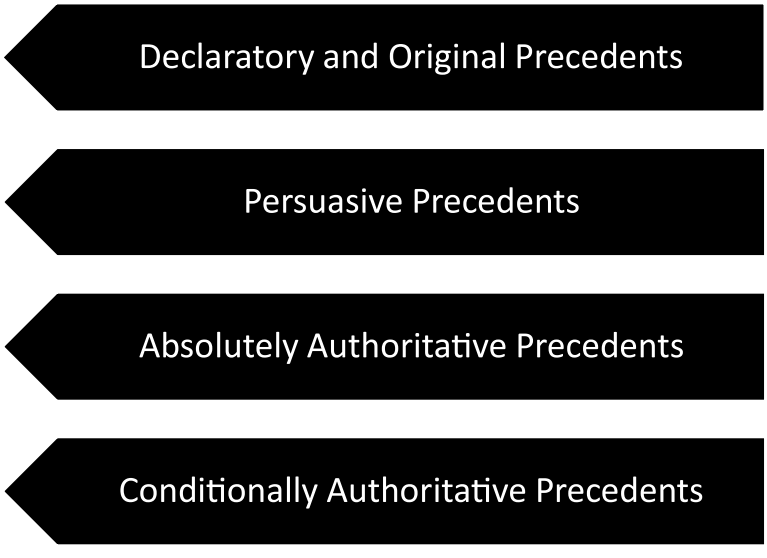
Supreme Court

The expression 'all courts' used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from unless there are extraordinary or special reasons to do so. If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it.

English decisions have only persuasive value in India. The Supreme Court is not bound by the decisions of Privy Council or Federal Court. Thus, the doctrine of precedent as it operates in India lays down the principle that decisions of higher courts must be followed by the courts subordinate to them. However, higher courts are not bound by their own decisions (as is the case in England).

Kinds of Precedents

Precedents may be classified as:



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.

> ***Example :***
>
> "Vishaka Guidelines" were stipulated by the Supreme Court of India, in *Vishaka and others* v. State of Rajasthan *case in 1997*, regarding prevention of sexual harassment at workplace. They acted as precedent for many cases during 1997 to 2013.

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.

> ***Example :***
>
> The decision of one High Court may not binding on other High Court. But the decisions can give a principle which may be helpful for the other High Court. So these type of decisions will have persuasive value. The other High Court may or may not follow the principle of the decision.

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.

In England decisions of the House of Lords are absolutely binding not only upon all inferior courts but even upon itself. Likewise, the decisions of the Court of Appeal are absolutely binding upon itself.

> ***Example :***
>
> The decisions of Higher Court are authoritatively binding on the lower courts.

> **Question:** An absolutely authoritative precedent is one which the judges are not obliged to follow.
>
> **Options :** (a) True (b) False.

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.

> ***Example :***
>
> 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.

Doctrine of Stare Decisis

The doctrine of stare decisis means "adhere to the decision and do not unsettle things which are established". It originated from latin term which means "to abide by things decided" 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. It is a legal doctrine that obligates courts to follow historical cases (precedents) while making ruling in similar cases.

Ratio Decidendi

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 some times 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.

Test Your Knowledge

Q1. Abstract Ratio Decidendi alone has the force of law as regards the world at large. (True/False)

Q2 Are Ratio Decidendi and Orbiter Dicta identical? (True/False)

3. Statutes or Legislation

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).

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.

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.

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. Where a dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgement whether any part of the rules so made is in excess of the power delegated by the parent Act.

In our legal system, Acts of Parliament and the Ordinances and other laws made by the President and Governors in so far as they are authorised to do so under the Constitution are supreme legislation while the legislation made by various authorities like Corporations, Municipalities, etc. under the authority of the supreme legislation are subordinate legislation.

4. Personal Laws

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:

a) The Shruti which includes four Vedas.

b) 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.

c) 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.

Example :

The matters of succession of Hindus are governed by Hindu Succession Act, 1956.

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

a) The holy Quran.

b) 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.

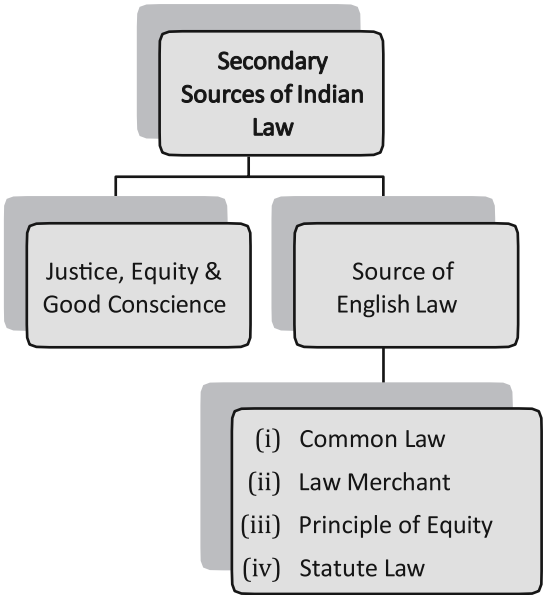
c) Ijmas, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.

d) 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.

e) 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



(i) 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.

The ancient Hindu Law had its own versions of the doctrine of justice, equity and good conscience. In its modern version, justice, equity and good conscience as a source of law, owes its origin to the beginning of the British administration of justice in India. The Charters of the several High Courts established by the British Government directed that when the law was silent on a matter, they should decide the cases in accordance with justice, equity and good conscience. 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: (1951) 1 SCR 1135.

(ii) 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:

- Common Law
- Law Merchant
- Principle of Equity
- Statute Law

(i) **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.

(ii) **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.

(iii) **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.

In some cases, there was no remedy or inadequate remedy at Common Law. The King was considered as the fountain head of justice; when people were dissatisfied or aggrieved with the decision of the Common Law Court, they could always file a mercy petition with the King-in-Council. The King would refer these petitions to his Chancellor. The Chancellor, who was usually a Bishop, would dispose of these petitions not according to the rigid letter of the law but according to his own dictates of commonsense, natural justice and good conscience. The law so administered by the Chancellor came to be known as 'Equity' and such courts as 'Equity Courts'. These 'Equity Courts' acted on number of maxims, meaning of few is as under: ,

"He who seeks equity must do equity",

"He who comes to equity must come with clean hands".

The Equity Courts had their separate existence from the Common Law Courts in England until the passing of the Judicature Act of 1873, when the separate existence of such courts was abolished and all High Courts were empowered to grant either or both the remedies (Common Law as well as Equity) according to the circumstances of each case.

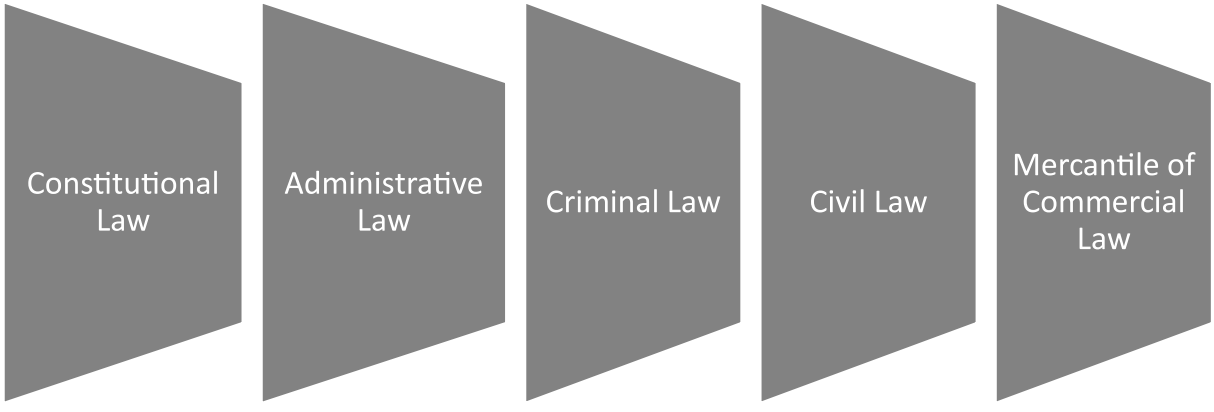
Some of the important principles and remedies developed by Equity Courts are recognition of the right of beneficiary to trust property, remedy of specific performance of contracts, equity of redemption in case of mortgages etc.

(iv) **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.

MERCANTILE OR COMMERCIAL LAW

Branches of Mercantile Law

There are many branches of law; viz.,

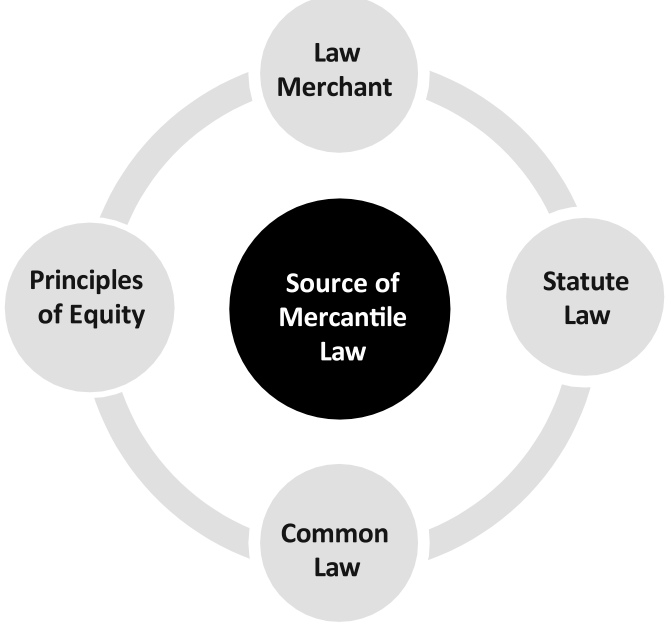


Mercantile Law is related to the commercial activities of the people of the society. It is that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions. Mercantile Law is a wide term and embraces all legal principles concerning 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.

The Mercantile Law or Law Merchant or *Lex Mercatorla* is the name given to that part of law which grew up from the customs and usages of merchants or traders in England which eventually became a part of Common Law of England.

Sources of Mercantile Law

The following are the main sources of Mercantile Law:



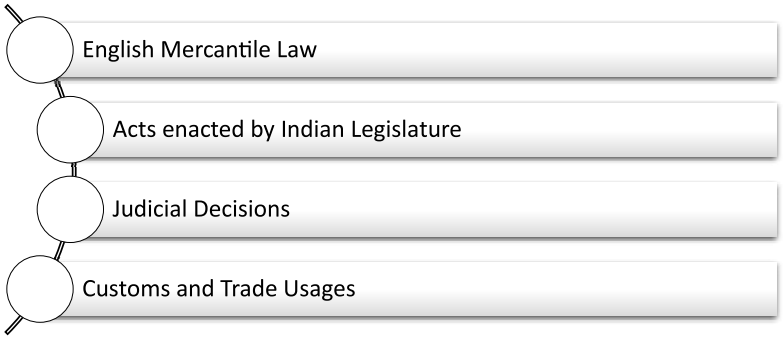
They have already been discussed under the heading – Sources of English Law.

Mercantile Law in India

Prior to 1872, mercantile transactions were regulated by the personal 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

The main sources of Indian Mercantile Law are:



(i) **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.

(ii) **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,

(a) The Indian Contract Act, 1872

(b) The Sale of Goods Act, 1930

(c) The Indian Partnership Act, 1932

(d) The Negotiable Instruments Act, 1881

(e) The Arbitration and Conciliation Act, 1996

(f) The Insurance Act, 1938.

(iii) **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. The English legal system has developed a system of judicial precedent which requires the extraction of the legal principle from a particular judicial decision, given the fulfillment of certain conditions, ensures that judges apply the principle in subsequent cases which are indistinguishable. The latter provision being termed "binding precedents". Such decisions are called as precedents and become an important source of law (See the topic Judicial Precedents at p.7). Prior to independence, the Privy Council of Great Britain was the final Court of Appeal and its decisions were binding on Indian

Courts. After independence, the Supreme Court of India is the final Court of Appeal. But even then, the decisions of English Courts such as Privy Council and House of Lords are frequently referred to as precedents in deciding certain cases and in interpreting Indian Statutes.

(iv) 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. For example, Section 1 of the Indian Contract Act, 1872, lays down that, "Nothing herein contained shall affect the provisions of any

Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act". Similarly Section 1 of the Negotiable Instruments Act, 1881, lays down that, "nothing herein contained... affects any local usage relating to any instrument in any oriental language". 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.

LESSON ROUND-UP

- Law is not static as circumstances and conditions in a society change, laws are also changed to fit the requirements of the society. The object of law is to provide hope of security for the future. It serves as a vehicle of social change and as a harbinger of social justice.
- 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.
- The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:
  - (a) Principal Sources of Indian Law
    - o Customs or Customary Law
    - o Judicial Decisions or Precedents
    - o Statutes or Legislation
    - o Personal Law e.g., Hindu and Mohammedan Law, etc.
  - (b) Secondary Sources of Indian Law
    - o Justice, Equity and Good Conscience;
    - o English Law
    - o Common Law
    - o Law Merchant
    - o Principle of Equity
    - o Statute Law.

- The majors School of Law that has emerged over time can be classified into six main heads. They are as follows:
  i. Natural School of Law
  ii. Analytical School of Law
  iii. Historical School of Law
  iv. Philosophical/Ethical School of Law
  v. Sociological School of Law
  vi. Realist School of Law.
- 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. The main sources of Indian Mercantile Law are
  a) English Mercantile Law
  b) Acts enacted by Indian Legislature
  c) Judicial Decisions
  d) Customs and Trade Usages.

GLOSSARY

Natural Law : Certain rights that are inherent by virtue of human nature and can be understood universally through human resource.

Positivistic Law : Aggregate of rules set by man as politically superior, or sovereign, to mean as political subject.

Legal customs : Customs that operates as binding rule of Law.

Conventional Customs : They are known as usages.

Grundnorm : It is the fundamental law, supreme law also known as the law of the land.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the sources of Indian Law.
2. Distinguish between Declaratory Precedents and Original Precedents.
3. Distinguish between Orbiter Dicta and Ratio Decidendi.
4. Define the term Obiter Dicta.
5. Explain Doctrine of Stare Decisis.
6. Write down the requisite of valid customs.

7. Write short note on:
   (a) Austin's Command theory of law.
   (b) Roscoe Pound's theory of law.
   (c) Salmond's theory of law.
   (d) Kelsen's Pure theory of law.
   (e) Bentham's theory of law.
   (f) Savigny's Theory of law.

LIST OF FURTHER READINGS

- Student Company Secretary
- Chartered Secretary
- G.W. Paton : A Textbook of Jurisprudence

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.icsi.edu/cs-journal/

Constitution of India

Lesson 2

KEY CONCEPTS

■ Legislature, Executive & Judiciary ■ Fundamental Rights ■ Fundamental Duties ■ Directive Principles ■ State ■ Writs

Learning Objectives

To understand:

- Basic Structure of the Constitution of India
- The meaning of 'State' the Constitution of India
- The fundamental rights enshrined in the Constitution
- Various doctrines useful for Interpretation of the Constitution
- The remedies provided by way of Writs, against violation of fundamental rights
- Understand the guidance given to the states for making law through Directive Principles of State Policy
- Fundamental Duties
- How ordinances are promulgated
- The hierarchy of courts in India
- Delegated legislation which are supplementary to the legislations passed by the Legislature
- The law making process in our country
- The constitution of various Standing and non-standing committees
- The amendments to the Constitution

Lesson Outline

- Broad Framework of the Constitution
- Preamble
- Structure
- Fundamental Rights
- Definition of State
- Justifiability of Fundamental Rights
- Directive Principles of State Policy
- Fundamental Duties
- Ordinance Making Powers
- Legislative Powers of the Union and the States
- Freedom of Trade, Commerce and Intercourse
- Constitutional Provisions relating to State Monopoly
- The Judiciary
- Writ Jurisdiction of High Courts and Supreme Court and Types of Writs
- Delegated Legislation
- Separation of Power
- Legislative functions
- Parliamentary Committees
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Constitution of India

The Preamble to the Constitution States

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 of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

BROAD FRAMEWORK OF THE CONSTITUTION

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons in a number of entrenched provisions and for the principles to be followed by the State in the governance of the country, labelled as "Directive Principles of State Policy". All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people. The Constitution of the country reflects the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it. It reflects the ideology and system of the Nation. It is the prime source of other laws.

PREAMBLE

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution. The preamble declares India to be a Sovereign, Socialist, Secular, and Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

The polity assured to the people of India by the Constitution is described in the preamble as a Sovereign, Socialist, Secular, and Democratic Republic. The expression "Sovereign" signifies that the Republic is externally and internally sovereign. Sovereignty in the strict and narrowest sense of the term implies independence all round, within and without the borders of the country. As discussed above, legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.

The democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

Constitution aims to secure to its people "justice – social, economic and political". The Directive Principles of State Policy, contained in Part IV of the Constitution are designed for the achievement of the socialistic goal envisaged in the preamble. The expression "Democratic Republic" signifies that our government is of the people, by the people and for the people.

STRUCTURE

Constitution of India is basically federal but with certain unitary features.

The majority of the Supreme Court judges in *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461, were of the view that the *federal features* form the basic structure of the Indian Constitution. However, there is some controversy as to whether the Indian Constitution establishes a federal system or it stipulates a unitary form of Government with some basic federal features. Thus, to decide whether our Constitution is federal, unitary or quasi federal, it would be better to have a look at the contents of the Constitution.

The essential features of a Federal Polity or System are – dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution.

The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as follows:

(a) In India, there are Governments at different levels, like Union and States.

(b) Powers to make laws have been suitably distributed among them by way of various lists as per the Seventh Schedule.

(c) Both Union and States have to follow the Constitutional provisions when they make laws.

(d) The Judiciary is independent with regard to judicial matters and judiciary can test the validity of independently. The Supreme Court decides the disputes between the Union and the States, or the States inter se.

(e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in Article 368 of the Constitution itself.

From the above, it is clear that the Indian Constitution basically has federal features. But the Indian Constitution does not establish two co-ordinate independent Governments. Both the Governments co-ordinate, co-operate and collaborate in each other's efforts to achieve the ideals laid down in the preamble.

Judicial View

The question as to whether the Indian Constitution has a federal form of Government or a unitary constitution with some federal features came up in various cases before the Supreme Court and the High Courts. But in most cases, the observations have been made in a particular context and have to be understood accordingly. The question rests mostly on value judgement, i.e., on one's own philosophy.

Peculiar Features of Indian Federalism

Indian Constitution differs from the federal systems of the world in certain fundamental aspects, which are as follows:

(1) The Mode of Formation: A federal Union, as in the American system, is formed by an agreement between a number of sovereign and independent States, surrendering a defined part of their sovereignty or autonomy to a new central organisation. But there is an alternative mode of federation, as in the Canadian system where the provinces of a Unitary State may be transformed into a federal union to make themselves autonomous.

India had a thoroughly Centralised Unitary Constitution until the Government of India Act, 1935 which for the first time set up a federal system in the manner as in Canada viz., by creation of autonomous units and combining them into a federation by one and the same Act.

(2) ***Position of the States in the Federation:*** In a federal system, a number of safeguards are provided for the protection of State's rights as they are independent before the formation of federation. In India, as the States were not previously sovereign entities, the rights were exercised mainly by Union, e.g., residuary powers.

(3) ***Citizenship etc.:*** The framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity with dual citizenship, a double set of officials and a double system of the courts. There is, however, single citizenship in India, with no division of public services or of the judiciary.

(4) ***Residuary Power:*** Residuary power is vested in the Union.

In other words, the Constitution of India is neither purely federal nor purely unitary. It is a combination of both and is based upon the principle that "In spite of federalism the national interest ought to be paramount as against autocracy stepped with the establishment of supremacy of law".

FUNDAMENTAL RIGHTS

The Constitution seeks to secure to the people "liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and fraternity assuring the dignity of the individual". With this object, the fundamental rights are envisaged in Part III of the Constitution.

The Concept of Fundamental Rights

Political philosophers in the 17th Century began to think that the man by birth had certain rights which were universal and inalienable, and he could not be deprived of them. The names of Rousseau, Locke, Montaesgue and Blackstone may be noted in this context. The Declaration of American Independence 1776, stated that all men are created equal, that they are endowed by their creator with certain inalienable rights: that among these, are life, liberty and the pursuit of happiness. Since the 17th century, it had been considered that man has certain essential, basic, natural and inalienable rights and it is the function of the State to recognise these rights and allow them a free play so that human liberty may be preserved, human personality developed and an effective cultural, social and democratic life promoted. It was thought that these rights should be entrenched in such a way that they may not be interfered with by an oppressive or transient majority in the Legislature. With this in view, some written Constitutions (especially after the First World War) guarantee rights of the people and forbid every organ of the Government from interfering with the same.

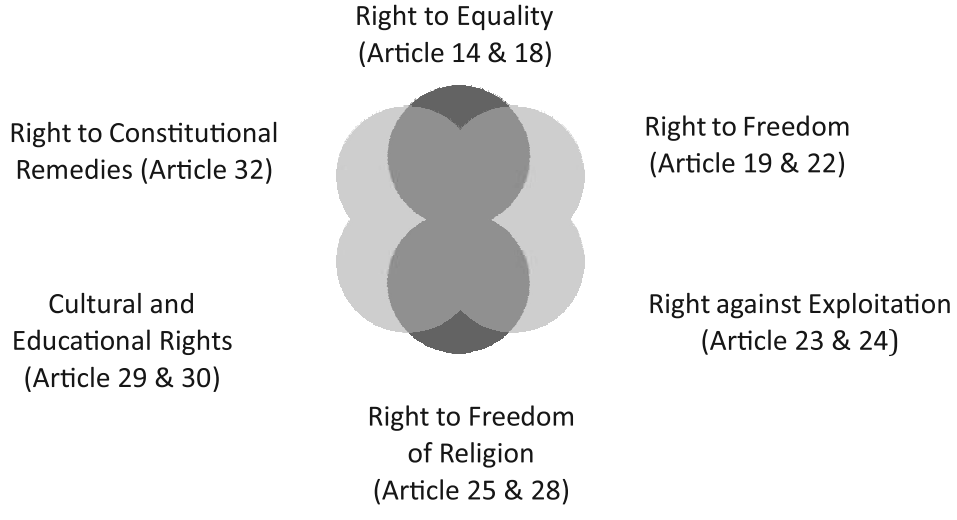
The fundamental difference in approach to the question of individual rights between England and the United States is that while the English were anxious to protect individual rights from the abuses of executive power, the framers of the American Constitution were apprehensive of tyranny, not only from the executive but also from the legislature. While the English people, in their fight for freedom against autocracy stopped with the establishment of Parliamentary supremacy, the Americans went further to assert that there had to be a law superior to the legislature itself and that the restraint of such paramount written law could only save them from the fears of absolution and autocracy which are ingrained in the human nature.

As regards India, the Simon Commission and the Joint Parliamentary Committee had rejected the idea of enacting declaration of Fundamental Rights on the ground that abstract declarations are useless, unless there exists the will and the means to make them effective. The Nehru Committee recommended the inclusion of Fundamental Rights in the Constitution for the country. Although that demand of the people was not met by the British Parliament under the Government of India Act, 1935, yet the enthusiasm of the people to have

such rights in the Constitution was not impaired. As a result of that enthusiasm they were successful in getting a recommendation being included in the Statement of May 16, 1946 made by the Cabinet Mission- (which became the basis of the present Constitution) to the effect that the Constitution-making body may adopt the rights in the Constitution. Therefore, as soon as Constituent Assembly began to work in December, 1947, in its objectives resolution Pt. Jawahar Lal Nehru moved for the protection of certain rights to be provided in the Constitution.

Inclusion of Fundamental Rights in Part III of the Constitution

Part III of the Indian Constitution guarantees six categories of fundamental rights. These are:



Earlier the right to property under Article 31 was also guaranteed as a Fundamental Right which has been removed by the 44th Constitutional Amendment Act, 1978. Now right to property is not a *fundamental right*, it is only a legal right.

Apart from this, Articles 12 and 13 deal with definition of 'State' and 'Law' respectively. Articles 33 to 35 deal with the general provisions relating to Fundamental Rights. No fundamental right in India is absolute and reasonable restrictions can be imposed in the interest of the state by valid legislation and in such case the Court normally would respect the legislative policy behind the same. (*People's Union for Civil Liberties* v. *Union of India,* (2004) 2 SCC 476).

From the point of view of persons to whom the rights are available, the fundamental rights may be classified as follows:

(a) Articles 15, 16, 19 and 30 are guaranteed only to citizens.

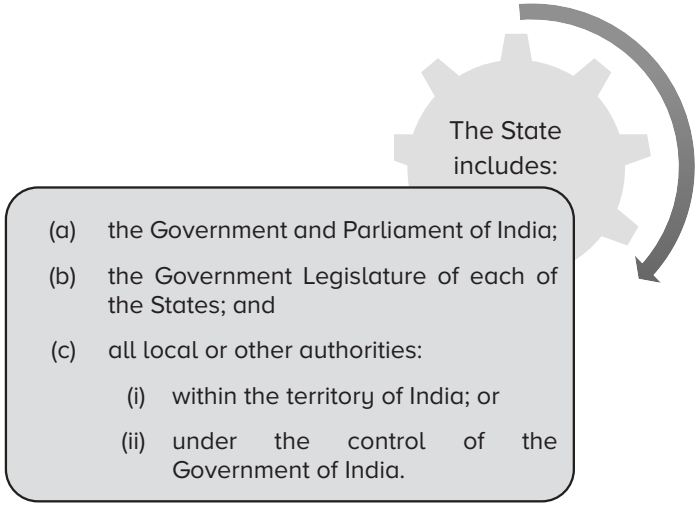
(b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India – citizen or foreigner.

(c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.

For convenience as well as for their better understanding it is proper to take each of these separately. But some related terms are necessary to be understood first.

Definition of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes –



CASE LAWS

The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards. The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions *(Electricity Board, Rajasthan Mohanlal, AIR 1967 SC 1957)*. The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India. (*In re: Angur Bala Parui, AIR 1999 Cal. 102*). It has also been held that a university is an authority (*University of Madras v. Shanta Bai, AIR 1954 Mad. 67*). The Gujarat High Court has held that the President is "State" when making an order under Article 359 of the Constitution (*Haroobhai v. State of Gujarat, AIR 1967, Guj. 229*). The words "under the control of the Government of India" bring, into the definition of State, not only every authority within the territory of India, but also those functioning outside, provided such authorities are under the control of the Government of India. In *Bidi Supply Co. v. Union of India, AIR 1956 SC 479*, State was interpreted to include its Income-tax department.

The Supreme Court in *Sukhdev Singh v. Bhagatram, AIR 1975 SC 1331* and in *R.D. Shetty v. International Airports Authority, AIR 1979 SC 1628,* has pointed out that corporations acting as instrumentality or agency of government would become 'State' because obviously they are subjected to the same limitations in the field of constitutional or administrative law as the government itself, though in the eye of law they would be distinct and independent legal entities. Statutory and non-statutory bodies that get financial resources from government, have deep pervasive control of government and with functional characters as such as ICAR, CSIR, ONGC, IDBI, Electricity Boards, NAFED, Delhi Transport Corporation etc. come under the definition of state. Statutory and Non-statutory bodies which are not substantially generally financed by the government don't come under definition of state. Examples are autonomous bodies, Cooperatives, NCERT etc. In *Chandra Mohan Khanna v. NCERT (1991) 4 SCC 578*, it was held that NCERT is not a State. In *Satish Nayak v. Cochin Stock Exchange Ltd. (1995 Comp LJ 35),* the Kerala High Court held that since a Stock Exchange was independent of Government control and was not discharging any public duty, it cannot be treated as 'other authority' under Article 12.

In *Ajay Hasia v. Khalid Mujib, AIR 1981 SC 481,* the Supreme Court has enunciated the following test for determining whether an entity is an instrumentality or agency of the State:

(1) If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

(2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.

(3) Whether the corporation enjoys a monopoly status which is conferred or protected by the State.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or an instrumentality.

(5) If the functions of the corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.

(6) If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

An important decision on the definition of State in Article 12 is *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111*. A seven Judge Bench of the Supreme Court by a majority of 5:2 held that CSIR is an instrumentality of "the State" falling within the scope of Article 12. The multiple test which is to be applied to ascertain the character of a body as falling within Article 12 or outside is to ascertain the nature of financial, functional and administrative control of the State over it and whether it is dominated by the State Government and the control can be said to be so deep and pervasive so as to satisfy the court "of brooding presence of the Government" on the activities of the body concerned.

In *Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649*, the Supreme Court applying the tests laid down in Pardeep Kumar Biswas case held that the Board of Control for Cricket in India (BCCI) was not State for purposes of Article 12 because it was not shown to be financially, functionally or administratively dominated by or under the control of the Government and control exercised by the Government was not pervasive but merely regulatory in nature.

Judiciary although an organ of State like the executive and the legislature, is not specifically mentioned in Article 12. However, the position is that where the Court performs judicial functions, e.g. determination of scope of fundamental rights *vis-a-vis* legislature or executive action, it will not occasion the infringement of fundamental rights and therefore it will not come under 'State' in such situation (*A.R. Antualay v. R.S. Nayak, (1988) 2 SCC 602*). While in exercise of non-judicial functions e.g. in exercise of rule-making powers, where a Court makes rules which contravene the fundamental rights of citizens, the same could be challenged treating the Court as 'State'.

Example

An central act has been passed by the parliament. The subject matter of the Act was to grant of certain pay related benefits to all employees of the State. Are only states of India (for example State of Maharastra, Haryana etc.) are required to comply with law.

No, According to Article 12 of the Constitution of the India the word state includes not only States of India but also certain other authorities.

JUSTIFIABILITY OF FUNDAMENTAL RIGHTS

Article 13 gives teeth to the fundamental rights. It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.

Existing Laws: Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws: Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution. After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right. . In State of Punjab v. Dalbir Singh AIR 2012 SC 1040 Supreme Court held that article 13 (2) clearly prohibits the making of any law by the state which takes away or abridges rights, conferred by part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention.

The word 'law' according to the definition given in Article 13 itself includes –

"... any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

It is clear that like definition of State in Article 12, the definition of 'law' in Article 13 is not exhaustive, e.g. it does not speak of even laws made by Parliament or State Legislatures which form the largest part of the body of laws. Because of this nature of the definition, the issue came up before the Supreme Court as to whether a Constitutional Amendment by which a fundamental right included in Part III is taken away or abridged is also a law within the meaning of Article 13. The Court twice rejected the view that it includes a Constitutional Amendment, but third time in the famous *Golaknath case (A.I.R. 1967 S.C. 1643)* by a majority of 6 to 5, the Court took the view that it includes such an amendment and, therefore, even a Constitutional amendment would be void to the extent it takes away or abridges any of the fundamental rights. By the Constitution (Twenty-Fourth Amendment) Act, 1971 a new clause has been added to Article 13 which provides that –

"Nothing in this Article shall apply to any amendment of this Constitution made under Article 368"

Article 13 came up for judicial review in a number of cases and the Courts have evolved doctrines like doctrine of *eclipse, severability, prospective overruling, acquiescence* etc. for interpreting the provisions of Article 13.

Example

There was a Law in force before 26th January, 1950 which was against the Fundamental Rights. It was contended that it can still be in force as the constitution does not make it void. Is the contention correct?

According to Article 13(1) of the Constitution of India, All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

CASE LAW

In the case of *CBI vs. R. R. Kishore (Supreme Court decided on 11.09.2023), the Supreme Court decided on the point that* whether declaration made in the case of *Subramanian Swamy vs. Director, Central Bureau of Investigation and another* (2014) 8 SCC 682, that Section 6A of the Delhi Special Police Establishment Act, 1942 being unconstitutional, can be applied retrospectively in context with Article 20 of the Constitution.

The Supreme Court has decided that it is crystal clear that once a law is declared to be unconstitutional, being violative of Part-III of the Constitution, then it would be held to be void ab initio, still born, unenforceable and non est in view of Article 13(2) of the Constitution and its interpretation by authoritative pronouncements. Thus, the declaration made by the Constitution Bench in the case of Subramanian Swamy will have retrospective operation. Section 6A of the DSPE Act is held to be not in force from the date of its insertion i.e. 11.09.2003.

Doctrine of Severability

One thing to be noted in Article 13 is that, it is not the entire law which is affected by the provisions in Part III, but the law becomes invalid only to the extent to which it is inconsistent with the Fundamental Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand. However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.

The doctrine has been applied invariably to cases where it has been found possible to separate the invalid part from the valid part of an Act. Article 13 only says that any law which is inconsistent with the fundamental rights is void "to the extent of inconsistency" and this has been interpreted to imply that it is not necessary to strike down the whole Act as invalid, if only a part is invalid and that part can survive independently. In *A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27,* the Supreme Court ruled that where an Act was partly invalid, if the valid portion was severable from the rest, the valid portion would be maintained, provided that it was sufficient to carry out the purpose of the Act.

Doctrine of Eclipse

The other noteworthy thing in Article 13 is that, though an existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead altogether. A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e., is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

The doctrine was first evolved in *Bhikaji Narain Dhakras v. State of M.P., A.I.R. 1955 S.C. 781*. In this case, the validity of C.P. and Berar Motor Vehicles Amendment Act, 1947, empowering the Government to regulate, control and to take up the entire motor transport business was challenged. The Act was perfectly a valid piece of legislation at the time of its enactment. But on the commencement of the Constitution, the existing law became inconsistent under Article 13(1), as it contravened the freedom to carry on trade and business under Article 19(1)(g). To remove the infirmity the Constitution (First Amendment) Act, 1951 was passed which permitted creation by law of State monopoly in respect of motor transport business. The Court held that the Article by reason of its language could not be read as having obliterated the entire operation of the inconsistent law or having wiped it altogether from the statute book. In case of a pre-Constitution law or statute, it was held, that the *doctrine of eclipse* would apply. The relevant part of the judgement is:

"The true position is that the impugned law became as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity."

However, there was a dispute regarding the applicability of the doctrine of eclipse, whether it should be applicable to both pre-Constitution and post-Constitution laws or only to pre-constitution laws. Some decisions were in favour of both laws and some were in favour of pre-constitution laws only. There is no unambiguous judicial pronouncement to that effect.

Waiver

The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State. However, the person must have the knowledge of his rights and that the waiver should be voluntary. The doctrine was discussed in *Basheshar Nath v. C.I.T., AIR 1959 SC 149,* where the majority expressed its view against the waiver of fundamental rights. It was held that it was not open to citizens to waive any of the fundamental rights. Any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it.

The Article has been invoked in many cases. Some of the important cases and observations are as under:

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances. The case is *Charanjit Lal Chowdhary* v. *Union of India*, AIR 1951 SC 41. In this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company through its directors had been managing and running a textile mill of the same name.

Later, on account of mis-management, a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain section of the community. The Central Government issued an Ordinance which was later replaced by an Act, known as Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950. With the passing of this Act, the management and the administration of the assets of the company were placed under the control of the directors appointed by the Government. As regards the shareholders, the Act declared that they could neither appoint a new director nor could take proceedings against the company for winding up. The petitioner filed a writ petition on the ground that the said Act infringed the rule of equal protection of laws as embodied in Article 14, because a single company and its shareholders were subjected to disability as compared with other companies and their shareholders. The Supreme Court dismissed the petition and held the legislation as valid. It laid down that the law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him only, that single individual may be treated as a class by himself. However, in subsequent cases the Court explained that the rule of presumption laid down in *Charanjit Lal's* case is not absolute, but would depend on facts of each case.

For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void [*Minor P. Rajendran v. State of Madras & Ors. Air 1968 Sc 1012)*].

Right of equality

Articles 14 to 18 of the Constitution deal with equality and its various facets. The general principle finds expression in Article 14. Particular applications of this right are dealt with in Articles 15 and 16. Still more specialised applications of equality are found in Articles 17 and 18.

Article 14: Equality before the law and equal protection of the laws

Article 14 of the Constitution says that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

As is evident, Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression 'equality before the law' which is borrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts. The second expression "the equal protection of the laws" which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection

shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary v. Union of India, AIR 1951 SC 41*). The right to equality is also recognised as one of the basic features of the Constitution (*Indra Sawhney v. Union of India, AIR 2000 SC 498*).

As a matter of fact all persons are not alike or equal in all respects. Application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality. Of course, mathematical equality is not intended. Equals are to be governed by the same laws. But as regards unequals, the same laws are not complemented. In fact, that would itself lead to inequality.

Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are 'similarly situated' to the complainant. [*Glanrock Estate (P.) Ltd. v. State of T.N. (2010) 10 SCC 96*]. *In Raj Bala v. State of Haryana AIR 2016 SC 33* Supreme Court held that declaring a piece of legislation as arbitrary and thereby unconstitutional implies value judgement. It has no application under the Indian constitution.

Legislative classification

A right conferred on persons that they shall not be denied equal protection of the laws does not mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. To separate persons similarly situated from those who are not, legislative classification or distinction is made carefully between persons who are and who are not similarly situated. The Supreme Court in a number of cases has upheld the view that Article 14 does not rule out classification for purposes of legislation. Article 14 does not forbid classification or differentiation which rests upon reasonable grounds of distinction.

The Supreme Court in *State of Bihar v. Bihar State 'Plus-2' lectures Associations, (2008) 7 SCC 231* held that now it is well settled and cannot be disputed that Article 14 of the Constitution guarantees equality before the law and confers equal protection of laws. It prohibits the state from denying persons or class of persons equal treatment; provided they are equals and are similarly situated. It however, does not forbid classification. In other words, what Article 14 prohibits is discrimination and not classification if otherwise such classification is legal, valid and reasonable.

Test of valid classification

Since a distinction is to be made for the purpose of enacting a legislation, it must pass the classical test enunciated by the Supreme Court in *State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75*. Permissible classification must satisfy two conditions, namely;

(i) it must be founded on an *intelligible differentia* which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

After considering leading cases on equal protection clause enshrined in Article 14 of the constitution, the five-Judge Bench of the Supreme Court in *Confederation of Ex-Servicemen Assns. v. Union of India, (2006) 8 SCC 399* stated: "In our judgement, therefore, it is clear that every classification to be legal, valid and permissible, must fulfill the twin test; namely:

(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) Such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".

The classification may be founded on different basis, such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. A legal and valid classification may be based on educational qualifications [*State of Bihar v. Bihar State 'Plus-2' lecturers Associations and Others, (2008) 7 SCC 238*].

A law based on a permissible classification fulfills the guarantee of the equal protection of the laws and is valid. On the other hand if it is based on an impermissible classification it violates that guarantee and is void. Reiterating the test of reasonable classification, the Supreme Court in *Dharam Dutt v. Union of India, (2004) 1 SCC 712* held that laying down of intelligible differentia does not, however mean that the legislative classification should be scientifically perfect or logically complete.

Scope of Article 14

The true meaning and scope of Article 14 has been explained in several decisions of the Supreme Court. The rules with respect to permissible classification as evolved in the various decisions have been summarised by the Supreme Court in *Ram Kishan Dalmiya v. Justice Tendulkar, AIR 1958 SC 538* as follows:

(i) Article 14 forbids class legislation, but does not forbid classification.

> **Example**
>
> A law has been passed for grant of financial assistance to girl child below the Age of 14 years for education. It was contented that there shall be equality before the law. Can this law be enacted?
>
> Yes, it can be passed if the Legislation is based on reasonable classification and intelligible differentia.

(ii) Permissible classification must satisfy two conditions, namely, (a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (b) the differentia must have a relation to the object sought to be achieved by the statute in question.

(iii) The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.

(iv) In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non-identity of treatment is enough.

(v) Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.

(vi) Article 14 condemns discrimination not only by substantive law but by a law of procedure.

(vii) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

A remarkable example of the application of the principle of equality under the Constitution is the decision of the Constitution Bench of the Supreme Court in *R.K. Garg* v. *Union of India*, AIR 1976 SC 1559. The legislation under attack was the Special Bearer Bonds (Immunities and Exemptions) Act, 1981. It permitted investment of black money in the purchase of these Bonds without any questions being asked as to how this money came into the possession.

In public interest litigation it was contended that Article 14 had been violated, because honest tax payers were adversely discriminated against by the Act, which legalized evasion. But the Supreme Court rejected the challenge, taking note of the magnitude of the problem of black money which had brought into being a parallel economy.

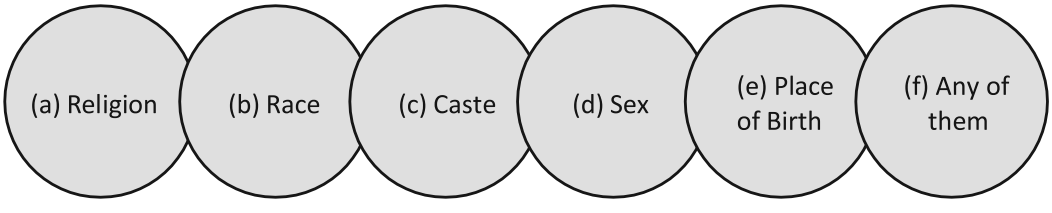
Finally it should be mentioned that Article 14 invalidates discrimination not only in substantive law but also in procedure. Further, it applies to executive acts also.

In the past, Article 14 has acquired new dimensions. In *Maneka Gandhi v. Union of India, AIR 1978 SC 597,* the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures a fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence (See also *Ramana Dayaram Shetty v. International Airport Authority, AIR 1979 SC 1628; Kasturi Lal v. State of J&K, AIR 1980 SC 1992).* Finally in *Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487,* the Supreme Court held " .... what Article 14 strikes at is arbitrariness because an action that is arbitrary must necessarily involve negation of equality..... Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such action." In this case the system of selection by oral interview, in addition to written test was upheld as valid, but allocation of above 15 per cent of the total marks for interview was regarded as arbitrary and unreasonable and liable to be struck down as constitutionally invalid.

Possession of higher qualification can be treated as a valid base or classification of two categories of employees, even if no such requirement is prescribed at the time of recruitment. If such a distinction is drawn no complaint can be made that it would violate Article 14 of the Constitution *(U.P. State Sugar Corpn. Ltd. v. Sant Raj Singh, (2006) 9 SCC 82).*

Article 15: Prohibition of discrimination on grounds of religion etc.

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:



Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) create certain exceptions to the right guaranteed by Article 15(1) and 15(2). Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women *(Union of India v. Prabhakaran, (1997) 2 SCC 633).*

Article 15(4) permits the State to make special provision for the advancement of –

(a) Socially and educationally backward classes of citizens;

(b) Scheduled castes; and

(c) Scheduled tribes.

Article 15(5) inserted in the Constitution of India under the Constitution (Ninety-third Amendment) Act, 2005, permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions

relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Further, Article 15(6) inserted in the Constitution of India under the Constitution (One Hundred and Third Amendment) Act, 2019. Article 15(6) provides that nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, –

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation. – For the purposes of Article 15 and Article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

Example

The parliament made a law for advancement of economically weaker sections of citizens. Can the parliament made such law?

Yes, the Constitution of India is amended by the Constitution (One Hundred and Third Amendment) Act, 2019 empowering the parliament to make such laws.

Article 16: Equality of opportunity in matters of public employment

Article 16(1) guarantees to all citizens' equality of opportunity in matters relating to employment or appointment of office under the State.

Article 16(2) prohibits discrimination against a citizen on the grounds of religion, race, caste, sex, descent, place of birth or residence.

However, there are certain exceptions provided in Article 16(3), 16(4) and 16(5). These are as under:

(1) Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]

(2) A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]

(3) The State from may make a law for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State. [Article 16(4A)]

(4) The State may consider any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as

a separate class of vacancies to be filled up 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 fifty per cent. reservation on total number of vacancies of that year. [Article 16(4B)]

(5) A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16(5)]

(6) The State may make a law for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category. [Article 16(6)]

The Supreme Court in *Secy. of State of Karnataka v. Umadevi (2006) 4 SCC 1* held that adherence to the rule of equality in public employment is a basic feature of the Constitution and since the rule of law is the core of the Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14. Equality of opportunity is the hallmark and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus any public employment has to be in terms of the Constitutional Scheme.

Rights Relating to Freedom

Articles 19-22 guarantee certain fundamental freedoms.

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely:

- Freedom of speech and expression
- Assemble peaceably and without arms
- Form associations or unions or co-operative societies
- Move freely throughout the territory of India
- Reside and settle in any part of the territory of India
- Practise any profession, or to carry on any occupation, trade or business.

These freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen. At the same time, none of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of Article 19. The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

(a) The restriction can be imposed by law and not by a purely executive order issued under a statute;

(b) The restriction must be reasonable;

(c) The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Example

A certain class of persons were denied to form co-operative societies. They contended that it is their fundamental right to form co-operative societies. Is the contention correct?

Yes, it is the fundamental right of citizen to form co-operatives societies.

Reasonableness

It is very important to note that the restrictions should be reasonable. If this word 'reasonable' is not there, the Government can impose any restrictions and they cannot be challenged. This word alone gives the right to an aggrieved person to challenge any restriction of the freedoms granted under this Article.

Reasonableness of the restriction is an ingredient common to all the clauses of Article 19. Reasonableness is an objective test to be applied by the judiciary. Legislative judgment may be taken into account by the Court, but is not conclusive. It is subject to the supervision of Courts. The following factors are usually considered to assess the reasonableness of a law:

(i) The objective of the restriction;

(ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;

(iii) How far the restriction is proportion to the evil in question;

(iv) Duration of the restriction;

(v) The conditions prevailing at the time when the law was framed.

The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Procedural and Substantiveness

In determining the reasonableness of a law, the Court will not only see the surrounding circumstances, but all contemporaneous legislation passed as part of a single scheme. It is the reasonableness of the restriction and not of the law that has to be found out, and if the legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the court can take judicial notice of such Acts forming part of the same legislative plan *(Lord Krishna Sagar Mills v. Union of India, AIR 1959 SC 316).*

The phrase 'reasonable restrictions' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. In determining the reasonableness of a statute, the Court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. The reasonableness of a restriction has to be determined in an objective manner and from the point of view of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations. The Court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction. The word 'restriction' also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction only. Though the test of reasonableness laid down in clauses (2) to (6) of Article 19 might in great part coincide with that for judging 'due process' under the American Constitution, it must not be assumed that these are identical. It has been held that the restrictions are imposed in carrying out the Directive Principles of State Policy is a point in favour of the reasonableness of the restrictions.

Scope and Limitations on the Freedoms

(a) Right to freedom of speech and expression

It need not be mentioned as to how important the freedom of speech and expression is in a democracy. A democratic Government attaches a great importance to this freedom because without freedom of speech and expression the appeal to reason which is the basis of democracy cannot be made. The right to speech and expression includes right to make a good or bad speech and even the right of not to speak. One may express oneself even by signs. The Courts have held that this right includes the freedom of press and right to publish one's opinion, right to circulation and propagation of one's ideas, freedom of peaceful demonstration, dramatic performance and cinematography. It may also include any other mode of expression of one's ideas. The Supreme Court in *Cricket Association of Bengal v. the Secretary, Ministry of Information & Broadcasting (Govt. of India), AIR 1995 SC 1236,* has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.

The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. This freedom includes the freedom of press as it partakes of the same basic nature and characteristic (*Maneka Gandhi v. Union of India, AIR 1978 S.C. 597*). However no special privilege is attached to the press as such, distinct from ordinary citizens. In *Romesh Thapar v. State of Punjab, AIR 1950 S.C. 124,* it was observed that "freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government is possible". Imposition of pre-censorship on publication under clause (2), is violative of freedom of speech and expression.

The right to freedom of speech is infringed not only by a direct ban on the circulation of a publication but also by an action of the Government which would adversely affect the circulation of the paper. The only restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other [*Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305*].

Regarding Commercial advertisements it was held in *Hamdard Dawakhana v. Union of India, AIR 1960 SC 554* that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce. A commercial advertisement does not aim at the furtherance of the freedom of speech. Later the perception about advertisement changed and it has been held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a) and such speech can also be subjected to reasonable restrictions only under Article 19(2) and not otherwise (*Tata Press Ltd*. v. *MTNL,* AIR 1995 SC 2438).

The right to know, 'receive and impart information' has been recognized within the right to freedom of speech and expression (*S.P. Gupta v. President of India, AIR 1982 SC 14*). A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. [*Secretary, Ministry of I&B, Govt. of India v. Cricket Association of Bengal, (1995) 2 SCC 161*].

The right to reply, i.e., the right to get published one's reply in the same news media in which something is published against or in relation to a person has also been recognised under Article 19(1)(a), particularly when the news media is owned by the State within the meaning of Article 12. It has also been held that a Government circular having no legal sanction violates Article 19(1)(a), if it compels each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection [*Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615*]. Impliedly the Court has recognised in Article 19(1)(a) the right to remain silent. The Supreme Court in *Union of India* v. *Naveen Jindal,* (2004) 2 SCC 476, has held that right to fly the National Flag freely with respect and dignity is a fundamental right of a

citizen within the meaning of Article 19(1)(a) of the Constitution being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation.

Dramatic performance is also a form of speech and expression. In *K.A. Abbas v. Union of India, AIR 1971 S.C. 481*, the Court held that censorship of films including (pre-censorship) is justified under Article 19(1) (a) and (2) of the Constitution but the restrictions must be reasonable. The right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the latter has also been recognized. *(Odyssey Communications (P) Ltd. v. Lokvidayan Sangathan, AIR 1988 SC 1642*).

Clause (2) of Article 19 specifies the limits upto which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the following heads :



Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by the executive action [*Express News Papers Pvt. Ltd. v. Union of India, (1986) 1 SCC 133*]. In *Sanjay Narayan, Editor-in-chief Hindustan v. Hon'ble High Court of Allahabad JT 2011 (10) SC 74* the Court initially expressed the view that the unbridled power of the media can become dangerous if check and balance is not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy. However, this right is restricted by article 19 (2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality and also Contempt of Courts Act and defamation.

CASE LAW

The Supreme Court, initially expressed the view that a Corporation is not a citizen within the meaning of Article 19 and, therefore, cannot invoke this Article. Subsequently the Supreme Court held that a company is a distinct and separate entity from its shareholders and refused to tear the corporate veil for determining the constitutionality of the legislation by judging its impact on the fundamental rights of the shareholders of the company (*TELCO v. State of Bihar, AIR 1965 S.C. 40*). But a significant modification is made by the Supreme Court in *R.C. Cooper v. Union of India, AIR 1970 S.C. 564* (also called the *Bank Nationalisation* case). The Supreme Court ruled that the test in determining whether the shareholder's right is impaired is not formal but is essentially qualitative. If the State action impaired the rights of the shareholders as well as of the company, the Court will not deny itself jurisdiction to grant relief. The shareholders' rights are equally affected, if the rights of the company are affected (*Bennett Coleman & Co., AIR (1973) S.C. 106*).

(b) Freedom of assembly

The next right is the right of citizens to assemble peacefully and without arms [Art. 19(1)(b)]. Calling an assembly and putting one's views before it is also intermixed with the right to speech and expression discussed above, and in a democracy it is of no less importance than speech. However, apart from the fact that the assembly *must be peaceful* and *without arms*, the State is also authorised to impose reasonable restrictions on this right in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order.

Freedom of assembly is an essential element in a democratic Government. In the words of Chief Justice *Waite* of the Supreme Court of America, "the very idea of Government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs". The purpose of public meetings being the education of the public and the formation of opinion on religious, social, economic and political matters, the right of assembly has a close affinity to that of free speech under Article 19(1)(a).

(c) Freedom of association

The freedom of association includes freedom to hold meeting and to takeout processions without arms. Right to form associations for unions is also guaranteed so that people are free to have the members entertaining similar views [Art. 19(1)(c)]. This right is also, however, subject to reasonable restrictions which the State may impose in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order, or

(iii) morality.

A question not yet free from doubt is whether the fundamental right to form association also conveys the freedom to deny to form an association. In *Tikaramji v. Uttar Pradesh, AIR 1956 SC 676*, the Supreme Court observed that assuming the right to form an association "implies a right not to form an association, it does notfollow that the negative right must also be regarded as a fundamental right". However, the High Court of Andhra Pradesh has held, that this right necessarily implies a right not to be a member of an association. Hence, the rules which made it compulsory for all teachers of elementary schools to become members of an association were held to be void as being violative of Article 19(1) (c) *(Sitharamachary v. Sr. Dy. Inspector of Schools, AIR 1958 A.P. 78*). This view gets support from *O.K. Ghosh v. Joseph, AIR 1963 SC 812*. It has been held that a right to form associations or unions does not include within its ken as a fundamental right a right to form associations or unions for achieving a particular object or running a particular institution.

(d) Freedom of movement

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1) (d). This right, however, does not extend to travel abroad, and like other rights stated above, it is also subject to the reasonable restrictions which the State may impose:

(i) in the interests of the general public, or

(ii) for the protection of the interests of any scheduled tribe.

A law authorising externment or interment to be valid must fall within the limits of permissible legislation in clause (5), namely restrictions must be reasonable and in the interests of the general public or for the protection of the interests of the Scheduled Tribes.

(e) Freedom of residence

Article 19(1)(e) guarantees to a citizens the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of a State or Union territory. This freedom is also subject to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe under Article 19(5). That apart, citizens can be subjected to reasonable restrictions [*Ebrahim* v. *State of Bom.,* (1954) SCR 933, 950]. Besides this, certain areas may be banned for certain kinds of persons such as prostitutes (*State of U.P.* v. *Kaushaliya*, AIR 1964 SC 416).

(f) Right to acquire, hold and dispose of property – deleted by 44th Amendment in 1978.]

(g) Freedom to trade and occupations

Article 19(1)(g) provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

An analysis of the case law reveals that the emphasis of the Courts has been on social control and social policy. However, no hard and fast rules have been laid down by the Court for interpreting this Article. The words *'trade', 'business', 'profession'* used in this Article have received a variety of interpretations. The word 'trade' has been held to include the occupation of men in buying and selling, barter or commerce, work, especially skilled, thus of the widest scope *(The Management of Safdarjung Hospital v. K.S. Sethi, AIR 1970 S.C. 1407).*

The word 'business' is more comprehensive than the word 'trade'. Each case must be decided according to its own circumstances, applying the common sense principle as to what business is. A *profession* on the other hand, has been held ordinarily as an occupation requiring intellectual skill, often coupled with manual skill. Like other freedoms discussed above, this freedom is also subject to reasonable restrictions. Article 19(6) provides as under:

Nothing in sub-clause (g) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions in the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to –

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled, for, clause (6) of the Article authorises legislation which:

(i) imposes reasonable restrictions on this freedom in the interests of the general public;

(ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and

(iii) enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

In order to determine the reasonableness of the restriction, regard must be had to the nature of the

business and conditions prevailing in that trade. It is obvious that these factors differ from trade to trade, and no hard and fast rules concerning all trades can be laid down. The word 'restriction' used in clause (6) is wide enough to include cases of total prohibition also. Accordingly, even if the effect of a law is the elimination of the dealers from the trade, the law may be valid, provided it satisfies the test of reasonableness or otherwise.

The vital principle which has to be kept in mind is that the restrictive law should strike a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19. The restriction must not be of an excessive nature beyond what is required in the interests of the public.

Monopoly

The Supreme Court's decision in *Chintamana Rao v. State of M.P., AIR 1951 S.C. 118;* is a leading case on the point where the constitutionality of Madhya Pradesh Act was challenged. The State law prohibited the manufacture of bidis in the villages during the agricultural season. No person residing in the village could employ any other person nor engage himself, in the manufacture of bidis during the agricultural season. The object of the provision was to ensure adequate supply of labour for agricultural purposes. The bidi manufacturer could not even import labour from outside, and so, had to suspend manufacture of bidis during the agricultural season. Even villagers incapable of engaging in agriculture, like old people, women and children, etc., who supplemented their income by engaging themselves manufacturing bidis were prohibited without any reason. The prohibition was held to be unreasonable.

However, after the Constitutional (Amendment) Act, 1951, the State can create a monopoly in favour of itself and can compete with private traders. It has been held in *Assn. of Registration Plates v. Union of India, (2004) SCC 476* that the State is free to create monopoly in favour of itself. However the entire benefit arising therefrom must ensure to the benefit of the State and should not be used as a cloak for conferring private benefit upon a limited class of persons.

Protection in respect of conviction for offences

Articles 20, 21 and 22 provide a system of protection, relevant to the criminal law. Article 20 guarantees to all persons – whether *citizens* or *non-citizens-three* rights namely –

(i) Protection against ex-post facto laws

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Ex-post facto laws are laws which punished what had been lawful when done. If a particular act was not an offence according to the law of the land at the time when the person did that act, then he cannot be convicted under a law which with retrospective declares that act as an offence. For example, what was not an offence in 1972 cannot be declared as an offence under a law made in 1974 giving operation to such law from a back date, say from 1972.

Even the penalty for the commission of an offence cannot be increased with retrospective effect. For example, suppose for committing dacoity the penalty in 1970 was 10 years imprisonment and a person commits dacoity in that year. By a law passed after his committing the dacoity the penalty, for his act cannot be increased from 10 to 11 years or to life imprisonment.

In *Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1953 S.C. 394,* it was clarified that Article 20(1) prohibited the conviction under an *ex post facto law*, and that too the substantive law. This protection is

not available with respect to procedural law. Thus, no one has a vested right in procedure. A law which nullifies the rigour of criminal law is not affected by the rule against *ex post facto law* [*Rattan Lal v. State of Punjab, (1964) 7 S.C.R. 676*].

(ii) Protection against double jeopardy

According to Article 20(2), no person can be prosecuted and punished for the same offence more than once. It is, however, to be noted that the conjunction "and" is used between the words prosecuted and punished, and therefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

(iii) Protection against self-incrimination

According to Article 20(3), no person accused of any offence shall be compelled to be a witness against himself. In other words, an accused cannot be compelled to state anything which goes against him. But it is to be noted that a person is entitled to this protection, only when all the three conditions are fulfilled:

1. that he must be accused of an offence;
2. that there must be a compulsion to be a witness; and
3. such compulsion should result in his giving evidence against himself.

So, if the person was not an accused when he made a statement or the statement was not made as a witness or it was made by him without compulsion and does not result as a statement against himself, then the protection available under this provision does not extend to such person or to such statement.

The 'right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. [*Selvi v. State of Karnataka, AIR 2010 SC 1974*].

Protection of life and personal liberty

Article 21 confers on every person the fundamental right to life and personal liberty. It says that,

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

The right to life includes those things which make life meaningful. For example, the right of a couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution (*Philips Alfred Malvin v. Y.J Gonsalvis and others, AIR 1999 Ker. 187*). The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right. [*Noise Pollution (v), in re, (2005) 5 SCC 733*]**.**

The majority in the case of *A.K. Gopalan v. State of Madras, AIR 1950 SC 27*, gave a narrow meaning to the expression 'personal liberty' within the subject matter of Articles 20 to 22 by confining it to the liberty of the person (that is, of the body of a person). The majority of the judges also took a narrow view of the expression *'procedure established by law'* in this case. In the *State of Maharashtra v. Prabhakar Pandurang Sanzigri, AIR 1966, SC 424*, Subba Rao J. considered the inter-relation between Articles 19 and 21 as was discussed by the majority Judges in the *A.K. Gopalan's case* and came to the conclusion that "that view was not the last word on the subject".

The expression 'liberty' in the 5th and 14th Amendments of the U.S. Constitution has been given a very wide meaning. The restricted interpretation of the expression 'personal liberty' preferred by the majority judgement in *A.K. Gopalan's case* namely, that the expression 'personal liberty' means only liberty relating to or concerning

the person or body of the individual, has not been accepted by the Supreme Court in subsequent cases.

That the expression 'personal liberty' is not limited to bodily restraint or to confinement to prison, only is well illustrated in *Kharak Singh v. State of U.P, AIR 1963 SC 1295.* In that case the question raised was of the validity of the police regulations authorising the police to conduct what are called as domiciliary visits against bad characters and to have surveillance over them. The court held that such visits were an invasion, on the part of the police, of the sanctity of a man's home and an intrusion into his personal security and his right to sleep, and therefore violative of the personal liberty of the individual, unless authorised by a valid law. As regards the regulations authorising surveillance over the movements of an individual the court was of the view that they were not bad, as no right to privacy has been guaranteed in the Constitution**.**

However, in *Gobind v. State of M.P., AIR 1975 S.C. 1378,* Mathew, J. asserted that the right to privacy deserves to be examined with care and to be denied only when an important countervailing interest is shown to be superior, and observed that this right will have to go through a process of case-by-case development. Mathew, J. explained that even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as emanating from them, the right is not absolute and it must be read subject to restrictions on the basis of compelling public interest.

Refusal of an application to enter a medical college cannot be said to affect person's personal liberty under Article 21 [*State of A.P. v. L. Narendranathan, (1971) 1 S.C.C. 607*].

In *Satwant Singh Sawhney v. A.P.O., New Delhi, AIR 1967 S.C. 1836*, it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure prescribed by the law of land sustaining the refusal of a passport to a person, it's refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21. This decision was accepted by the Parliament and the infirmity was set right by the enactment of the Passports Act, 1967.

It was stated in *Maneka Gandhi v. Union of India, AIR 1978 S.C. 597*, that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this right except according to procedure prescribed by law. In this case, it was clearly laid down that the fundamental rights conferred by Part III of the Constitution are not distinct and mutually exclusive. Thus, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has still to stand the test of one or more of fundamental rights conferred by Article 19 which may be applicable to a given situation**.**

Procedure established by law

The expression 'procedure established by law' means procedure laid down by statute or procedure prescribed by the law of the State. Accordingly, first, there must be a law justifying interference with the person's life or personal liberty, and secondly, the law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed.

The law laid down in *A.K. Gopalan v. State of Madras, AIR 1950 SC 27*, that the expression 'procedure established by law' means only the procedure enacted by a law made by the State was held to be incorrect in the *Bank Nationalisation Case (1970) 1 S.C.C. 248*. Subsequently, in *Maneka Gandhi's case (AIR 1978 SC 49)*, it was laid down, that the law must now be taken to be well settled that Article 21 does not exclude Article 19 and a law prescribing a procedure for depriving a person of 'personal liberty' will have to meet the requirements of Article 21 and also of Article 19, as well as of Article 14.

The procedure must be fair, just and reasonable. It must not be arbitrary, fanciful or oppressive. An interesting, follow-up of the *Maneka Gandhi's* case came in a series of cases.

In *Bachan Singh v. State of Punjab, AIR 1980 S.C. 898*, it was reiterated that in Article 21 the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

Presently, this term personal liberty extends to variety of matters like right to bail, right not to be handcuffed except under very few cases, right to speedy trial, right to free legal aid etc. In *Justice KS Puttaswamy (Retd.) v. Union of India AIR 2017 SC 4161* Supreme Court held that right to life and personal liberty includes right to privacy as an integral part guaranteed under part III of the Constitution. On August 24, 2017, the Supreme Court of India held that the right to privacy is protected by the Constitution of India. Right to privacy applies across the gamut of "fundamental" rights including equality, dignity (Article 14), speech, expression (Article 19), life, and liberty (Article 21).

CASE LAW

Swapnil Tripathi and Ors. vs. Supreme Court of India and Ors. (26.09.2018 - SC) : AIR 2018 SC 4806

In this case, Petitioners have sought a declaration that Supreme Court case proceedings of "constitutional importance having an impact on the public at large or a large number of people" should be live streamed in a manner that is easily accessible for public viewing. The three judge bench held that live-streaming of court proceedings are important so as to enable administration of justice especially owing to the effect it has on public at large. It is important to re-emphasise the significance of live-streaming as an extension of the principle of open justice and open courts. it was stated in this cas as follows:

"*Live-streaming of proceedings is crucial to the dissemination of knowledge about judicial proceedings and granting full access to justice to the litigant. Access to justice can never be complete without the litigant being able to see, hear and understand the course of proceedings first hand. Apart from this, live-streaming is an important facet of a responsive judiciary which accepts and acknowledges that it is accountable to the concerns of those who seek justice.*"

PHR Invent Educational Society v. UCO Bank and Others, [2024] 4 S.C.R. 541 : 2024 INSC 297 decided by Supreme Court on 12.04.2024

High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person. However, it is subject to certain exceptions

This case can be referred to for understanding and give more clarity of the law relating to entertaining writ petition by the High Courts under Article 226 of the Constitution of India.

In the instant case the Hon'ble Supreme Court has laid down that it could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:

(i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

(ii) it has acted in defiance of the fundamental principles of judicial procedure;

(iii) it has resorted to invoke the provisions which are repealed; and

(iv) when an order has been passed in total violation of the principles of natural justice.

Further it was clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

Article 21A: Right to Education

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, 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. In *Environmental and Consumers Protect foundation v. Delhi Administration 2012 (4) SCALE 243* the Court held that in order to ensure compliance of article 21A of the Constitution, it is imperative that schools must have qualified teachers and basic infrastructure. In *State of Tamil Nadu v. K. Shyam Sunder AIR 2011 SC 3470* the Court held that right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the grounds of their economic, social and cultural background. In *Fahima Shareen RK v. State of Kerala and others* the High Court of Kerala on September 19, 2019 upheld that 'Right to Internet Access' as a fundamental right. The Court declared that the right to have access to Internet becomes the part of right to education as well as right to privacy under Article 21 of the Constitution of India.

Protection against arrest and detention

Although Article 21 does not impose a limitation on the legislature in so far as the deprivation of life or personal liberty is concerned, yet a legislative Act providing for such deprivation is subject to the procedural safeguards provided in Article 22 and if it does not provide for any of these safeguards it shall be declared unconstitutional. However, Article 22 does not apply uniformly to all persons and makes a distinction between:

(a) alien enemies,

(b) person arrested or detained under preventive detention law, and

(c) other persons.

So far as alien enemies are concerned the article provides no protection to them. So far as persons in category are concerned, it provides the following rights (These rights are not given to persons detained under preventive detention law).

(i) A person who is arrested cannot be detained in custody unless he has been informed, as soon as he may be, of the grounds for such arrest.

(ii) Such person shall have the right to consult and to be defended by a legal practitioner of his choice.

(iii) A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

Preventive Detention

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it. No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law. Parliament has the power to make a law for preventive detention for reasons connected with defence, foreign affairs or the security of India. Parliament and State Legislatures are both entitled to pass a law of preventive detention for reasons connected with the security of State, the maintenance of public order, or the maintenance of supplies and services essential to the community.

Safeguards against Preventive Detention

Article 22 (amended by the 44th Constitution Amendment Act, 1978)[1] contains following safeguards against preventive detention:

(a) such a person cannot be detained for a longer period than three months unless:

1. The changes proposed by the Constitution (Forty-fourth Amendment), Act, 1978 have not been notified as yet.

(i) An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.

(ii) Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board.

(b) The authority ordering the detention of a person under the preventive detention law shall:

(i) communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and

(ii) afford him the earliest opportunity of making the representation against the order.

It may, however, be noted that while the grounds for making the order are to be supplied, the authority making such order is not bound to disclose those facts which it considers to be against the public interest.

Right against Exploitation

This group of fundamental rights consists of Articles 23 and 24. They provide for rights against exploitation of all citizens and non-citizens. Taking them one by one they guarantee certain rights by imposing certain prohibitions not only against the State but also against private persons.

(a) Prohibition of traffic in human beings and forced labour

Article 23 imposes a complete ban on traffic in human beings, begar and other similar forms of forced labour. The contravention of these provisions is declared punishable by law. Thus the traditional system of beggary particularly in villages, becomes unconstitutional and a person who is asked to do any labour without payment or even a labourer with payment against his desire can complain against the violation of his fundamental right under Article 23.

'Traffic' in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. 'Begar' means involuntary work without payment.

The State can impose compulsory service for public purposes such as conscription for defence or social service etc. While imposing such compulsory service the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them. (Clause 2 of Article 23).

(b) Prohibition of employment of children

Article 24 prohibits the employment of children below the age of fourteen in any factory or mine. The Employment of Children Act, 1938; The Factories Act, 1948; The Mines Act, 1952; The Apprentices' Act, 1961; and the Child Labour (Prohibition and Regulation) Act, 1986 are some of the important enactments in the statute book to protect the children from exploitation by unscrupulous employers.

The Supreme Court has issued detailed guidelines as to child labour in *M.C. Mehta v. State of T.N.,* AIR 1993 S.C. 699.

Right to Constitutional Remedies

Article 32 guarantees the enforcement of Fundamental Rights. It is remedial and not substantive in nature. The rest of the Articles 33 to 35 relate to supplementary matters and do not create or guarantee any right. Therefore, we shall discuss Art. 32 first and then rest of the Articles, i.e., 33-35 briefly.

Remedies for enforcement of Fundamental Rights

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right. It is really a far reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court. He can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged. This power of the Supreme Court to issue directions, etc., may also be assigned to other Courts by Parliament without affecting the powers of the Supreme Court.

Example

There is a right to freedom of speech under Constitution of India. What is the remedy provided for its violation?

On the basis of principle of *ubi jus ibi remedeum* when there is right, there shall also be remedy. Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right.

The right to move the Supreme Court is itself a guaranteed right and the significance of this has been assessed by *Gajendragadkar, J*. in the following words:

The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri, J., regard itself 'as the protector and guarantor of fundamental rights', and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights. In discharging the duties assigned to it, this Court has to play the role of 'sentinel on the *qui vive'* (*State of Madras* v. *V.G. Row,* AIR 1952 SC 196) and it must always regard it as its solemn duty to protect the said fundamental rights 'zealously and vigilantly'. (*Daryao* v. *State of U.P.,* AIR 1961 SC 1457).

Where a fundamental right is also available against private persons such as the right under Articles 17, 23 and 24, the Supreme Court can always be approached for appropriate remedy against the violation of such rights by private individuals. *(Peoples' Union for Democratic Rights* v. *Union of India,* AIR 1982 SC 1473). A petitioner's challenge under Article 32 extends not only to the validity of a law but also to an executive order issued under the authority of the law. Court's jurisdiction under Article 32 is 'wide enough to reach out to injustice in any form'. Article 32 empowers the Supreme Court to issue orders which enforce fundamental rights. [*Romila Thapar v. Union of India, (2018) 10 SCC 753].*

In *Nithya Anand Raghavan v. State of NCT of Delhi AIR 2017 SC 3137* the Supreme Court held that the remedy of writ of *habeas corpus* cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. In *Assam Sanmilata Mahasangha v. Union of India AIR 2015 SC 783* the Court held that article 32 which has been described as the 'heart and soul' of the Constitution guarantees the right to move to the Supreme Court for enforcement of all or any of the fundamental rights conferred by Part III of the Constitution. This article is therefore, itself a fundamental right. In *Centre for PIL v. Union of India AIR 2011 SC 1267* the Court held that before a citizen can claim a writ of *quo warranto* he must satisfy the court *inter-alia* that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of *quo warranto* is issued to prevent a continued exercise of unlawful authority.

The right guaranteed by Article 32 shall not be suspended except as provided in the Constitution. Constitution does not contemplate such suspension except by way of President's order under Article 359 when a proclamation of Emergency is in force.

In Article 31C the words appearing at the end of the main paragraph, namely and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy were declared to be void in *Kesavananda's* case.

Supplementary provisions

Articles 33-35 – contain certain supplementary provisions.

Article 33 authorises Parliament to restrict or abrogate the application of fundamental rights in relation to members of armed forces, para-military forces, police forces and analogous forces.

Article 34 is primarily concerned with granting indemnity by law in respect of acts done during operation of martial law. The Constitution does not have a provision authorizing proclamation of martial law. Article 34 says that Parliament may by law indemnify any person in the service of the Union or of State or any other person, for an act done during martial law.

Article 35 provides that wherever Parliament has by an express provision been empowered to make a law restricting a fundamental right Parliament alone can do so, (and not the state legislature).

Amendability of the Fundamental Rights

(a) Since 1951, questions have been raised about the scope of amending process contained in Article 368 of the Constitution. The basic question raised was whether the Fundamental Rights are amendable. The question whether the word 'Law' in Clause (2) of Article 13 includes amendments or not or whether amendment in Fundamental Rights guaranteed by Part III of the Constitution is permissible under the procedure laid down in Article 368 had come before the Supreme Court in *Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 458,* in 1951 where the First Amendment was challenged. The Court held that the power to amend the Constitution including the Fundamental Rights, was contained in Article 368 and that the word 'Law' in Article 13(2) did not include an amendment to the Constitution which was made in exercise of constituent and not legislative power. This decision was approved by the majority judgement in *Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845.*

Thus, until the case of *I.C. Golak Nath v. State of Punjab, A.I.R. 1967, S.C. 1643,* the Supreme Court had been holding that no part of our Constitution was unamenable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368 itself.

(b) But, in *Golak Nath's* case, a majority overruled the previous decisions and held that the Fundamental Rights are outside the amendatory process if the amendment takes away or abridges any of the rights. The majority, in *Golak Nath's* case, rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Article 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Article 13(2).

(c) To nullify the effect of *Golak Nath's* case, Parliament passed the Constitution (Twenty-Fourth Amendment) Act in 1971 introducing certain changes in Article 13 and Article 368, so as to assert the power of Parliament (denied to it in *Golak Nath's* case) to amend the Fundamental Rights. The Constitutional validity of the 24th Amendment was challenged in the case of *Kesavanand Bharti v. State of Kerala, A.I.R. 1973 S.C. 1461.* The Supreme Court upheld the validity of 24th Constitutional Amendment holding that Parliament can amend any Part of the Constitution including the Fundamental Rights. But the Court

made it clear that Parliament cannot alter the basic structure or framework of the Constitution**.** In *Indira Gandhi v. Raj Narain, AIR 1975 S.C. 2299*, the appellant challenged the decision of the Allahabad High Court who declared her election as invalid on ground of corrupt practices. In the mean time Parliament enacted the 39th Amendment withdrawing the control of the S.C. over election disputes involving among others, the Prime Minister. The S.C. upheld the challenge and held that democracy was an essential feature forming part of the basic structure of the Constitution. The exclusion of Judicial review in Election disputes in this manner damaged the basic structure. The *doctrine of 'basic structure'* placed *a limitation on the powers of the Parliament to introduce* substantial alterations or to make a new Constitution.

To neutralise the effect of this limitation, the Constitution (Forty-Second Amendment) Act, 1976 added to Article 368 two new clauses. By new clause (4), it has been provided that no amendment of the Constitution made before or after the Forty-Second Amendment Act shall be questioned in any Court on any ground. New clause (5) declares that there shall be no limitation whatever on the Constitutional power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution made under Article 368.

The scope and extent of the application of the doctrine of basic structure again came up for discussion before the Supreme Court in *Minerva Mill Ltd. v. Union of India, (1980) 3 SCC, 625*. The Supreme Court unanimously held clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment Act as unconstitutional transgressing the limits of the amending power and damaging or destroying the basic structure of the Constitution.

In *Waman Rao v. Union of India, (1981) 2 SCC 362* the Supreme Court held that the amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them are beyond the constitutional power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. [See also *Bhim Singh Ji v. Union of India (1981)1 SCC 166*.]

In *L. Chandra Kumar v. Union of India (1997) 3 SCC 261* the Supreme Court held that power of judicial review is an integral and essential feature of the Constitution constituting the basic part , the jurisdiction so conferred on the High Courts and the Supreme Court is a part of in-violable basic structure of the Constitution.

In *I.R. Coelho v. State of T.N., (2007) 2 SCC 1*, Article 31-B as introduced by the Constitution (First amendment) Act 1951 was held to be valid by the Supreme Court. The fundamental question before the nine Judge Constitution Bench was whether on or after 24.4.1973 (i.e., when the basic structure of the Constitution was propounded) it is permissible for the Parliament under Article 31-B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is the effect on the power of judicial review of the court. The challenge was made to the validity of the Urban Land (Ceiling and Regulation) Act, 1976 which was inserted in the Ninth Schedule.

The Supreme Court held that all amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touch stone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles under lying them. So also any law included in Schedule IX do not become part of the Constitution. They derive their validity on account of being included in Schedule IX and this exercise is to be tested every time it is undertaken. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law on the principles declared in this judgement. However, if a law held to be violative of any rights of Part III is subsequently incorporated in the Ninth Schedule after 24.4.1973 such a violation shall be open to challenge on the ground that it destroys or damages the basic structure doctrine.

In *Glanrock Estate (P) Ltd. v. State of Tamil Nadu (2010) 10 SCC 96*, the Supreme Court upheld constitutional validity of Constitution (Thirty-fourth) Amendment Act, 1974. By Constitution (Thirty-fourth) Amendment Act, 1974 Gudalur Janman Estates (Abolition & Conversion into Ryotwari) Act, 1969 was inserted in the Ninth Schedule as item 80.

It was alleged that the 1969 Act violated the principle of equality because by the T N Land Reforms (Fixation of Ceiling on Land) Act, 1961 only ceiling surplus forest lands vested in the State but by the 1969 Act all forests vested in the State. The constitutional amendment was further challenged on the ground that it validated the 1969 Act by inserting it in the Ninth Schedule in spite of Section 3 of the 1969 Act having been declared as unconstitutional in *Balmadies case,* (1972) 2 SCC 133, thereby violating the principles of judicial review, rule of law and separation of powers. (Section 3 had been declared unconstitutional in Balmadies case because it could not be shown how vesting of forest lands was an agrarian reform.)

Upholding the constitutional validity of the amendment, the Supreme Court held:

None of the facets of Article 14 have been abrogated by the Constitution (Thirty fourth Amendment) Act, 1974, which included the 1969 Act in the Ninth Schedule. When the 1969 Act was put in the Ninth Schedule in 1974, the Act received immunity from Article 31(2) with retrospective effect.

It is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Article 14, however egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.

In the present case, not even an ordinary principle of equality under Article 14, leave aside the egalitarian equality as an overarching principle, is violated. Even assuming for the sake of argument that Article 14 stood violated, even then the 1969 Act in any event stood validated by its insertion in the Ninth Schedule vide the Constitution (Thirty-fourth Amendment) Act, 1974.There is no merit in the submission that the Constitution (Thirty fourth Amendment) Act, 1974 by which the 1969 Act was inserted in the Ninth Schedule as item 80 seeks to confer naked power on Parliament and destroys basic features of the Constitution, namely, judicial review and separation of powers as well as rule of law.

The doctrine of basic structure provides a touchstone on which validity of the constitutional amendment Act could be judged. Core constitutional values/ overarching principles like secularism; egalitarian equality etc. fall outside the amendatory power under Article 368 of the Constitution and Parliament cannot amend the constitution to abrogate these principles so as to rewrite the constitution. [In *Glanrock Estate (P) Ltd. State of T N (2010) 10 SCC 96.]. In GVK industries v. The Income Tax Officer (2011) 4 SCC 36* the Court held that under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features - the basic structure - of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly.

DIRECTIVE PRINCIPLES OF STATE POLICY

The Sub-committee on Fundamental Rights constituted *by the Constituent Assembly* had suggested two types of Fundamental Rights – one which can be enforced in the Courts of law and the other which because of their different nature cannot be enforced in the law Courts. Later on however, the former were put under the head 'Fundamental Rights' as Part III which we have already discussed and the latter were put separately in Part IV of the Constitution under the heading 'Directive Principles of State Policy' which are discussed in the following pages.

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the 'provisions contained

in this part (i) *shall not be enforceable by any Court*, but the principles therein laid down are neverthless (ii) *fundamental in the governance of the country* and it shall be the duty of the state to apply these principles in making laws. The Directives, however, differ from the Fundamental Rights contained in Part-III of the Constitution or the ordinary laws of the land in the following respects:

(i) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.

(ii) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.

(iii) The Directives *per-se* do not confer upon or take away any legislative power from the appropriate legislature.

(iv) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.

(v) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.

(vi) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

The declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of the provisions may easily arise. What will be the legal position if a law enacted to enforce a Directive Principle violates a Fundamental Right? Initialy, the Courts, adopted a strict view in this respect and ruled that a Directive Principle could not override a Fundamental Right, and in case of conflict between the two, a Fundamental Right would prevail over the Directive Principle. When the matter came before the Supreme Court in *State of Madras v. Champakram Dorairajan, AIR 1951 S.C. 226,* where the validity of a Government order alleged to be made to give effect to a Directive Principle was challenged as being violative of a Fundamental Right, the Supreme Court made the observation that :

"The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights."

The Court ruled that while the Fundamental Rights were enforceable, the Directive Principles were not, and so the laws made to implement Directive Principles could not take away Fundamental Rights.

The Supreme Court also pointed out that looking at Directive Principles, we find as was envisaged by the Constitution makers, that they lay down the ideals to be observed by every Government to bring about an economic democracy in this country. Such a democracy actually is our need and unless we achieve it as soon as possible, there is a danger to our political and constitutional democracy of being overthrown by undemocratic and unconstitutional means.

Important Directive Principles

To be specific, the important Directive Principles are enumerated below:

(a) State to secure a social order for the promotion of welfare of the people:

(1) The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).

(2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).

(b) Certain principles of policy to be followed by the State. The State, particularly, must direct its policy towards securing:

(1) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(2) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(3) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

(4) equal pay for equal work for both men and women;

(5) that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter a vocation unsuited to their age or strength;

(6) that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

(bb) The State shall secure that the operation of legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39A).

(c) The State must take steps to organise the Village Panchayats and enable them to function as units of self- government (Article 40).

(d) Within the limits of economic capacity and development the State must make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, etc. (Article 41).

(e) Provision must be made for just and humane conditions of work and for maternity relief (Article 42).

(f) The State must endeavour to secure living wage and good standard of life to all types of workers and must endeavour to promote cottage industries on an individual of co-operative basis in rural areas (Article 43).

(ff) The State take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry (Article 43A).

(g) The State must endeavour to provide a uniform civil code for all Indian citizens (Article 44).

(h) Provision for free and compulsory education for all children upto the age of fourteen years (Article 45).

(i) The State must promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46).

(j) The State must regard it one of its primary duties to raise the level of nutrition and the standard of living and to improve public health and in particular it must endeavour to bring about prohibition of the consumption, except for medicinal purposes, in intoxicating drinks and of drugs which are injurious to health (Article 47).

(k) The State must organise agriculture and animal husbandry on modern and scientific lines and improve the breeds and prohibit the slaughter of cows and calves and other milch and draught cattle (Article 48).

(kk) The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48A).

(l) Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).

(m) The State must separate executive from judiciary in the public services of the State (Article 50).

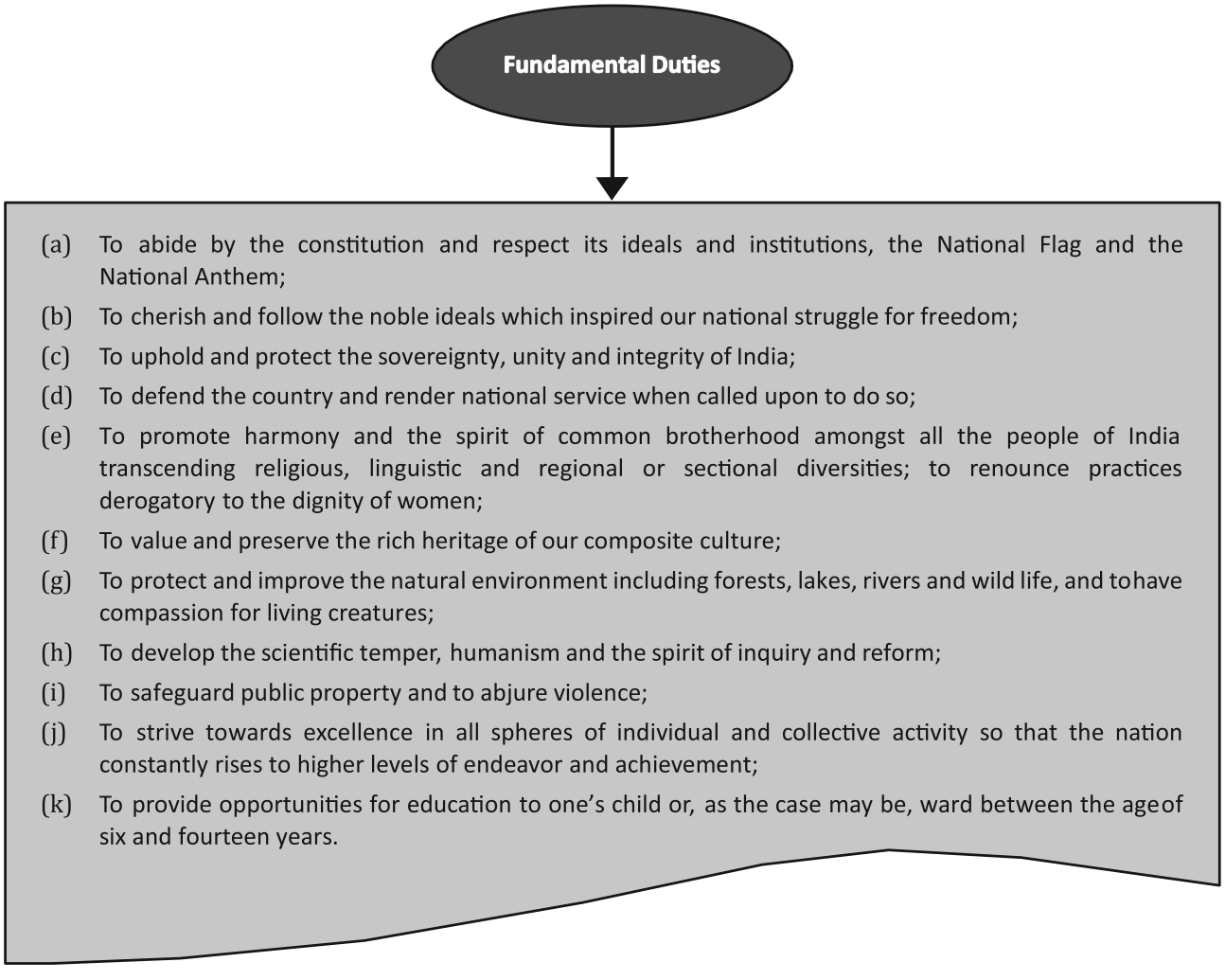
(n) In international matters the State must endeavour to promote peace and security, maintain just and honourable relations in respect of international law between nations, treaty obligations and encourage settlement of international disputes by arbitration (Article 51).

FUNDAMENTAL DUTIES

Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Forty-second Amendment) Act, 1976.

The objective in introducing these duties is not laid down in the Bill except that since the duties of the citizens are not specified in the Constitution, so it was thought necessary to introduce them.

These Fundamental Duties are:



Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their

implementation. Fundamental duties can't be enforced by writs (*Surya Narain v. Union of India, AIR 1982 Raj 1*). The Supreme Court in *AIIMS Students' Union v. AIIMS (2002) SCC 428* has reiterated that though the fundamental duties are not enforceable by the courts, they provide a valuable guide and aid to the interpretation of Constitutional and legal issues.

Further, in *Om Prakash v. State of U.P. (2004) 3 SCC 402*, the Supreme Court held that fundamental duties enjoined on citizens under Article 51-A should also guide the legislative and executive actions of elected or non- elected institutions and organizations of citizens including municipal bodies.

ORDINANCE MAKING POWERS

1. Of the President

In Article 53 the Constitution lays down that the "executive power of the Union shall be vested in the President". The President of India shall, thus, be the head of the 'executive power' of the Union. The executive power may be defined as the power of "carrying on the business of Government" or "the administration of the affairs of the state" excepting functions which are vested in any other authority by the Constitution. The various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under various heads as follows:



(i) Administrative power, i.e., the execution of the laws and the administration of the departments of Government.

(ii) Military power, i.e., the command of the armed forces and the conduct of war.

(iii) Legislative power, i.e., the summoning; prorogation, etc. of the legislature.

(iv) Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

These powers vest in the President under each of these heads, subject to the limitations made under the Constitution.

Ordinance-making power

The most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

According to Article 13(3)(a) "Law" includes an "Ordinance". But an Ordinance shall be of temporary duration. It may be of any nature, i.e., it may be retrospective or may amend or repeal any law or Act of Parliament itself.

This independent power of the executive to legislate by Ordinance has the following peculiarities:

(i) the Ordinance-making power will be available to the President only when both the Houses of Parliament

have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session because law cannot be made by that House in session alone. Both the Houses must be in session when Parliament makes the law. The President's Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.

(ii) this power is to be exercised by the President on the advice of his Council of Ministers.

(iii) the President must be satisfied about the need for the Ordinance and he cannot be compelled

(iv) the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.

(v) the period of six weeks will be counted from the latter date if the Houses reassemble on different dates.

Example

The Arbitration and Conciliation (Amendment) Ordinance, 2020 and the Taxation and other laws (Relaxation of certain Provisions) Ordinance, 2020 are few of the ordinances passed by President of India in the year 2020.

2. Of the Governor

The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally there shall be a Governor for each State but the same person can be appointed as Governor for two or more States. The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. The head of the executive power to a State is the Governor just as the President for the Union.

Powers: The Governor possesses executive, legislation and judicial powers as the President's except that he has no diplomate or military powers like the President.

Ordinance making power

This power is exercised under the head of 'legislative powers'. The Governor's power to make Ordinances as given under Article 213 is similar to the Ordinance making power of the President and have the force of an Act of the State Legislature. He can make Ordinance only when the State Legislature or either of the two Houses (where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power Governor must act with the aid and advise of the Council of Ministers. But in following cases the Governor cannot promulgate any Ordinance without instructions from the President:

(a) if a Bill containing the same provisions would under this Constitution have required the previous section of the President.

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

(c) an Act of the State legislature containing the same provisions would under this Constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

The Ordinance must be laid before the state legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Example

There is an urgent need for passing a legislation for the country. The parliament is not in session. What can be done in this case?

If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

The Indian Constitution is essentially federal.

Dicey, in the "Law of Constitution' has said "Federation means the distribution of the force of the State among a number of co-ordinate bodies, each originating in and controlled by the Constitution". The field of Government is divided between the Federal and State Governments which are not subordinate to one another but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle.

A federal constitution establishes a dual polity as it comprises two levels of Government. At one level, there exists a Central Government having jurisdiction over the whole country and reaching down to the person and property of every individual therein. At the other level, there exists the State Government each of which exercises jurisdiction in one of the States into which the country is divided under the Constitution. A citizen of the federal country thus becomes subject to the decrees of two Government – the central and the regional.

The Union of India is now composed of 29 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. The result is that the States are not delegates of the Union and though there are agencies and devices for Union control over the States in many matters, the States are autonomous within their own spheres as allotted to them by the Constitution. Both the Union and States are equally subject to the limitations imposed by the Constitution, say, for example, the exercise of legislative powers being limited by Fundamental Rights. However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.

The two levels of Government divide and share the totality of governmental functions and powers between themselves. A federal constitution thus envisages a division of governmental functions and powers between the centre and the regions by the sanction of the Constitution.

Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States. Analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of:

(a) territory with respect to which the laws are to be made, and

(b) subject matter on which laws are to be made.

2. Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that State. For example, a law passed by

the legislature of the Punjab State cannot be made applicable to the State of Uttar Pradesh or any other state. However, this simple generalisation of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

From the territorial point of view, Parliament, being supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India. A law made by Parliament is not invalid merely because it has an extra-territorial operation.

As explained by Kania C.J. in *A.H. Wadia v. Income-tax Commissioner, A.I.R. 1949 F.C. 18, 25* "In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned".

A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law. Article 246(4) provides that Parliament can make a law for a Union

Territory with respect to any matter, even if it is one which is enumerated in the State List. With regard to Union Territories, there is no distribution of legislative powers. Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject. These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

A State Legislature may make laws only for the state concerned. It can also make laws which may extend beyond the territory of that State. But such law can be valid only on the basis of "territorial nexus". That is, if there is sufficient nexus or connection between the State and the subject matter of the law which falls beyond the territory of the State, the law will be valid. The sufficiency of the nexus is to be seen on the basis of the test laid down by our Supreme Court in *State of Bombay* v. *R.M.D.C.,* A.I.R. 1957 S.C. 699, according to which two conditions, must be fulfilled:

(i) the connection must be real and not illusory; and

(ii) the liability sought to be imposed by that law must be pertinent to that connection.

If both the conditions are fulfilled by a law simultaneously then only it is valid otherwise not. To illustrate, in the case cited above a newspaper in the name of "Sporting Star" was published and printed at Bangalore in Mysore (now Karnataka) State. It contained crossword puzzles and engaged in prize competitions. It had wide circulation in the State of Bombay (now Maharashtra) and most of its activities such as the standing invitations, the filling up of the forms and the payment of money took place within that State. The State of Bombay imposed a tax on the newspaper. The publishers challenged the validity of the law on the ground that it was invalid in so far it covered a subject matter falling beyond the territory of that State because the paper was published in another State. The Supreme Court, applying the doctrine of territorial nexus, held that the nexus was sufficient between the law and its subject-matter to justify the imposition of the tax. So in this way, the state laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax-matters.

3. Distribution of Subject Matter of Legislation

In distributing the subjects on which legislation can be made, different constitutions have adopted different pattern. For example, in the U.S.A. there is only one short list on the subject. Either by their express terms or by necessary implication some of them are exclusively assigned to the Central Government and the others concurrent on which Centre and the States both can make laws. The subjects not enumerated in this list, i.e., residuary subjects, have been left for the States. Similar pattern has been followed in Australia but there is one short list in which a few subjects have been exclusively assigned to the Centre and there is a longer list in which those subjects are enumerated on which Centre and States both can make laws. By necessary implication a few of these concurrent subject have also become exclusively Central subjects. The unenumerated subjects fall exclusively within the State jurisdiction. A different pattern has been adopted in Canada where there are three lists of subjects, one consists of subjects exclusively belonging to the Centre, and the other consists of those exclusively belonging to the States and the third where both can make law. Thus residuary subjects fall within the central jurisdiction. The Government of India Act, 1935 followed the Canadian pattern subject to the modification that here the lists of subjects were much more detailed as compared to those in the Canadian Constitution and secondly, the residuary subjects had been left to the discretion of the Governor-General which he could assign either to Centre or to the States.

The Constitution of India, substantially follows the pattern of the Government of India Act, 1935 subject to the modification that the residuary subjects have been left for the Union as in Canada. To understand the whole scheme, the Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VIIth Schedule to the Constitution. List I is named as the Union List. List II as the State List and III as the Concurrent List. Each list contains a number of entries in which the subjects of legislation have been separately and distinctly mentioned. The number of entries in the respective lists is 97, 66 and 47. The subjects included in each of the lists have been drawn on certain basic considerations and not arbitrarily or in any haphazard manner.

Thus, those subjects which are of national interest or importance, or which need national control and uniformity of policy throughout the country have been included in the Union List; the subjects which are of local or regional interest and on which local control is more expedient, have been assigned to the State List and those subjects which ordinarily are of local interest yet need uniformity on national level or at least with respect to some parts of the country, i.e., with respect, to more than one State have been allotted to the Concurrent List. To illustrate, defence of India, naval, military and air forces; atomic energy, foreign affairs, war and peace, railways, posts and telegraphs, currency, coinage and legal tender; foreign loans; Reserve Bank of India; trade and commerce with foreign countries; import and export across customs frontiers; inter-State trade and commerce, banking; industrial disputes concerning Union employees; coordination and determination of Standards in institutions for higher education are some of the subjects in the Union List. Public Order; police; prisons; local Government; public health and sanitation; trade and commerce within the State; markets and fairs; betting and gambling etc., are some of the subjects included in the State List. And coming to the Concurrent List, Criminal law; marriage and divorce; transfer of property; contracts; economic and social planning; commercial and industrial insurance; monopolies; social security and social insurance; legal, medical and other professions; price control, electricity; acquisition and requisition of property are some of the illustrative matters included in the Concurrent List.

Apart from this enumeration of subjects, there are a few notable points with respect to these lists, e.g.:

(i) The entries relating to tax have been separated from other subjects and thus if a subject is included in any particular List it does not mean the power to impose tax with respect to that also follows. Apart

from that, while other subjects are in the first part of the List in one group, the subjects relating to tax are given towards the end of the List.

(ii) Subject-matter of tax is enumerated only in the Union List and the State List. There is no tax subject included in the Concurrent List.

(iii) In each List there is an entry of "fees" with respect to any matter included in that List excluding court fee. This entry is the last in all the Lists except List I where it is last but one.

(iv) There is an entry each in Lists I and II relating to "offences against laws with respect to any of the matters" included in the respective List while criminal law is a general subject in the Concurrent List.

So far we have discussed the general aspect of the subject matters of legislation or of the items on which Legislation could be passed. The next question that arises is, who will legislate on which subject? Whether, it is both Centre and the States that can make laws on all subjects included in the three Lists or there is some division of power between the two to make laws on these subjects? The answer is that the Constitution makes clear arrangements as to how the powers shall be exercised by the Parliament or the State Legislatures on these subjects. That arrangement is mainly contained in Article 246, but in addition to that, provisions have also been made in Articles 247 to 254 of the Constitution.

4. Legislative Powers of the Union and the States with respect to Legislative Subjects

The arrangement for the operation of legislative powers of the Centre and the States with respect to different subjects of legislation is as follows:

(a) With respect to the subject enumerated in the Union, i.e., List I, the Union Parliament has the exclusive power to make laws. The State Legislature has no power to make laws on any of these subjects and it is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake – which is not expected – the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognised.

(b) With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has exclusive power to make laws. Therefore Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.

(c) With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognises an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.

(d) With respect to all those matters which are not included in any of the three lists, Parliament has the

exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction (*Union of India* v. *H.S. Dhillon, A.I.R. 1972 S.C. 1061*).

5. Power of Parliament to make Laws on State List

We have just discussed that the State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them. However, our Constitution makes a few exceptions to this general rule by authorising Parliament to make law even on the subjects enumerated in the State List. Following are the exceptions which the Constitution so recognises:

(a) In the National Interest (Article 249)

Parliament can make a law with respect to a matter enumerated in the State List if the Council of States declares by a resolution supported by two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make a law on that matter. By such declaration Parliament gets the authority to legislate on that matter for the whole or part of the country so long as the resolution of the Council of States remains in force. But such resolution shall remain in force for a period not exceeding one year. However, a fresh resolution can be passed at the end of one year to give extended lease to the law of Parliament and that way the law of Parliament can be continued to remain in force for any number of years.

The laws passed by Parliament under the provision cease to have effect automatically after six months of the expiry of the resolution period. Beyond that date, such Parliamentary law becomes inoperative except as regards the thing done or omitted to be done before the expiry of that law.

(b) During a proclamation of emergency (Article 250)

While a Proclamation of Emergency is in operation, Article 250 of the Constitution of India removes restrictions on the legislative authority of the Union Legislature in relation to the subjects enumerated in the State List. Thus, during emergency, Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. These laws will cease to have effect on the expiration of six months after the proclamation ceases to operate. After that date, such Union laws shall become inoperative, except in respect of things done or omitted to be done before the expiry of the said period. Under Article 352, if the President is satisfied that a grave emergency exists where-by the security of India or any part of the territory thereof is threatened whether by war, or external aggression or armed rebellion, he may by proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation. It is not necessary that there is an actual war or armed rebellion. It is enough that the President is satisfied that there is an imminent danger of such war or armed rebellion as the case may be. The proclamation of emergency shall not be issued except when the decision of the Union Cabinet that such proclamation may be issued, has been communicated to the President in writing. Every such proclamation shall be laid before each House of Parliament and unless it is approved by both the Houses by a majority of not less than two-thirds of the members present and voting within a period of 30 days thereof, such proclamation shall cease to operate. If any such proclamation is issued at a time when the House of People (Lok Sabha) has been dissolved, or the dissolution of the House of People takes place during the period of one month referred to above but before passing the resolution, and if a resolution approving the proclamation has been passed by the Council of State (Rajya Sabha), the proclamation shall cease to operate at the expiry of thirty days from the date on which the House of the People (Lok Sabha) first sits after it's reconstitution, unless before the expiration of the said period of thirty days a resolution approving the proclamation has also been passed by the House of the People.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six

months from the date of passing of the second resolution approving the proclamation. But this period of six months may be extended by a further period of six months, if, within the first six months, both the Houses of Parliament pass a resolution approving the continuance in force of such proclamation. *Prior to the Constitution 44th Amendment Act, the position was that the proclamation when approved by both the Houses of Parliament would remain in the force for an indefinite period unless and until the President chose to revoke the proclamation in exercise of the power conferred by the then Article 352(2)(a).*

Article 353 provides that while a proclamation of emergency is in operation, the Parliament shall have the power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding, that it is one which is not enumerated in the Union List.

(c) Breakdown of Constitutional Machinery in a State (Article 356 and 357)

In case the Governor of a State reports to the President, or he is otherwise satisfied that the Government of a State cannot be carried on according to the provisions of the Constitution, then he (President) can make a proclamation to that effect. By that proclamation, he can assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State, and declare that the powers of Legislature of that State shall vest in Parliament. Parliament can make laws with respect to all State matters as regards the particular State in which there is a breakdown of constitutional machinery and is under the President's rule. Further it is not necessary that the legislature of the concerned State should be suspended or dissolved before it is brought under the President's rule, but practically it so happens. It is important to note that the President cannot, however, assume to himself any of the powers vested in or exercisable by a High Court or to suspend, either in whole or in part, the operation of any provision of the Constitution relating to the High Courts.

Under the Constitution of India, the power is really that of the Union Council of Ministers with the Prime Minister as its head. The satisfaction of the President contemplated by this Article is subjective in nature. The power conferred by Article 356 upon the President is a conditional power. It is notan absolute power. The existence of material-which may comprise of, or include, the report(s) of the Governor – is a pre-condition. The satisfaction must be formed on relevant materials. Though the power of dissolving the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall Constitutional scheme that the President shall exercise it only after the proclamation is approved by both the Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The proclamation under Clause (1) can be issued only where the situation contemplated by the clause arises. Clause (3) of Article 356, is conceived as a control on the power of the President and also as a safeguard against its abuse (*S.R. Bommai* v. *Union of India,* AIR 1994 SC 1918).

Clause 2 of Article 356 provides that any such proclamation may be revoked or varied by a subsequent proclamation. It may, however, be noted that the presidential proclamation is valid only for six months at a time and that also if approved by both the Houses of Parliament within a period of two months from the date of proclamation. A fresh proclamation can be issued to extend the life of the existing one for a further period of six months but in no case such proclamation can remain in force beyond a consecutive period of three years. The Constitution (Forty-Second) Amendment Act, 1976 inserted a new clause (2) in Article 357. It provides that any law made in exercise of the Power of the Legislature of the State by Parliament or the President or other Authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other Authority would not, but for the issue of a proclamation

under Article 356 have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered, or repealed or amended by a competent Legislature or other authority. This means that the laws made during the subsistence of the proclamation shall continue to be in force unless and until they are altered or repealed by the State Legislature. So an express negative act is required in order to put an end to the operation of the laws made in respect of that State by the Union.

The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. The Supreme Court or High Court can strike down the proclamation if it is found to be *mala fide* or based on wholly irrelevant or extraneous grounds. If the Court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. (see *S.R. Bommai's case*).

(d) On the request of two or more States (Article 252)

Article 252 of the Constitution enumerates the power of Parliament to legislate for state. The exercise of such power is conditional upon an agreement between two or more States requesting Parliament to legislate for them on a specified subject. This Article provides that, if two or more States are desirous that on any particular item included in the State List there should be a common legislation applicable to all such State then they can make a request to Parliament to make such law on that particular subject. Such request shall be made by passing a resolution in the legislatures of the State concerned. If request is made in that form then parliament can make law on that subject as regards those States. The law so made may be adopted by other States also, by passing resolutions in their legislatures. Once, however, such law has been made, the power of those State legislatures which originally requested or which later on adopted such law is curtailed as regards that matter; and only Parliament can amend, modify or repeal such a law on similar request being made by any State or States. If any of the consenting States makes a law on that subject then its law will be invalid to the extent to which it is inconsistent with a law of Parliament.

To take an example, Parliament passed the Prize Competitions Act, 1955 under the provisions of the Constitution.

(e) Legislation for enforcing international agreements (Article 253)

Parliament has exclusive power with respect to foreign affairs and entering into treaties and agreements with foreign countries and implementing of treaties and agreements and conventions with foreign countries. But a treaty or agreement concluded with another country may require national implementation and for that purpose a law may be needed. To meet such difficulties, the Constitution authorises Parliament to make law on any subject included in any list to implement:

(i) any treaty, agreement or convention with any other country or countries, or

(ii) any decision made at any international conference, association or other body.

These five exceptions to the general scheme of distribution of legislative powers on the basis of exclusive Union and State Lists go to show that in our Constitution there is nothing which makes the States totally immune from legislative interference by the Centre in any matter. There remains no subject in the exclusive State jurisdiction which cannot be approached by the Centre in certain situations. But by this, one must not conclude that the distribution of legislative power in our Constitution is just illusory and all the powers vest in the Centre. On the other hand, the distribution of legislative powers is real and that is the general rule but to face the practical difficulties the Constitution has made a few exceptions which are to operate within the circumscribed sphere and conditions.

6. Interpretation of the Legislative Lists

For giving effect to the various items in the different lists the Courts have applied mainly the following principles :

(a) ***Plenary Powers:*** The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory. In the words of Gajenderagadkar, C.J.

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. A general word used in an entry ... must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it (*Jagannath Baksh Singh* v. *State of U.P., AIR 1962 SC 1563*).

Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter. For example, if power to collect taxes is granted to a legislature, the power not to collect taxes or the power to remit taxes shall be presumed to be included within the power to collect taxes.

(b) ***Harmonious Construction****:* Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.

(c) ***Pith and Substance Rule:*** The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. In a federal Constitution, as was observed by Gwyer C.J. "it must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere" (*Prafulla Kumar* v. *Bank of Khulna, AIR 1947 PC 60*). Therefore, where such overlapping occurs, the question must be asked, what is, "pith and substance" of the enactment in question and in which list its true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered. By way of illustration, acting on entry 6 of List II which reads "Public Health and Sanitation". Rajasthan Legislature passed a law restricting the use of sound amplifiers. The law was challenged on the ground that it dealt with a matter which fell in entry 31 of List I which reads: "Post and telegraphs, telephones, wireless broadcasting and other like forms of communication", and, therefore, the State Legislature was not competent to pass it. The Supreme Court rejected this argument on the ground that the object of the law was to prohibit unnecessary noise affecting the health of public and not to make a law on broadcasting, etc. Therefore, the pith and substance of the law was "public health" and not "broadcasting" (*G. Chawla* v. *State of Rajasthan, AIR 1959 SC 544*).

(d) ***Colourable Legislation:*** It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such

legislation is called colourable piece of legislation and is invalid. To take an example in *Kameshwar Singh v. State of Bihar, A.I.R. 1952 S.C. 252*, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensation. The Supreme Court found that this was a colourable exercise of power of acquisition by the State legislature, because "the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised".

The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorised to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives – good or bad – it did that.

These are just few guiding principles which the Courts have evolved, to resolve the disputes which may arise about the competence of law passed by Parliament or by any State Legislature.

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

This heading has been given to Part XIII of the Constitution. This part originally consisted of seven articles – Articles 301 to 307 – of which one (Art. 306) has been repealed. Out of these articles it is the first, i.e., 301 which, in real sense, creates an overall comprehensive limitation on all legislative powers of the Union and the State which affect the matters covered by that Article. This Article guarantees the freedom of trade, commerce and intercourse and runs in the following words:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

The opening words of this Article clearly show, and it has been so held by the Supreme Court, that except the provisions contained under this Part, i.e., Articles 302 to 307 under no other provision of the Constitution the free flow of trade and commerce can be interfered with. The object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken by internal barriers.

The concept *of trade, commerce and intercourse* today is so wide that from ordinary sale and purchase it includes broadcasting on radios, communication on telephone and even to non-commercial movement from one place to another place. If such is the scope of trade and commerce then any law relating to any matter may affect the freedom of trade, commerce and intercourse, e.g., it may be said that the law which imposes the condition of licence for having a radio violates the freedom of trade and commerce, or a law which regulates the hours during which the electricity in a particular locality shall be available may be called as affecting the freedom of trade and commerce because during those hours one cannot use the radio or television or one cannot run this factory. If that view is taken then every law shall become contrary to Articles 301 and unless saved by Articles 302 to 307 shall be unconstitutional. To avoid such situations the Supreme Court in the very first case on the matter (*Atiabari Tea Co. v. State of Assam, A.I.R. 1951 S.C. 232*) declared that only those laws which "directly and immediately" restrict or impede the freedom of trade and commerce are covered by Article 301 and such laws which directly and incidentally affect the freedom guaranteed in that article are not within the reach of Article 301. The word 'intercourse' in this article is of wide import. It will cover all such intercourse as might not be included in the words 'trade and commerce'.

Thus, it would cover movement and dealings even of a non-commercial nature (*Chobe v. Palnitkar, A.I.R. 1954 Hyd. 207*). The word, free in Article 301 cannot mean an absolute freedom. Such measures as traffic regulations licensing of vehicles etc. are not open to challenge.

It was further held in the next case (*Automobile Transport Ltd. v. State of Raj., A.I.R. 1962 S.C. 1906*) that regulations that facilitate the freedom of trade and commerce and compensatory taxes are also saved from the reach of Article 301. About compensatory taxes the Supreme Court has doubted the correctness of its own views in a later case *Khyerbari Tea Co. v. State of Assam, A.I.R. 1964 S.C. 925.*

With respect to regulatory laws also, we may say that if they are the laws which facilitate the freedom of trade and commerce then they are not at all laws which impede the free flow of trade and commerce directly or indirectly. The freedom of trade and commerce guaranteed under Article 301 applies throughout the territory of India; it is not only to inter-state but also to intra-state trade, commerce and intercourse. But in no way it covers the foreign trade or the trade beyond the territory of India. Therefore, the foreign trade is free from the restriction of Article 301.

Trade and commerce which are protected by Article 301 are only those activities which are regarded as lawful trading activities and are not against policy. The Supreme Court held that gambling is not "trade". Similarly, prize competitions being of gambling in nature, cannot be regarded as trade or commerce and as such are not protected under Article 301 (*State of Bombay v. RMDC, AIR 1957 SC 699*).

The freedom guaranteed by Article 301 is not made absolute and is to be read subject to the following exceptions as provided in Articles 302-305.

(a) Parliament to Impose Restriction in the Public Interest

According to Article 302 Parliament may, by law, impose such restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest.

(b) Parliament to make Preference or Discrimination

Parliament cannot by making any law give preference to one State over the other or make discrimination between the States except when it is declared by that law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 303 (1) and (2)].

(c) Power of the State Legislature

The Legislature of a State may by law:

(i) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(ii) impose such reasonable restrictions on the freedom of trade, commerce or intercourse within the State as may be required in the public interest.

However, no bill or amendment for making a law falling in this provision can be introduced or moved in the Legislature of a State without the previous sanction of the President. [Article 304]

In *Kalyani Stores v. State of Orissa, (AIR 1966 SC 1686)* Supreme Court held that Article 304 enables State legislature to impose taxes on goods from other States, if goods produced within the state are subjected to such taxes. A subsequent assent of President is also sufficient, as held in *State of Karnataka v. M/s Hansa Corpn., (1981) AIR SC 463.*

(d) Saving of Existing Laws

The law which was already in force at the commencement of the Constitution shall not be affected by the provisions of Article 301 except in so far as the President may, by order, otherwise direct (Art 305).

(e) Saving of Laws providing for State Monopoly

The laws which create State monopoly in any trade, etc. are saved from attack under Article 301, i.e., they are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce. So, if the State creates a monopoly in road, transporters cannot complain that their freedom of trade and commerce has been affected or if the State created monopoly in banking then other bankers cannot complain that their freedom of trade and commerce has been restricted.

The last provision (Article 307) in Part XIII authorises Parliament to appoint by law such authority as it considers appropriate for carrying out purposes of Articles 301 to 304 and to confer on the authority so appointed such powers and duties as it thinks necessary.

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

Creation of monopoly rights in favour of a person or body of persons to carry on any business *prima facie* affects the freedom of trade. But in certain circumstances it can be justified.

After the Constitution (Amendment) Act, 1951, the State creates a monopoly in favour of itself, without being called upon to justify its action in the Court as being reasonable.

Sub-clause (ii) of clause (6) of Article 19 makes it clear that the freedom of profession, trade or business will not be understood to mean to prevent the state from undertaking either directly or through a corporation owned or controlled by it, any trade, business, industry or service, whether to the exclusion, complete or partial, citizens or otherwise.

If a law is passed creating a State monopoly the Court should enquire as to what are the provisions of the said law which are basically and essentially necessary for creating the state monopoly. Sub-clause (ii) of clause (6) protects only the essential and basic provisions. If there are other provisions which are subsidiary or incidental to the operation of the monopoly they do not fall under Article 19(6)(ii). It was held by Shah, J. in *R.C. Cooper v. Union of India, (1970) 1 SCC 248,* that the impugned law which prohibited the named banks from carrying the banking business was a necessary incident of the business assumed by the Union and hence was not liable to be challenged under Article 19(6)(ii) in so far as it affected the right of a citizen to carry on business.

THE JUDICIARY

The Courts in the Indian legal system, broadly speaking, consist of:

(i) The Supreme Court,

(ii) The High Courts, and

(iii) The subordinate courts.

The Supreme Court

The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law. But appeals from High Courts in constitutional matters lay to the Federal Court (created under the Government of India Act, 1935) and thence to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain

Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

High Courts

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

Some High Courts (notably) Bombay, Calcutta and Delhi, have ordinary original civil jurisdiction (i.e., jurisdiction to try regular civil suits) for their respective cities. High Courts can also hear references made by the Income Tax Appellate Tribunal under the Income Tax Act and other tribunals.

It should be added, that the "writ" jurisdiction vested at present in all High Courts by the Constitution was (before the Constitution came into force) vested only in the High Courts of Bombay, Calcutta and Madras (i.e., the three Presidency towns).

Subordinate Courts

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly under the Civil Courts Act of each State. Criminal courts are created mainly under the Bharatiya Nyaya Sanhita.

Civil Courts

In each district, there is a District Court presided over by the District Judge, with a number of Additional District Judges attached to the court. Below that Court are Courts of Judges (sometimes called subordinate Judges) and in, some States, Munsiffs. These Courts are created under State Laws.

Criminal Courts

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves have been divided by Bharatiya Nagarik Suraksha Sanhita, 2023 into 'Judicial' and 'Executive' Magistrates. The latter do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquillity and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

As regards Judicial Magistrates, they are of two classes: Second Class and First Class. Judicial Magistrates are subject to the control of the Court of Session, which also is itself a Court of original jurisdiction. The powers of Magistrates of the two classes vary, according to their grade. The Court of Session can try all offences, and has power to award any sentence, prescribed by law for the offence, but a sentence of death requires confirmation by the High Court.

Special Tribunals

Besides these Courts, which form part of the general judicial set up, there are host of specialised tribunals dealing with direct taxes, labour, excise and customs, claims for accidents caused by motor vehicles, copyright and monopolies and restrictive trade practices.

For the trial of cases of corruption, there are Special Judges, appointed under the Criminal Law Amendment Act, 1952.

WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

In the words of Dicey, prerogative writs are *'the bulwark of English Liberty'*. The expression 'prerogative writ' is one of English common law which refers to the extraordinary writs granted by the sovereign, as fountain of justice on the ground of inadequacy of ordinary legal remedies. In course of time these writs were issued by the High Court as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. Under the Constitution by virtue of Article 226, every High Court has the power to issue directions or orders or writs including writs in the nature of *Habeas corpus, Mandamus, Prohibition, Quo warranto* and *Certiorari* or any of them for the enforcement of Fundamental Rights stipulated in Part III of the Constitution or for any other purpose. This power is exercisable by each High Court throughout the territory in relation to which it exercises jurisdiction. Where an effective remedy is available, the High Court should not readily entertain a petition under Article 226 of the constitution of India e.g., under the Companies Act, a share holder has very effective remedies for prevention of oppression and mismanagement. Consequently High Court should not entertain a petition under the said Article (*Ramdas Motors Transport Company Limited T.A. Reddy, AIR 1997 SC 2189*).

The Supreme Court could be moved by appropriate proceedings for the issue of directions or orders or writs, as referred to under Article 226 for the enforcement of the rights guaranteed by Part III of the Constitution. Article 32 itself being a fundamental right, the Constitutional remedy of writ is available to anyone whose fundamental rights are infringed by state action. Thus we see the power of the High Courts to issue these writs is wider than that of the Supreme Court, whereas:

(a) an application to a High Court under Article 226 will lie not only where some other limitation imposed by the Constitution, outside Part III, has been violated, but, an application under Article 32 shall not lie in any case unless the right infringed is 'Fundamental Right' enumerated in Part III of the Constitution;

(b) while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person, Government or other authority only if such person or authority is physically resident or located within the territorial jurisdiction of the particular High Court extends or if the cause of action arises within such jurisdiction.

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights" by Article 32 (1). Although the Constitution has provided for concurrent writ jurisdiction of the High Courts it is not necessary, that an aggrieved petitioner should first apply to the High Court and then to the Supreme Court (*Romesh Thappar v. State of Madras AIR 1950 SC 124*)

The jurisdiction of the High Court also extends to the enforcement of rights other than Fundamental Rights provided there is a *public duty*. The Supreme Court's jurisdiction to issue writs extends to all Fundamental Rights (*Common Cause v. Union of India, A.I.R. 1999 SC 2979*).

CASE LAWS

Satender Kumar Antil vs. Central Bureau of Investigation and Ors., 2024 INSC 134 decided by Supreme Court on 11th July, 2022

In this case, taking note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of Section 170 of the Code of Criminal Procedure ("the Code"), an endeavour was made by Supreme Court to categorize the types of offenses to be used as guidelines for the future.

The Supreme Court inter alia said that "The principle that bail is the Rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India."

Further, in this case, the Supreme Court issued certain directions, however they may be subject to State Amendments. These directions are meant for the investigating agencies and also for the courts. The directions are as under:

a) The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.

b) The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.

c) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the Accused for grant of bail.

d) All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed Under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.

e) There need not be any insistence of a bail application while considering the application Under Section 88, 170, 204 and 209 of the Code.

f) There needs to be a strict compliance of the mandate laid down in the judgment of this Court in case of Siddharth.

g) The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

h) The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

i) While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

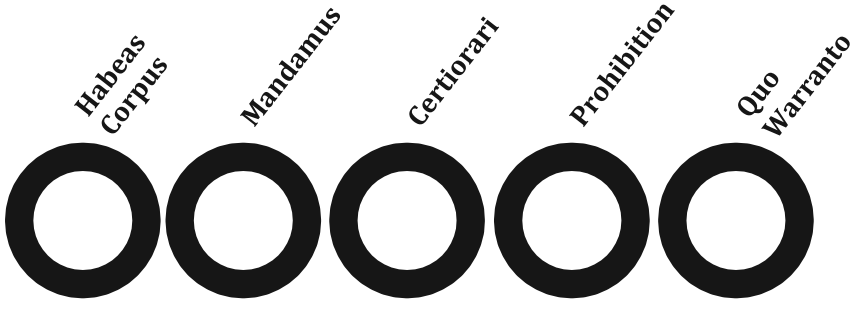
j) An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh case, followed by appropriate orders.

k) Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

l) All State Governments, Union Territories and High Courts are directed to file affidavits/status reports within a period of four months.

Types of Writs

A brief description of the various types of writs is given below:



1. *Habeas Corpus*

The writ of *Habeas corpus* - an effective bulwark of personal liberty – is a remedy available to a person who is confined without legal justification. The words '*Habeas Corpus*' literally mean "to have the body". When a *prima facie* case for the issue of writ has been made then the Court issues a *rule nisi* upon the relevant authority to show-cause why the writ should not be issued. This is in national order to let the Court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the Court. Under Articles 32 and 226 any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of *Habeas Corpus* as no man can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. An appeal to the Supreme Court of India may lie against an order granting or rejecting the application (Articles 132, 134 or 136). The disobedience to this writ is met with by punishment for contempt of Court under the Contempt of Courts Act.

Example

X has been detained wrongfully in custody by Y. As X was detained wrongfully by Y, the writ of habeas corpus can be filed in court by X's family on his behalf since his whereabouts are not known to them. Can X's family file a Writ Petition?

As he was detained wrongfully by Y (police officer), the writ of habeas corpus can be filed in court by X's family on his behalf since his whereabouts are not known to them

2. *Mandamus*

The word '*Mandamus'* literally means 'we command'. The writ of *mandamus* is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction while resort to certiorari and prohibition arises when the tribunal has wrongly exercised jurisdiction or exceeded its jurisdiction and are available only against judicial and quasi-judicial bodies. *Mandamus* can be issued against any public authority. It commands activity. The writ is used for securing judicial enforcement of public duties. In a fit case, Court can direct executives to carry out Directive Principles of the Constitution through this writ [*State of Maharashtra* v. *MP Vashi,* 1995 (4) SCALE]. The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed for. It is not issued if the authority has a discretion.

The Constitution of India by Articles 226 and 32 enables *mandamus* to be issued by the High Courts and the Supreme Court to all authorities.

Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and power (Article 361). It does not lie also against a private individual or body except where the state is in collusion with such private party in the matter of contravention of any provision of the Constitution of a statute. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

Example

Direction to correct the PAN Card by the High Court or Supreme Court to an authority.

3. Prohibition

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

Example

Staying the proceedings without the jurisdiction by the High Court or Supreme Court.

While *mandamus* commands activity, prohibition commands inactivity, it is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ may be of right and not a matter of discretion.

4. Certiorari

It is available to any person, wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially in excess of their legal authority. [*The King* v. *Electricity Commissioners,* (1924) I.K.B. 171, P. 204-5].

Example

Quashing the order passed without the jurisdiction by the High Court or Supreme Court.

The writ removes the proceedings from such body to the High Court, to quash a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of *certiorari* throughout their territorial jurisdiction when the subordinate judicial authority acts (i) without or in excess of jurisdiction or in (ii) contravention of the rules of natural justice or (iii) commits an error apparent on the face of the record. The jurisdiction of the Supreme Court to issue such writs arises under Article 32. Although the object of both the writs of *prohibition* and of *certiorari* is the same, prohibition is available at an earlier stage whereas *certiorari* is available at a later stage but in similar grounds, i.e., *Certiorari* is issued after authority has exercised its powers.

5. Quo Warranto

The writ of *quo warranto* enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is a usurper. The holder of the office has to show to the court under what authority he holds the office. It is issued when:

(i) the office is of public and of a substantive nature,

(ii) created by statute or by the Constitution itself, and

(iii) the respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.

The fundamental basis of the proceeding of *Quo warranto* is that the public has an interest to see that an unlawful claimant does not usurp a public office. It is a discretionary remedy which the court may grant or refuse.

Example

Writ available against illegal appointments in public office.

DELEGATED LEGISLATION

The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policies pursuant to the establishment of a welfare state as contemplated by our Constitution, have made it necessary for the legislatures to delegate its powers. Further, the Parliamentary procedure and discussions in getting through a legislative measure in the Legislatures is usually time consuming.

The three relevant justifications for delegated legislation are:

(i) the limits of the time of the legislature;

(ii) the limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations, where direction is wanted; and

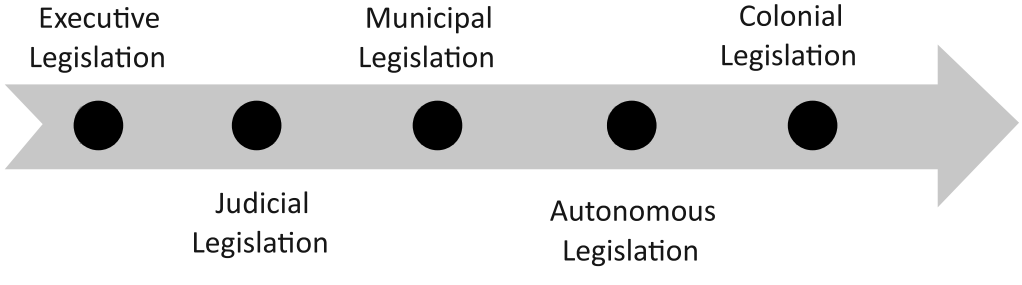
(iii) the need of some weapon for coping with situations created by emergency.

The delegation of the legislative power is what Hughus, Chief Justice called, flexibility and practicability *(Currin Wallace* 83 L. ed. 441).

Classification of delegated legislation

The American writes classify delegated legislation as contingent and subordinate. Further, legislation is either supreme or subordinate. The Supreme Law or Legislation is that which proceeds from supreme or sovereign power in the state and is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some sovereign or supreme authority.

Classification of Subordinate Legislation



1. Executive Legislation

The tendency of modern legislation has been in the direction of placing in the body of an Act only few general rules or statements and relegating details to statutory rules. This system empowers the executive to make rules and orders which do not require express confirmation by the legislature. Thus, the rules framed by the Government under the various Municipal Acts fall under the category.

2. Judicial Legislation

Under various statues, the High Courts are authorised to frame rules for regulating the procedure to be followed in courts. Such rules have been framed by the High Courts under the Guardians of Wards Act, Insolvency Act, Succession Act and Companies Act, etc.

3. Municipal Legislation

Municipal authorities are entrusted with limited and sub-ordinate powers of establishing special laws applicable to the whole or any part of the area under their administration known as bye-laws.

4. Autonomous Legislation

Under this head fall the regulations which autonomus bodies such as Universities make in respect of matters which concern themselves.

5. Colonial Legislation

The laws made by colonies under the control of some other nation, which are subject to supreme legislation of the country under whose control they are.

Principles applicable

A body, to which powers of subordinate legislation are delegated must directly act within the powers which are conferred on it and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers. The doctrine of implied powers means where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.

Subordinate legislation can not take effect unless published. Therefore, there must be promulgation and publication in such cases. Although there is no rule as to any particular kind of publication.

Conditional legislation is defined as a statute that provides controls but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statue. In other words in sub-ordinate legislation the delegate completes the legislation by supplying details within the limits prescribed by the statue and in the case of conditional legislation, the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority, the time and manner of carrying its legislation into effect (*Hamdard Dawa Khana v. Union of India, AIR, 1960 SC 554*).

While delegating the powers to an outside authority the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby. If an Act is contrary to the provisions of the Constitution, it is void. Our Constitution embodies a doctrine of judicial review of legislation as to its conformity with the Constitution.

In England, however, the position is different. Parliament in England may delegate to any extent and even all its power of law-making to an outside authority. In U.S.A., the Constitution embodies the doctrine of separation of powers, which prohibits the executive being given law making powers. On the question whether there is any limit beyond which delegation may not go in India, it was held in *In re-Delhi Laws Act, 1912 AIR 1951 SC 332,* that there is a limit that essential powers of legislation or essential legislative functions cannot be delegated. However, there is no specific provision in the Constitution prohibiting the delegation. On the question whether such doctrine is recognised in our Constitution, a number of principles in various judicial decisions have been laid down which are as follows:

(a) The primary duty of law-making has to be discharged by the Legislature itself. The Legislature cannot delegate its primary or essential legislative function to an outside authority in any case.

(b) The essential legislative function consists in laying down the 'the policy of the law' and 'making it a binding rule of conduct'. The legislature, in other words must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority for carrying out the declared policy.

(c) If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.

(d) It follows from the above that an Act delegating law-making powers to a person or body shall be invalid, if it lays down no principles and provides no standard for the guidance of the rule-making body.

(e) In applying this test the court could take into account the statement in the preamble to the act and if said statements afford a satisfactory basis for holding that the legislative policy or principle has been enunciated with sufficient accuracy and clarity, the preamble itself would satisfy the requirements of the relevant tests.

(f) In every case, it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation made is *intra vires* or not will have to be decided by the application of the relevant tests.

(g) Delegated legislation may take different forms, *viz.,* conditional legislation, supplementary legislation subordinate legislation etc., but each form is subject to the one and same rule that delegation made without indicating intelligible limits of authority is constitutionally incompetent.

RECENT AMENDMENTS

102nd Amendment

The Constitution (One Hundred Second Amendment) Act, 2018 received assent of the President on 11th August, 2018. This amendment *inter-alia* provided for National Commission for Backward Classes and provisions for socially and educationally backward classes

103rd Amendment

The Constitution (One Hundred Third Amendment) Act, 2018 received assent of the President on 12th January, 2019. This amendment added for advancement of any economically weaker sections of citizens *inter-alia* including admission to educational institutions including private educational institutions, whether aided or unaided by the State and reservation of appointments or posts in favour of any economically weaker sections of citizens.

104th Amendment

The Constitution (One Hundred Fourth Amendment) Act, 2019 received assent of the President on 21st January, 2020. This amendment extended the period for reservation of seat for Schedule Castes and Schedule Tribes in the House of the People and in the Legislative Assemblies of the States to eighty Years from the commencement of this Constitution.

SEPARATION OF POWERS

It is generally accepted that there are three main categories of governmental functions – (i) the Legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State, i.e., legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

Article 50 of the Constitution of India deals with Separation of judiciary from executive. It provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.

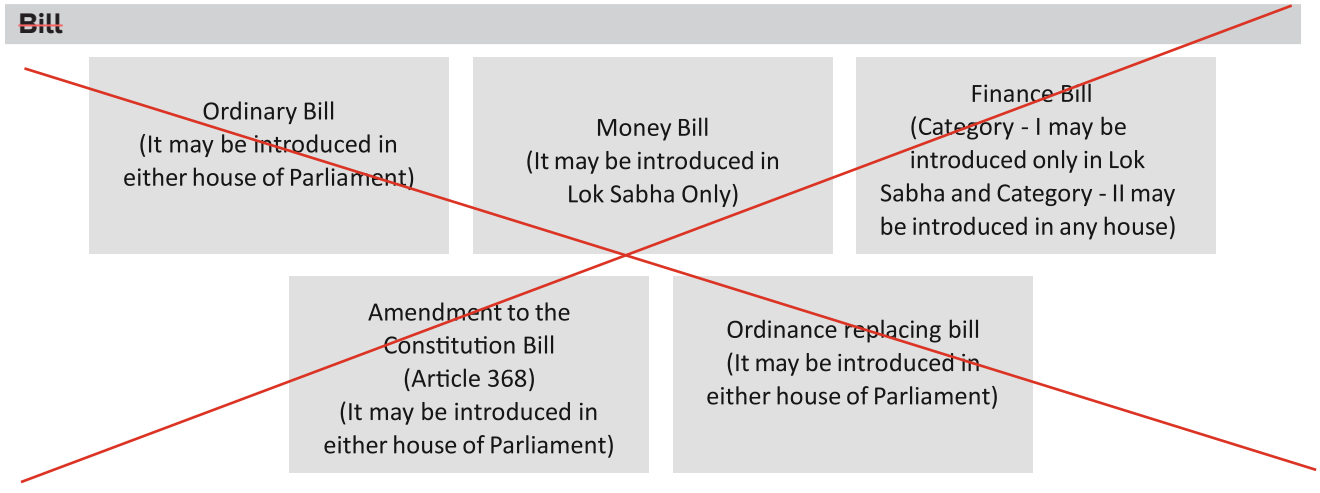
Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ.

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers.

The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the government have been sufficiently differentiated. (*Ram Jawaya v. State of Punjab, AIR 1955 SC 549*). None of the three of organs of the Government can take over the functions assigned to the other organs. (*Keshanand Bharti v. State of Kerala, AIR 1973 SC 1461, Asif Hameed v. State of J&K 1989 AIR, SC 1899*) In *State of Bihar v. Bihar Distillery Ltd., (AIR 1997 SC 1511*) the Supreme Court has held that the judiciary must recognize the fundamental nature and importance of the legislature process and must accord due regard and deference to it. The Legislative and Executive are also expected to show due regard and deference to the judiciary. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government. The concept of checks and balance is inherent in the scheme.

LEGISLATIVE FUNCTIONS

Bill



Source: https://cms.rajyasabha.nic.in/UploadedFiles/Legislation/Introduction.pdf and https://cms.rajyasabha.nic.in/UploadedFiles/Procedure/PracticeAndProcedure/English/6/legislative_procedure.pdf

A Bill is a draft statute which becomes law after it is passed by both the Houses of Parliament and assented to by the President. All legislative proposals are brought before Parliament in the forms of Bills.

Types of Bills and their Specific Features

(i) Bills may be broadly classified into Government Bills and Private Members' Bills depending upon their initiation in the House by a Minister or a Private Member.

(ii) Content wise, Bills are further classified into:

(a) Original Bills which embody new proposals, ideas or policies,

(b) Amending Bills which seek to modify, amend or revise existing Acts,

(c) Consolidating Bills which seek to consolidate existing law/enactments on a particular subject,

(d) Expiring Laws (Continuance) Bills which seek to continue Acts which, otherwise, would expire on a specified date,

(e) Repealing and amending Bill to cleanse the Statute Book,

(f) Validating Acts to give validity to certain actions,

(g) Bills to replace Ordinances,

(h) Money and Financial Bills, and

(i) Constitution Amendment Bills.

(iii) However, procedurally, the Bills are classified as

(a) Ordinary Bills

(b) Money Bills and Financial Bills

(c) Ordinance Replacing Bills and

(d) Constitution Amendment Bills.

(iv) Financial Bills can be further classified as Financial Bills Categories A and B. Category A Bills contain provisions dealing with any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 and other matters and Category B Bills involve expenditure from the Consolidated Fund of India.

(v) Financial Bill Category A can only be introduced in the Lok Sabha on the recommendation of the President. However once it has been passed by the Lok Sabha, it is like an ordinary Bill and there is no restriction on the powers of the Rajya Sabha on such Bills.

(vi) Financial Bill Category B and Ordinary Bills can be introduced in either House of Parliament.

(vii) Ordinance replacing Bills are brought before Parliament to replace an Ordinance, with or without modifications, promulgated by the President under article 123 of the Constitution of a subject. To provide continuity to the provisions of the Ordinance, such a Bill has to be passed by the Houses of Parliament and assented to by the President within six weeks of the reassembly of Parliament.

(viii) As per the procedure laid down in the Constitution, Constitution Amendment Bills can be of three types viz.,

(a) requiring simple majority for their passage in each House;

(b) requiring special majority for their passage in each House, i.e., a majority of the total membership of a House and by a majority of not less than two-thirds of the members of that House present and voting (Article 368); and

(c) requiring special majority for their passage and ratification by Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures (proviso to clause (2) of Article 368). A Constitution Amendment Bill under Article 368 can be introduced in either House of Parliament and has to be passed by each House by special majority.

The latest amendment to the Constitution was 104th Amendment which came into force on 21-01-2021.

(ix) Under provisions of Article 108 of the Constitution, if after a Bill passed by one House and transmitted

to the other House:-

(a) is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months elapse from the date of its receipt by the other House without the Bill being passed by it,

the President may, unless the Bill has elapsed by reason of a dissolution of the Lok Sabha, summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill. If at the joint sitting of the two Houses, the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed to have been passed by both Houses. However there is no provision of joint sittings on a Money Bill or a Constitution Amending Bill.

(x) After the dissolution of Lok Sabha all Bills except the Bills introduced in the Rajya Sabha and pending therein, lapse.

[2]Law making process (How a Bill becomes an Act)

A Bill is the draft of a legislative proposal which has to pass through various stages before it becomes an Act of Parliament.

First Reading

The legislative process starts with the introduction of a Bill in either House of Parliament – Lok Sabha or Rajya Sabha. A Bill can be introduced either by a Minister or by a Private Member. In the former case, it is known as a Government Bill and in the latter case it is called a Private Member's Bill.

It is necessary for a Member-in-charge of the Bill to ask for leave to introduce the Bill. If leave is granted by the House, the Bill is introduced. This stage is known as the First Reading of the Bill. If the motion for leave to introduce a Bill is opposed, the Speaker may, allow a brief explanatory statement to be made by the Member who opposes the motion and the Member-in-charge who moved the motion. Where a motion for leave to introduce a Bill is opposed on the ground that the Bill initiates legislation outside the legislative competence of the House, the Speaker may permit a full discussion thereon. Thereafter, the question is put to the vote of the House. However, the motion for leave to introduce a Finance Bill or an Appropriation Bill is forthwith put to the vote of the House.

Publication in Gazette

After a Bill has been introduced, it is published in the Official Gazette. Even before introduction, a Bill might, with the permission of the Speaker, be published in the Gazette.

Reference of Bill to Standing Committee

After a Bill has been introduced, the presiding Officer of the house concerned can refer the Bill to the Standing Committee concerned for examination and make report thereon.

If a Bill is referred to the Standing Committee, the Committee shall consider the general principles and clauses of the Bill referred to them and make report thereon. After the Bill has thus been considered, the Committee submits its report to the House. The report of the Committee, being of persuasive value, shall be treated as considered advice given by the Committee.

Second Reading

The Second Reading consists of consideration of the Bill which is in two stages:

2. https://loksabhadocs.nic.in/our%20parliament/How%20a%20bill%20become%20an%20act.pdf

First Stage: The first stage consists of general discussion on the Bill as a whole when the principle underlying the Bill is discussed.

Second Stage: The second stage of the Second Reading consists of clause-by-clause consideration of the Bill.

Third Reading

Thereafter, the Member-in-charge can move that the Bill be passed. This stage is known as the Third Reading of the Bill. At this stage, the debate is confined to arguments either in support or rejection of the Bill. In passing an ordinary Bill, a simple majority of Members present and voting is necessary. But in the case of a Bill to amend the Constitution, a majority of the total membership of the House and a majority of not less than two-thirds of the Members present and voting is required in each House of Parliament.

Bill in the other House

After the Bill is passed by one House, it is sent to the other House for concurrence with a message to that effect, and there also it goes through the stages described above, except the introduction stage.

Consideration of the Bill at a Joint Sitting

If a Bill passed by one House is rejected by the other House, or, the Houses have finally disagreed as to the amendments to be made in the Bill, or more than six months elapse from the date of the receipt of the Bill by the other House without the Bill being passed by it, the President may call a joint sitting of the two Houses to resolve the deadlock. If, at the joint sitting of the Houses, the Bill is passed by a majority of the total number of Members of both the Houses present and voting, with the amendments, if any, accepted by them, the Bill is deemed to have been passed by both the Hoses.

There cannot be a joint sitting of both Houses on a Constitution Amendment Bill.

Assent of the President

When a Bill is passed by both Houses, the Secretariat of the House which is last in possession of the Bill obtains the assent of the President. In the case of a Money Bill or a Bill passed at a joint sitting of the Houses, the Lok Sabha Secretariat obtains assent of the President. The Bill becomes an Act only after the President has given assent to it.

PARLIAMENTARY COMMITTEES

The work done by the Parliament in modern times is not only varied in nature, but considerable in volume. The time at its disposal is limited. It cannot, therefore, give close consideration to all the legislative and other matters that come up before it. A good deal of its business is, therefore, transacted by what are called the Parliamentary Committees.

Parliamentary Committees play a vital role in the Parliamentary System. They are a vibrant link between the Parliament, the Executive and the general public. The need for Committees arises out of two factors, the first one being the need for vigilance on the part of the Legislature over the actions of the Executive, while the second one is that the modern Legislature these days is over-burdened with heavy volume of work with limited time at its disposal. It thus becomes impossible that every matter should be thoroughly and systematically scrutinized and considered on the floor of the House. If the work is to be done with reasonable care, naturally some Parliamentary responsibility has to be entrusted to an agency in which the whole House has confidence. Entrusting certain functions of the House to the Committees has, therefore, become a normal practice. This has become all the more necessary as a Committee provides the expertise on a matter which is referred to it. In a Committee, the matter is deliberated at length, views are expressed

freely, and the matter is considered in depth, in a business-like manner and in a calmer atmosphere. In most of the Committees, public is directly or indirectly associated when memoranda containing suggestions are received, on-the-spot studies are conducted and oral evidence is taken which helps the Committees in arriving at the conclusions.

The Committees aid and assist the Legislature in discharging its duties and regulating its functions effectively, expeditiously and efficiently. Through Committees, Parliament exercises its control and influence over administration. Parliamentary Committees have a salutary effect on the Executive. The Committees are not meant to weaken the administration, instead they prevent misuse of power exercisable by the Executive. It may, however, be remembered that Parliamentary control in the context of the functioning of the Committees may mean influence, not direct control; advice, not command; criticism, not obstruction; scrutiny, not initiative; and accountability, not prior approval. This, in brief, is the rationale of the Committee System. The Committees have functioned in a non-partisan manner and their deliberations and conclusions have been objective. This, in a large measure, accounts for the respect in which the recommendations of the Parliamentary Committees are held.

Ad hoc and Standing Committees

Parliamentary Committees are of two kinds: *Ad hoc* Committees and the Standing Committees. *Ad hoc* Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report. The principal *Ad hoc* Committees are the Select and Joint Committees on Bills. Others like the Railway Convention Committee, the Committees on the Draft Five Year Plans and the Hindi Equivalents Committee were appointed for specific purposes. Apart from the *Ad hoc* Committees, each House of Parliament has Standing Committees like the Business Advisory Committee, the Committee on Petitions, the Committee of Privileges and the Rules Committee, etc.

Other Committees

Other Committees of special importance is yet another class of Committees which act as Parliament's 'Watch Dogs' over the executive. These are the Committees on Subordinate Legislation, the Committee on Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertakings and Departmentally Related Standing Committees (DRSCs). The Committee on Estimates, the Committee on Public Accounts, the Committee on Public Undertakings and DRSCs play an important role in exercising a check over governmental expenditure and Policy formulation.

Parliamentary Committees:-

Ad hoc Committees and the standing committees

- Ad hoc committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report.
- Apart from the Ad hoc committees, each house of parliament has standing committtes like the business advisory committees; the committee on petition, the committee of privileges and the Rules committee etc.

Other Committees

- These committees act as Parliament's 'Watch Dogs' over the executive. These are the committees on Subordinate Legislations, the Committee of Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertakings and Departmentally Related Standing Committees (DRSCs)

CASE LAWS

Skill Lotto Solutions v. Union of India, 2020 SCC OnLine SC 990

In present case, the constitutional validity of levying of taxes on lottery, betting and gambling was challenged in the Court. The Supreme Court held that the taxation of lottery tickets and prize money as constitutionally lawful. The SC ruled that gaming and lotteries fall under the Goods and Services Tax's purview and are therefore legitimate under the law. It was stated as follows:

"The value of taxable supply is a matter of statutory Regulation and when the value is to be transaction value which is to be determined as per Section 15 of Central Goods And Services Tax Act, 2017, it is not permissible to compute the value of taxable supply by excluding prize which has been contemplated in the statutory scheme. When prize paid by the distributor/agent is not contemplated to be excluded from the value of taxable supply, we are not persuaded to accept the submission of the Petitioner that prize money should be excluded for computing the taxable value of supply the prize money should be excluded. We, thus, conclude that while determining the taxable value of supply the prize money is not to be excluded for the purpose of levy of GST."

Municipal Corporation of Gr. Mumbai vs. Ankita Sinha (25.10.2021 - SC) 2021 SCC OnLine SC 897

In this case, the principal issue as to whether the National Green Tribunal (in short "the Tribunal") can exercise suomotu jurisdiction or initiate suomotu action. Tribunal may initiate suo moto action. However, same is subject to opportunities of being heard. Court stated that

"the judgment rendered by this Court predicates that even if the Tribunal intends to initiate suomotu action, must give opportunity to the parties likely to be affected before passing any adverse order against them. Viewed thus, the ex parte preemptory order(s) passed by the Tribunal without giving opportunity to the person(s) likely to be affected by such order(s), be treated as effaced from the record."

LESSON ROUND-UP

- The Constitution of India came into force on January 26, 1950. The preamble to the Constitution sets out the aims and aspirations of the people of India. Constitution of India is basically federal but with certain unitary features. The essential features of a Federal System are – dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution.
- The fundamental rights are envisaged in Part III of the Constitution. These are:
  - (i) Right to Equality;
  - (ii) Right to Freedom;
  - (iii) Right against Exploitation;
  - (iv) Right to Freedom of Religion;
  - (v) Cultural and Educational Rights;
  - (vi) Right to Constitutional Remedies.
- The Directive Principles as envisaged by the Constitution makers lay down the ideals to be observed by every Government to bring about an economic democracy in this country.

- Article 51 A imposing the fundamental duties on every citizen of India was inserted by the Constitution (Forty-second Amendment) Act, 1976.
- The most important legislative power conferred on the President is to promulgate Ordinances. The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of the Parliament. The Governor's power to make Ordinances is similar to the Ordinance making power of the President and has the force of an Act of the State Legislature.
- The Union of India is composed of 29 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. Both the Union and States are equally subject to the limitations imposed by the Constitution. However, there are some parts of Indian Territory which are not covered by these States and such territories are called Union Territories.
- The courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country is an institution created by the Constitution. The jurisdiction of the Supreme Court is vast including the writ jurisdiction for enforcing Fundamental Rights.
- The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances, have made it necessary for the legislature to delegate its powers.
- Article 50 of the Constitution of India deals with Separation of judiciary from executive. It provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.
- A Bill is a draft statute which becomes law after it is passed by both the Houses of Parliament and assented to by the President. All legislative proposals are brought before Parliament in the form of Bills.
- Parliamentary Committees play a vital role in the Parliamentary System. They are a vibrant link between the Parliament, the Executive and the general public.

GLOSSARY

Doctrine of Severability: If after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid.

Doctrine of Eclipse: A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights but the eclipsed or dormant parts become effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution.

Equality before the law: Law treats everyone equal. Legislative classification: Legislative classification or distinction is made carefully between persons who are and who are not similarly situated.

Delegated Legislation: The legislative power delegated to non legislatures.

Constitutional Remedies: The remedies that guarantee the enforcement of Fundamental Rights.

Harmonious Construction: Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory.

Pith and Substance Rule: The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. The Constitution of India is "federal in character but with unitary features". Comment.
2. What is bill? Discuss type of bills and their specific features.
3. Write short notes on:
   (i) Separation of Powers
   (ii) Writ of Habeas Corpus
   (iii) Writ of Mandamus
   (iv) Writ of Certiorari
   (v) Parliamentary Committees
4. Does a law made by a State to create monopoly rights in favour of a person to carry on any business affect the freedom of trade?
5. "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Comment.
6. Explain the powers of promulgation of ordinances under the Constitution of India.
7. The judicial structure of India is well equipped to deal with every kind of cases. Comment.
8. Explain the various principles behind Interpretation of the Legislative Lists
9. Write a short note on Finance Bill.

LIST OF FURTHER READINGS

- Constitution of India
- V.N. Shukla's the Constitution of India; Eastern Book Company, Lucknow
  Durga Das Basu
- Dr. J. N Pandey's Constitution Law of India
  Dr. D.K. Singh (Ed.)

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)
• https://sansad.in/ls

Interpretation of Statutes

Lesson 3

KEY CONCEPTS

■ Legislature ■ Statute ■ Literal Construction ■ Reasonable Construction ■ Harmonious Construction ■ Internal and External Aids to Interpretation

Learning Objectives

To understand:

- The meaning and need of interpretation of statutes
- Principle required to applied while interpreting a statute
- The meaning and need of interpretation of statutes
- Principle required to be applied while interpreting a statute
- Internal and external aid to Interpretation of Statutes
- Legal terminologies used in the field of legal studies
- How to read a Bare Act and Citation of Cases
- The rules that are applicable while interpreting statutes
- How different laws are required to be interpreted in a different manner
- Various doctrines that may be used while interpreting statutes
- The rules that are applicable while interpreting statutes
- How different laws are required to be interpreted in a different manner
- Various doctrines that may be used while interpreting statutes
- The applicability of General Clauses Act
- Reading methodology of Companies Act, 2013

Lesson Outline

- Introduction
- Need for Interpretation of a Statute
- Meanings of Interpretation of Statutes
- Casus Omissus rule
- Interpretation of Definition Clause
- Principles of Interpretation including Heydon's Rule of Interpretation, Golden Rule of Interpretation
- Presumptions
- Aids to Interpretation
- Legal Terminologies & Legal Maxims
- Reading a Bare Act & Citation of Cases
- Prospective and Retrospective Operation
- Use of "may" and "shall"
- Use of "and" and "or"
- Interpretation of Proviso
- Deeming Provisions
- Repugnancy with other Statutes
- Conflict between General Provision and Special Provision
- Socially Beneficial Construction
- Interpretation of Procedural Law
- Interpretation of Fiscal and Taxing Statutes
- Delegated Legislations
- Conflict between Statute, Rules and Regulations
- Doctrine of Substantial Compliance
- Doctrine of Impossibility of Performance
- Strict Construction of Penal Statutes
- Brief of General Clause Act, 1897
- Reading methodology of the Companies Act, 2013 and its Legal Aura
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

"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

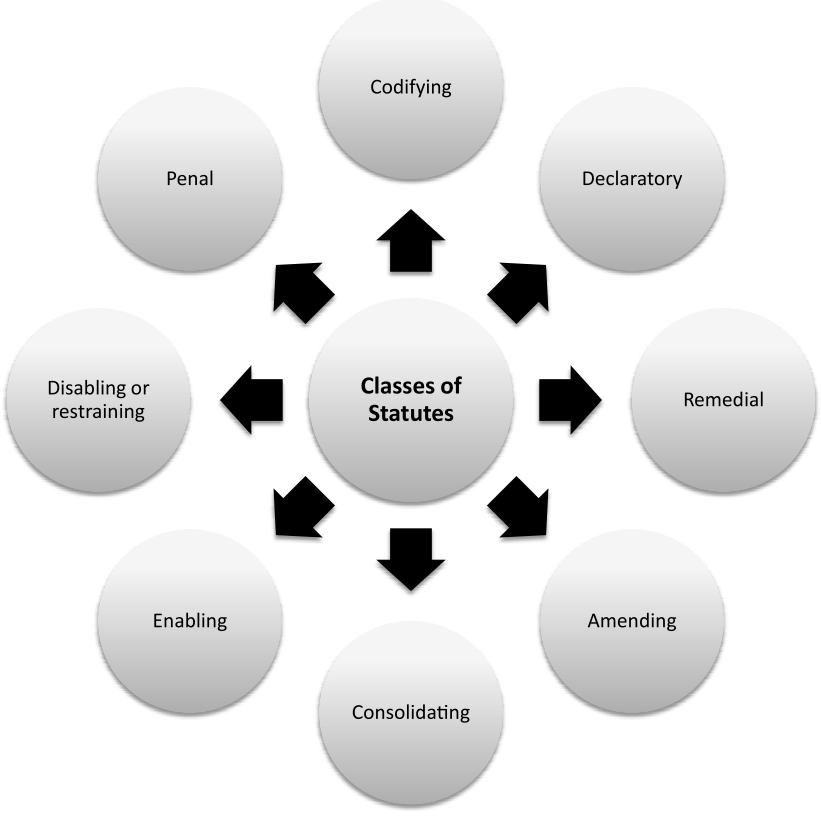
A statute has been defined as "the will of the legislature" (Maxwell, Interpretation of Statutes, 11th ed. p. 1). Normally, it denotes the Act enacted by the legislature.

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



(1) Codifying, when they codify the unwritten law on a subject;

(2) Declaratory, when they do not profess to make any alteration in the existing law, but merely declare or explain what it is;

(3) Remedial, when they alter the common law, or the judge made (non-statutory) law;

(4) Amending, when they alter the statute law;

(5) Consolidating, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance;

(6) Enabling, when they remove a restriction or disability;

(7) Disabling or restraining, when they restrain the alienation of property;

(8) Penal, when they impose a penalty or forfeiture.

NEED FOR INTERPRETATION OF A STATUTE

The following observation of Denning L.J. in *Seaford Court Estates Ltd. v. Asher, (1949) 2 K.B. 481 (498)***,** on the need for statutory interpretation is instructive: "It is not within human powers to forsee the manifold sets of facts which may arise; and that; even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judge's trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. To put into other words : A judge should ask himself the question : If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

The object of interpretation has been explained in Halsbury's Laws of England 3rd Ed., vol. 2, p. 381 in the following words: "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". The object of interpretation, thus, in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

According to Salmond, interpretation or construction is the process by which the Court's seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

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. However, there is no hierarchy of one rule over the other. The interpreter has to analyse which rule has to apply after giving due consideration to the facts of the situation and intent of the statute.

It must be kept in the mind that there is a clear distinction between Interpretation and Legislation. The court only interprets the law and does not legislate it. If the provision of law is misused and subjected to the abuse of the process of law, it is for the Legislature to amend modify or repeal it by having recourse to appropriate procedure if deemed necessary. Therefore, statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.

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

A court generally interprets the law against rewriting.

[1]It is corollary to the general rule of literal construction that nothing is to be added to or taken out from a statute unless there are adequate grounds to justify the inference the legislature intended something which it omitted to express.

[2]When the language is clear and unambiguous and when there is no need to apply the tools of interpretation, there is no need to interpret the word 'or', nor any need to read it as a substitute word, instead of its plain and simple meaning denoting as 'alternative'.

However, [3]the judge may read in or read out words which he considers to be necessarily implied or surplus by words which are already in the statute; and the judge has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.

INTERPRETATION OF DEFINITION CLAUSE

Usually, every statute has a definition section (also called 'interpretation clause') which provides definitions of various words and phrases used in the statute.

1. Maxwell on the Interpretation of Statutes, 12th edn., page 33.
2. Sri Jeyaram Educational Trust v. A. G. Syed Mohideen & Others 2010 AIR SCW 871
3. Cross: Statutory Interpretation, 3rd edn., p. 93.

Example

Section 2 of the Companies Act, 2013 provides the definitions of various terms used in the statute.

In order to keep the definition relevant the words "unless the context otherwise required" are used in the provisions relating to definition. These words means that the definition is only conclusive unless otherwise context requires.

While interpreting, the interpreter should consider the context in which a word has been used, where the definition of a word has not been given – the construction must be given in its popular sense and Object of the statute should be given due consideration.

Further, the definitions may be exhaustive definitions and inclusive definitions. In exhaustive definitions, a restricted meaning is provided for a particular word and in inclusive definitions, there is a scope of further reading into of the words according to the context.

Example

Exhaustive Definition: "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. (section 2(1) of the Companies Act, 2013.

Inclusive Definition: As per section 2(22AA) of the Income-tax Act, 1961 "document" includes an electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000

PRINCIPLES OF INTERPRETATION INCLUDING HEYDON'S RULE OF INTERPRETATION, GOLDEN RULE OF INTERPRETATION

At the outset, it must be clarified that, it is only when the intention of the legislature as expressed in the statute is not clear, that the Court in interpreting it will have any need for the rules of interpretation of statutes. It may also be pointed out here that since our legal system is, by and large, modelled on Common Law system, our rules of interpretation are also same as that of the system. It is further to be noted, that the so called rules of interpretation are really guidelines.

Primary Rules
• 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
• Rule of *Ejusdem Generis*

Other Rules of Interpretation
• *Expressio Unis Est Exclusio Alterius*
• *Contemporanea Expositio Est Optima Et Fortissima in Lege*
• *Noscitur a Sociis*
• Strict and Liberal Construction

(i) Primary Rules

(a) 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.

Interpretation should not be given which would make other provisions redundant (*Nand Prakash Vohra v. State of H.P., AIR 2000 HP 65*).

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases."

"Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used". (Brett M.R.)

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions of another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated.

Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.

Some of the other basic principles of literal construction are:

(i) Every word in the law should be given meaning as no word is unnecessarily used.

(ii) 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 (2005) 4 SCALE, P.1*, held: One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.

- If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended, abridged, so far as to avoid such an inconvenience, but no further.
- The onus of showing that the words do not mean what they say lies heavily on the party who alleges it.
- He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

(b) The Mischief Rule or Heydon's Rule

In *Heydon's* Case, in [1584] [76 ER 637 360 REP 7a], 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:

(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 of the Commonwealth; and

(4) The true reason of the remedy.

Although judges are unlikely to propound formally in their judgments the four questions in Heydon's Case, consideration of the "mischief" or "object" of the enactment is common and will often provide the solution to a problem of interpretation. Therefore, when the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words is the rule laid down in Heydon's case which has "now attained the status of a classic". The rule directs that the Courts must adopt that construction which "shall suppress the mischief and advance the remedy". But this does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregard the context and the collection in which they occur. (*See Umed Singh v. Raj Singh, A.I.R. 1975 S.C. 43*)

The Supreme Court in *Sodra Devi's case, AIR 1957 S.C. 832* 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.

(c) 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. Exclusive reliance on the bare dictionary meaning of words' may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough interpreting the provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve.

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.

CASE LAWS

It is only when the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship of injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence *(Tirath Singh v. Bachittar Singh, A.I.R. 1955 S.C. 830).*

Courts can depart from dictionary meaning of a word and give it a meaning which will advance the remedy and suppress the mischief provided the Court does not have to conjecture or surmise. A construction will be adopted in accordance with the policy and object of the statute *(Kanwar Singh v. Delhi Administration, AIR 1965 S.C. 871).* To make the discovered intention fit the words used in the statute, actual expression used in it may be modified [*Newman Manufacturing Co. Ltd. v. Marrables, (1931) 2 KB 297, Williams v. Ellis, 1880 49 L.J.M.C.*]. If the Court considers that the litera legis is not clear, it, must interpret according to the purpose, policy or spirit of the statute (ratio-legis). It is, thus, evident that no invariable rule can be established for literal interpretation.

In *RBI v. Peerless General Finance and Investment Co. Ltd. (1987) 1 SCC 424.* The Supreme Court stated that if a statute is looked at in the context of its enactment, with the glasses of the statute makers provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. *(See also Chairman Indore Vikas Pradhikaran v. Pure Industrial Coke and Chemicals Ltd., AIR 2007 SC 2458*).

In *Municipal Corporation of Hyderabad vs. P.N. Murthy & Ors., 1987 SCR (2) 107* It was observed by the Supreme Court that the scheme of the relevant sections has to be read and construed in a meaningful, purposeful and rational manner. The expression 'vest' employed in Section 202(1)(c), under the circumstances must of necessity be construed as vesting both in title as well as in possession.

(d) 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 and, "whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise" *(Raj Krishna v. Pinod Kanungo, A.I.R. 1954 S.C. 202 at 203).*

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 harmonius construction".

CASE LAWS

The Supreme Court applied this rule in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution and it was held that the right of every religious denomination or any section thereof to manage its own affairs in matters of religion [Article 26(b)] is subject to a law made by a State providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)(b)]. *(Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255).*

In *M/s New India Sugar Mills Ltd. vs. Commissioner of Sales Tax, Bihar. SC, 1963 AIR 1207* It was observed by Supreme Court that It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature.

(e) Rule of *Ejusdem Generis*

Ejusdem Generis, literally means "of the same kind or species". The rule can be stated thus:

(i) In an enumeration of different subjects in an Act, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed down by treating them as applying to things of the same kind as those previously mentioned, unless of course, there is something to show that a wide sense was intended;

(ii) If the particular words exhaust the whole genus, then the general words are construed as embracing a larger genus.

In other words, 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, A.I.R. 1971 S.C. 1033).* To apply the rule the following conditions must exist:

(1) The statute contains an enumeration by specific words,

(2) The members of the enumeration constitute a class,

(3) The class is not exhausted by the enumeration,

(4) A general term follows the enumeration,

(5) There is a distinct genus which comprises more than one species, and

(6) There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires. *(See Thakura Singh v. Revenue Minister, AIR 1965 J & K 102)*

Question: Which of the given is not a primary rule of Interpretation?

Options:

(A) Literal Construction

(B) Heydon's rule

(C) *Noscitur a Sociis*

(D) *Ejusdem Generis*

Answer: (C)

The rule of *ejusdem generis* must be applied with great caution because, it implies a departure from the natural meaning of words, in order to give them a meaning or supposed intention of the legislature. The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus.

Whether the rule of *ejusdem generis* should be applied or not to a particular provision depends upon the purpose and object of the provision which is intended to be achieved.

(ii) Other Rules of Interpretation

(a) *Expressio Unis Est Exclusio Alterius*

The rule means that express mention of one thing implies the *exclusio*n of another.

At the same time, general words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction; because many things are put into a statute ex *abundanti cautela*, and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute. 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)*

(b) *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.

But if the statute appears to be capable of only interpretation, the fact that a wrong meaning had been attached to it for many years, will be immaterial and the correct meaning will be given by the Courts except when title to property may be affected or when every day transactions have been entered into on such wrong interpretation.

(c) *Noscitur a Sociis*

'*Noscitur* a *Sociis*', i.e., "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words. It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim 'noscitur a socitis' has much relevance in understanding the import of words in a statutory provision *(K. Bhagirathi G. Shenoy v. K.P. Ballakuraya, AIR 1999 SC 2143).*

The rule states that where two or more words which are susceptible of analogous meaning are coupled together, they are understood in their cognate sense. It is only where the intention of the legislature in associating wider words with words of narrower significance, is doubtful that the present rule of construction can be usefully applied.

The same words bear the same meaning in the same statute. But this rule will not apply:

(i) When the context excluded that principle.

(ii) If sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.

(iii) Where it would cause injustice or absurdity.

(iv) Where different circumstances are being dealt with.

(v) Where the words are used in a different context.

(d) Strict and Liberal Construction

In Wiberforce on Statute Law, it is said that what is meant by 'strict construction' is that "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", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute". Beneficial construction to suppress the mischief and advance the remedy is generally preferred.

A Court invokes the rule which produces a result that satisfies its sense of justice in the case before it. "Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (viz., the literal rule, the golden rule and the mischief rule) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another. Sometimes a Court discusses all the three approaches. Sometimes it expressly rejects the 'mischief rule' in favour of the 'literal rule'. Sometimes it prefers, although never expressly, the 'mischief rule' to the 'literal rule'.

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. These are:

(a) That the words in a statute are used precisely and not loosely.

(b) 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.

(c) 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*" (The act itself does not constitute guilt unless done with a guilty intent).

(d) That the state is not affected by a statute unless it is expressly mentioned as being so affected.

(e) 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.

(f) That the legislature knows the state of the law.

(g) That the legislature does not make any alteration in the existing law unless by express enactment.

(h) That the legislature knows the practice of the executive and the judiciary.

(i) Legislature confers powers necessary to carry out duties imposed by it.

(j) 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.

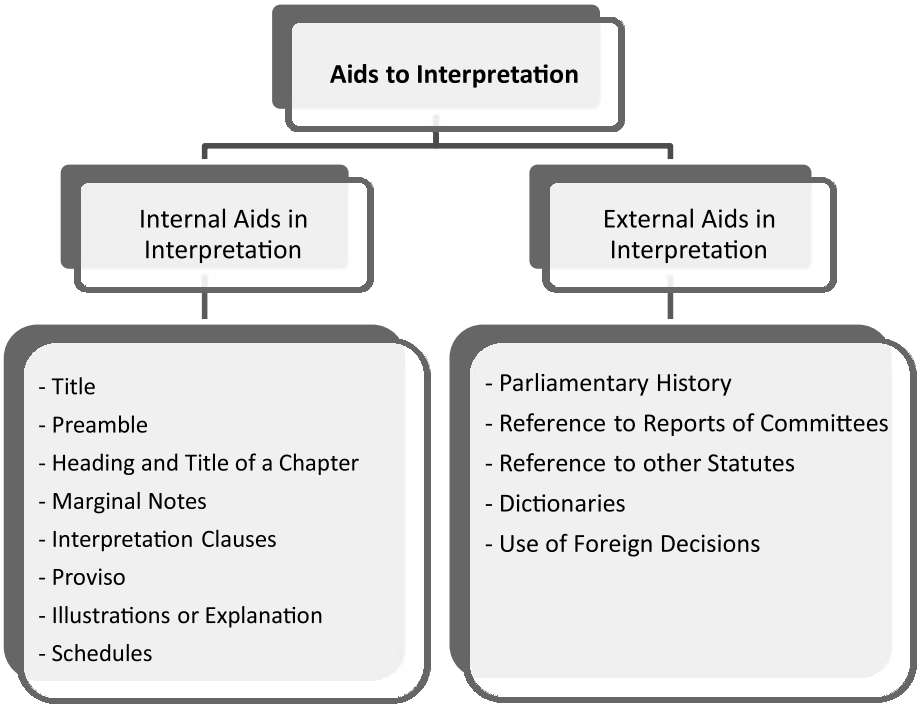
(jj) The law compels no man to do that which is futile or fruitless.

(k) 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. It is a well settled rule of interpretation that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

(l) 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.

(m) The doctrine of natural justice is really a doctrine for the interpretation of statutes, under which the Court will presume that the legislature while granting a drastic power must intend that it should be fairly exercised.

AIDS TO INTERPRETATION



In coming to a determination as to the meaning of a particular Act, it is permissible to consider two points, namely,

(1) The external evidence derived from extraneous circumstances, such as, previous legislation and decided cases etc., and

(2) The internal evidence derived from the Act itself.

(a) Internal Aids in 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.

While dealing with the Supreme Court Advocates (Practice in High Court) Act, 1951 bearing a full title as "An Act to authorise Advocates of the Supreme Court to practice as of right in any High Court", S.R. Das, J. observed:" One cannot but be impressed at once with the wording of the full title of the Act. Although there are observations in earlier English Cases that the title is not a part of the statute and is, therefore, to be excluded from consideration in construing the statutes. It is now a settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of an enactment.

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". This rule has been applied to Indian statutes also by the Privy Council in *Secretary of State v. Maharaja Bobbili, (1920) 43 Mad. 529*, and by the Courts in India in a number of cases (See for example, *Burrakur Coal Co. v. Union of India, AIR 1961 SC 154*. Referring to the cases *in Re. Kerala Education Bill, AIR 1958 SC 956* and *Bishambar Singh v. State of Orissa, AIR 1954 SC 139,* the Allahabad High Court has held in *Kashi Prasad v. State, AIR 1967 All. 173*, that even though the preamble cannot be used to defeat the enacting clauses of a statute, it has been treated to be a key for the interpretation of the statute.

Supreme Court in *Kamalpura Kochunni v. State of Madras, AIR 1960 SC 1080,* pointed out that the preamble may be legitimately consulted in case any ambiguity arises in the construction of an Act and it may be useful to fix the meaning of words used so as to keep the effect of the statute within its real scope.

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". But according to the other view, resort to the heading can only be taken when the enacting words are ambiguous. So Lord Goddard, C.J. expressed himself as: However, the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the sections where there cannot be any doubt as to the ordinary meaning of the words". Similarly, it was said by Patanjali Shastri, J.: "Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment". In this regard, the Madhya Pradesh High Court in *Suresh Kumar* v. *Town Improvement Trust, AIR 1975 MP 189*, has held: "Headings or titles prefixed to sections or group of sections may be referred to as to construction of doubtful expressions; but the title of a chapter cannot be used to restrict the plain terms of an enactment".

The Supreme Court observed that, "the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or the sub-heading may be referred to as an aid for construing the provision but even in such a case aid could not be used for cutting down the wide application of the clear words used in the provision" *(Frick India Ltd. v. Union of India, AIR 1990 SC 689)*.

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*). At any rate, there can be no justification for restricting the section by the marginal note, and the marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear and unambiguous *(Chandraji Rao v. Income-tax Commissioner, A.I.R. 1970 S.C. 158).*

The Privy Council in *Balraj Kumar v. Jagatpal Singh, (1904) 26 All. 393*, has held that the marginal notes to the sections are not to be referred to for the purpose of construction. The Supreme Court in *Western India Theatres Ltd. v. Municipal Corporation of Poona, (1959) S.C.J. 390*, has also held, that a marginal note cannot be invoked for construction where the meaning is clear.

Marginal notes appended to the Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore, they have been made use of in consulting the Articles, e.g. Article 286, as furnishing prima facie, "some clue as to the meaning and purpose of the Article".

When reference to marginal note is relevant? The Supreme Court has held that the marginal note although may not be relevant for rendition of decisions in all types of cases but where the main provision is sought to be interpreted differently, reference to marginal note would be permissible in law. *[Sarbajit Rick Singh v. Union of India (2008) 2 SCC 417; See also Dewan Singh v. Rajendra Prasad (2007) 1 Scale 32].*

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.

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive, whereas where the word defined is declared to 'include' such and such, the definition is prima facie extensive. Further, a definition may be in the form of 'means and includes', where again the definition is exhaustive. On the other hand, if a word is defined 'to apply to and include', the definition is understood as extensive. (See *Balkrishan v. M. Bhai AIR 1999 MP 86*)

A definition section may also be worded in the form 'so deemed to include' which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within the word defined which according to ordinary meaning is not included within it.

A definition may be both inclusive and exclusive, i.e., it may include certain things and exclude others. In such a case limited *exclusio*n of a thing may suggest that other categories of that thing which are not excluded fall within the inclusive definition.

The definition section may itself be ambiguous and may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition

is to give precision and certainty to a word or a phrase which would otherwise be vague and uncertain but not to contradict or supplement it altogether.

When a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the statute.

When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language, the provision and the object intended to be served thereby.

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".

A distinction is said to exist between the provisions worded as 'proviso', 'exception' or 'saving clause'. 'Exception' is intended to restrain the enacting clause to particular cases; 'proviso' is used to remove special cases from the general enactment and provide for them specially; and 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

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).*

An explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an explanation may have been added ex *abundanti cautela* to allay groundless apprehension.

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.

There are two principles or rules of interpretation which ought to be applied to the combination of an Act and its schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is prima facie at any rate devoted to that purpose, then the Act and the schedule must be read as if the schedule were operating for that purpose only. If the language of a clause in the schedule can be satisfied without extending it beyond for a certain purpose, in spite of that, if the language

of the schedule has in its words and terms that go clearly outside the purpose, the effect must be given by them and they must not be treated as limited by the heading of the part of the schedule or by the purpose mentioned in the Act for which the schedule is prima facie to be used. One cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act.

Whether a particular requirement prescribed by a form is mandatory or directory may have to be decided in each case having regard to the purpose or object of the requirement and its interrelation with other enacting provisions of the statute; and it is difficult to lay down any uniform rule. Where forms prescribed under the rules become part of rules and, the Act confers an authority prescribed by rules to frame particulars of an application form, such authority may exercise the power to prescribe a particular form of application.

The statement of objects and reasons as well as the 'notes on clauses of the Bill relating to any particular legislation may be relied upon for construing any of its provisions where the clauses have been adopted by the Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original Bill and it will be unsafe to attach undue importance to the statement of objects and reasons or notes on clauses.

The Courts have only to enquire, what the legislature has thought fit to enact?

Regarding the reference to the statement of objects and reasons, it is a settled law that it can legitimately be referred to for a correct appreciation of:

(1) what was the law before the disputed Act was passed;

(2) what was the mischief or defect for which the law had not provided;

(3) what remedy the legislature has intended; and

(4) the reasons for the statute.

(b) External Aids in Interpretation

Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. Where the words of an Act are clear and unambiguous, no resource to extrinsic matter, even if it consists of the sources of the codification, is permissible. But where it is not so, the Court can consider, apart from the intrinsic aids, such as preamble and the purview of the Act, both the prior events leading up to the introduction of the Bill, out of the which the Act has emerged, and subsequent events from the time of its introduction until its final enactment like the legislation, history of the Bill, Select Committee reports.

Parliamentary History

The Supreme Court, enunciated the rule of *exclusio*n 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.

It has already been noticed that the Court is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute", or to have regard to "the surrounding circumstances" which existed at the time of passing of the statute. Like any other external aid, the inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself.

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*].

When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision *(Davis v. Johnson (1978) 1 All. E.R. 1132).* But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

Present trends in the European Economic Community Countries and the European Court, however, is to interpret treaties, conventions, statutes, etc. by reference to travaux preparatories, that is, all preparatory records such as reports and other historical material.

Reference to other Statutes

It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in pari materia, i.e., statutes dealing with the same subject matter or forming part of the same system. Viscount Simonds conceived it to be a right and duty to construe every word of a statute in its context and he used the word in its widest sense including other statutes in pari materia.

The meaning of the phrase 'pari materia' has been explained in an American case in the following words: "Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the words simlis. It is used in opposition to it intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. When the two pieces of legislation are of differing scopes, it cannot be said that they are in pari materia.

It is well accepted legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and subjects of the Act.

Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. But the later law is entitled to weight when it comes to the problem of construction.

Generally speaking, a subsequent Act of a legislature affords no useful guide to the meaning of another Act which comes into existence before the later one was ever framed. Under special circumstances the law does, however, admit of a subsequent Act to be resorted to for this purpose but the conditions, under which the later Act may be resorted to for the interpretation of the earlier Act are strict. Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings.

Although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at the repealed Act in pari materia on a question of construction.

The regulations themselves cannot alter or vary the meaning of the words of a statute, but they may be looked at as being an interpretation placed by the appropriate Government department on the words of the statute. Though the regulations cannot control construction of the Act, yet they may be looked at, to assist in the interpretation of the Act and may be referred to as working out in detail the provisions of the Act consistently with their terms.

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". As stated by Krishna Aiyar, J. "Dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically the definition clause furnish a different denotation". Further, words and expressions at times have a 'technical' or a 'legal meaning' and in that case, they are understood in that sense. Again, judicial decisions expounding the meaning of words in construing statutes in pari materia will have more weight than the meaning furnished by dictionaries.

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.

Question : Which of the following is Internal aid to Interpretation?

Options:

(A) Marginal Notes

(B) Parliamentary History

(C) Reference to Reports of Committees

(D) Reference to other Statutes

Answer: (A)

CASE LAW

The Authority for Clarification and Advance Ruling & Anr. v. M/s. Aakavi Spinning Mills (P) Ltd decided by Supreme Court on 12.01.2022

The Authority for Clarification and Advance Ruling, had held that the commodity "Hank Yarn", as stipulated in Entry 44 of Part B of the Fourth Schedule to the Tamil Nadu Value Added Tax Act, 2006 ('the Act'), meant only "Cotton Hank Yarn" and not "Viscose Staple Fiber ('VSF') Hank Yarn". The learned Single Judge of the Hon'ble High Court agreed with the interpretation. Per contra, the Division Bench of the High Court was of the view that no external aid for interpretation was called for when the language of the Entry in question was clear in itself. The Division Bench was also of the view that even the referred Budget speech did not specifically mention that there was any intention to restrict the exemption only to "Cotton Hank Yarn". The appeal was made to the Apex Court.

The Hon'ble Supreme Court decided and reiterated that, *there is no occasion to refer to the external aids like Finance Minister Speech in the present case, in view of the plain language in Entry 44* and even if one were to do so, there is no occasion to make an inference from the said Budget Speech that only cotton Hank yarn was entitled to be exempted. Cotton Hank yarn continues to be exempt in Entry 44 ....

LEGAL TERMINOLOGIES & LEGAL MAXIMS

A priori: From the antecedent to the consequent.

Ab initio: From the beginning.

Absolute sententia expositore non indiget: Plain words require no explanation.

Actio mixta: Mixed action.

Actio personalis moritur cum persona: A personal right of action dies with the person.

Actionable per se: The very act is punishable and no proof of damage is required.

Actus Curiae Neminem Gravabit: Act of the Court shall prejudice no one.

Actus non facit reumnisi mens sit rea: An act does not make a man guilty unless there be guilty intention.

Actus reus: Wrongful act.

Ad hoc: For the particular end or case at hand.

Ad idem: At the same point.

Ad valorem: According to value.

Aliunde: From another source.

Amicus Curiae: A friend of court member of the bar who is appointed to assist the Court.

Animus possidendi: Intention to possess

Audi alteram partem: Hear the other side.

Benami: Nameless.

Bona fide: Good faith; genuine.

Caveat: A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator.

Caveat emptor: Let the buyer beware.

Caveat actor: Let the doer beware.

Caveat venditor: Let the seller beware.

Certiorari: A writ by which records of proceeding are removed from inferior courts to High Court and to quash decision that goes beyond its jurisdiction.

Cestui que trust: The person who has the equitable right to property in India he is known as beneficiaries.

Consensus ad idem: Common consent necessary for a binding contract.

Contemporanea expositio est optima et fortissima lege: A contemporaneous exposition or language is the best and strongest in Law.

Corpus delicti: Body/gist of the offence.

Cy pres: As nearly as may be practicable.

Damnum sine injuria: Damage without injury.

De facto: In fact.

De jure: By right (opposed to de facto) in Law.

Dehors: Outside; foreign to (French term).

De novo: To make something new; To alter.

Dies non: Day on which work is not performed.

Deceit: Anything intended to mislead another.

Del credre agent: Is a mercantile agent who in consideration of extra remuneration called a del credre commission undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts.

Delegate potestas nonpotest delegari: A delegated power cannot be delegated further.

Delegatus non potest delegare: A delegate cannot delegate.

Dictum: Statement of law made by judge in the course of the decision but not necessary to the decision itself.

Dispono: Convey legally.

Ejusdem generis: Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

Estoppel: Stopped from denying.

Ex parte: Proceedings in the absence of the other party.

Expressio unius est exclusio alterius: Express mention of one thing implies the *exclusio*n of another or which is shortly put.

Ex turpi causa non oritur actio: No action arises from an illegal or immoral cause.

Fatum: Beyond human foresight.

Fait accompli: Things done and no longer worth arguing against; an accomplished act.

Factum probandum: Fact in issue which is to be proved.

Factum probans: Relevant fact.

Ferae naturae: Dangerous by nature.

Force majeure: Circumstance beyond one's control, irresistible force or compulsion.

Generalia specialibus non derogant: General things do not derogate from special.

Habeas corpus: A writ to have the body to be brought up before the judge.

Ignorantia legis neminem excusat: Ignorance of law excuses no one.

Injuria sine damno: Injury without damage.

Interest reipublicae ut sit finis litium: State or public interest requires that there should be a limit to litigation.

Ipso facto: By the very nature of the case.

In promptu: In readiness.

In posse: In a state of possibility.

In limine: Initial stage; at the outset.

In lieu of: Instead of.

Inter alia: Among other things.

Inter se: Among themselves.

In specie: In kind.

Inter vivos: Between living persons.

Intra vires: Within the powers.

In personam: A proceeding in which relief is sought against a specific person.

Indicia: A symbol; token; mark.

Innuendo: Allusive remark.

Jus in personam: Right against a person.

Jus in rem: Right against the world at large.

Jus non scriptum: Unwritten law; Customary Law.

Jus scriptum: Written Law.

Lex Marcatoria: The law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards became incorporated into it.

Lex fori: The law of the forum of court.

Lis: A suit cause of action.

Lis pendens: A pending suit.

Locus standi: Right of a party to an action to appear and be heard on the question before any tribunal.

Mala fide: In bad faith.

Mandamus: A writ of command issued by a Higher Court to a Lower Court/Government/ Public Authority.

Mens rea: Guilty mind.

Manesuetae natureae: Harmless by nature.

Mesne profits: The rents and profits which a trespasser has received/made during his occupation of premises.

Misnormer: A wrong name.

Mutatis-mutandis: With necessary changes in points of detail.

Noscitur a sociis: A word is known by its associated, one is known by his companions.

Obiter dictum: An incidental opinion by a judge which is not binding.

Onus Probandi: Burden of proof.

Pari passu: On equal footing or proportionately.

Per se: By itself taken alone.

Persona non-grata: Person not wanted.

Per incuriam: Through want of care; through inadvertance.

Prima facie: At first sight; on the face of it.

Profit a prendre: A right for a man in respect of his tenement.

Pro bono publico: For the public good.

Pro forma: As a matter of form.

Pro rata: In proportion.

Posteriori: From the consequences to the antecendent.

Puisne mortgage: Second mortgage.

Pari causa: Similar circumstances, with equal right.

Pari materia: Relating to same person or thing.

Qui facit per alium facit per se: He who acts through another is acting by himself.

Quo warranto: A writ calling upon one to show under what authority he holds or claims an office.

Quia timet: Protective justice for fear. It is an action brought to prevent a wrong that is apprehended.

Quid pro quo: Something for something.

Ratio decidendi: Principle or reason underlying a decision.

Res judicata: A decision once rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be agitated again.

Res ipsa loquitur: The things speak for itself.

Respondent superior: Let the principal be liable.

Res sub judice: Matter under consideration.

Res gestae: Facts relevant to a case and admissible in evidence.

Rule nisi: A rule which will become imperative and final unless cause to be shown against it.

Scire facias: Your cause to know.

Status quo: The existing state of things at any given date.

Scientiet volenti non fit injuria: Injury is not done to one who knows and wills it.

Spes successionis: Chance of a person to succeed as heir on the death of another.

Supra: Above; this word occurring by itself in a book refers the reader to a previous part of the book.

Suppressio veri: Suppression of previous knowledge.

Sui juris: Of his own right.

Simpliciter: Simply; without any addition.

Scienter: Being aware of circumstances, the knowledge of which is necessary to make one liable, as applied to the keeper of a vicious dog, means no more than reasonable cause to apprehend that he might commit the injury complained of.

Sine qua non: An indispensable condition.

Situs: Position; situation; location.

Suo motu: On its own motion.

Stare decisis: Precedent. Literally let the decision stand.

Sine die: Without a day being appointed.

Travaux preparatotries: Preparatory records.

Tortum: Civil wrong actionable without contract.

Uberrimae fide: Of utmost good faith.

Ubi jus ibi remedium: Where there is a right there is remedy.

Ultra vires: Beyond the scope, power or authority.

Ut lite pendente nihil innovertur: Nothing new to be introduced during ligitation.

Usufructuary: One who has the use and reaps the profits of property, but not ownership.

Ut res magis valeat quam pereat: The words of a statue must be construed so as to give a sensible or reasonable meaning to them.

Vis major: Act of God.

Vigilantibuset, non dormientibus, jura subveniunt: The laws help those who are vigilant and not those who are slumber or lazy.

Vice versa: The order being reversed; other way round.

Volenti non fit injuria: Damage suffered by consent gives no cause of action.

READING A BARE ACT & CITATION OF CASES

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:

1. A Bare Act should be read according to the context
2. Definition clause of the Act & *pari materia* statutes and General Clauses Act may be referred to
3. Literal interpretation should be given initially
4. Break the sentence but understand a provision as a whole
5. Read – understand – apply rule would be beneficial
6. 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)

Equivalent Citation is also an important mean to refer the cases which means parallel citations. They are used to refer to the citations of same cases published in other journal.

The citation generally gives an indication to the name of the parties, year of judgement, volume number, Abbreviated title of journal, page number.

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.

CASE LAW

In *Nabendu Dutta v. Arindam Mukherjee [2004] 121 Comp Cas 150 (Cal)* it was held that interpretation of the words of any statute cannot be given effect so as to frustrate or defeat the object of the act or to lead to an absurdity. The language mentioned in clause (g) of sub section (1) of section 274 of the Companies Act, 1956, clearly suggests that on the date of the commencement of the amending act (Companies (Amendment) Act, 2000) if any person has been a director in the defaulting company he will be affected by this subsection. Although the Legislature has not made any retrospective operation expressly, yet the language employed therein contextually makes it implicit that the Legislature intends retrospective operation. The words “is already a director” suggest, a person continuing to be director till the date of commencement of the amendment act. This is supported by the words “has failed to repay its deposits”. The plain grammatical position of these latter few words suggests that the failure has started even before the commencement of the amendment act. If the operation of the language is intended by the Legislature to indicate a future event or occurrence, then the words “has failed to deposit” or “is already a director” would not have been employed in the sub section.

USE OF "MAY" AND "SHALL"

The words "shall" or "may" used in a provision depends on the nature of compliance and gravity of non-compliance. 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.

However, this rule cannot be applied in all the situations while interpreting a statute. There are many cases where 'shall' is used even if the nature of the provision is permissive or discretionary and may is used when nature of the provision is mandatory. This may happen due to various reasons including mistake or confusion of the draftsman. Also the drafters may find it easy to use 'shall' leaving it to the courts to interpret the provision.

The word "may" is often read as "shall" or "must" when there is something in the nature of the thing to be done which makes it the duty of the person on whom the power is conferred to exercise the power. There are several court decisions in which the word 'shall' is held as 'may' and *vice versa*.

CASE LAW

P.N. Chockalingam Pillai vs A. Natarajan And Ors.: (2001) 3 MLJ 661

The Madras High Court has decided the matter in which a question relating to nature of provision regarding laying the notification before the Legislature was raised. The Madras High Court has decided as under:

"Considering the word "shall" used, the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as pre-emptory. The term "shall" in its ordinary significance is mandatory and the Court shall ordinarily give that interpretation to that term unless such interpretation leads to absurd or inconvenient or be at variance with the intent of the Legislature to be collected from the other parts of the Act....

...We are in the agreement with the conclusion of the learned Judge that the provisions of the statute conferring on the State Government to lay the notification before the Legislature should be strictly followed. We hold that the provision, namely Sub-section (6) in Section 1 is mandatory and not directory."

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:

Example

Under Companies Act, 2013 "document" includes summons, notice, requisition, order, declaration, form **and** register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form.

Under this situation if 'and' is used as conjunctive than the interpretation would not be correct.

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.

It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. There is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute, a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may then have to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section.

In some cases a proviso may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant.

CASE LAW

In *A.N. Sehgal & Ors 1991 AIR SCW 1246,* the Supreme Court stated as follows:

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso 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. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect.

DEEMING PROVISIONS

A provision in a statute which contains the word 'deemed' is called a deeming provision or legal faction. 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.

Example

Section 314(2)(a) of the Companies Act 1956 provides that 'If any office or place of profit is held in contravention of the provisions of sub-section (1), the director, partner, relative, firm, private company, or the manager concerned, shall be deemed to have vacated his or its office as such on and from the date next following the date of the general meeting of the company referred to in the first proviso....'

Sometimes a deeming provision is used simply to provide that something will not be treated as a particular way, e.g. 'Provided that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been shown to the company to be invalid or to have terminated'.

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.

In construing the scope of legal fiction, it would be proper and necessary to assume all those facts, on which alone the legal fiction can operate. The court is entitled and bound to ascertain the purpose for which the statutory fiction is created to ascertain as to what persons are entitled to the benefit of statutory fiction.

But a fiction created by law cannot operate beyond the purpose for which it has been created, It is a well known principle of construction that in interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The full effect must be given to the fiction and then it should be carried to its logical end.

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.

This principle is also expressed in the Latin maxim Generalia specialibus non derogant (also known as the rule of implied exception) meaning general things do not derogate from special things; things general do not restrict or detract from things special; universal things do not detract from specific things. This well-known proposition

of law says that when a matter falls under any specific provision, then it must be governed by that provision and not by the general provision. The general provisions must admit to the specific provisions of law. It is a basic principle of statutory interpretation.

In *Pretty v. Solly (1859-53 ER 1032)* quoted in Craies on Statute Law at p. 206, 6th Edition) Romilly, M. R., mentioned the rule thus:

"The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

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

After discerning, the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the statute *pro bono publico*.

In interpreting legislation which was clearly in furtherance of the Directive Principles of State Policy under article 39 (b) and (c) of the constitution of India, the court cannot adopt a doctrinaire or pedantic approach. It is a well-known rule of construction that in dealing with such a beneficent piece of legislation, the court ought to adopt a construction which would subserve and carry out the purpose and object of the Act rather than defeat it. Surplus Lands of the textile mills taken over under sub-section (1) of section 3 of the Textile Undertakings (Taking over of Management) Act, 1983 are but a vital physical resource capable of generating and sustaining economic growth of the Textile mills. There can be no doubt that the legislative intent and object of the Act was to secure the socialization of such surplus lands with a view to sustain the sick textile undertakings so that they could properly be utilized by the company for social good, i.e. in resuscitating the dying textile undertakings.[4]

In construing social welfare legislation, the courts should adopt a beneficent rule of construction and in any event, that construction should be preferred which fulfils the policy of the legislation. Construction to be adopted should be more beneficial to the purpose in favour of and in whose interest the Act has been passed. So it is clear that in the matter of interpretation of a beneficial legislation, the approach of the courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat that purpose.

Further, it is a well-known canon of interpretation of statutes that in interpreting social welfare legislation, the court will normally adopt an interpretation which would favour persons sought to be benefited by the legislation. Where the courts are faced with a choice between a wider meaning which carries out more fully what appears to have been the object of the Legislature and a narrow meaning which carries it out less fully or not at all, they will often choose the former.

It is a sound rule of construction to confine the provisions of a statute to itself. The benefits intended by

4. National Textile Corporation Ltd. v. Sitaram Mills Ltd. (1987) 61 Comp Cas 373 (SC)

social welfare legislation such as the Employees Provident Funds and Miscellaneous Provisions Act and the Employees State Insurance Act 1948, cannot be defeated by granting relief under section 633 of the Companies Act to directors of the Companies in relation to offences under those Acts.[5]

INTERPRETATION OF PROCEDURAL LAW

By its very nomenclature, Bharatiya Nagarik Suraksha Sanhita, 2023, 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.

The principle was succinctly stated by Lord Russell of Killowon in *Inland Revenue Commrs. v. Duke of West-Minster, 1936 AC 1 at p. 24(A)*:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstance of his case.'

As Lord Cairns said many years ago in *Partington v. The Attorney General, (1869) 4 H L 100 at p. 122 (B):*

'As I understand the principle of all fiscal legislation it is this; if the person sought to be taxed, comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'

Relying on the above cases and discarding the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position, the Supreme Court said in *A. V. Fernandez v. The State of Kerala AIR 1957 SC 657*:

"It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the, substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

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

5. Rabindra Chamaria v. Registrar of Companies (1992) 73 Comp Cas 257 (SC)
6. Shivjee Singh v. Nagendra Tiwary 2010 AIR SCW 4064

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.

However, in the preface to the Government publication 'Clarifications and Circulars on Company Law', Mr. K.K. Ray, the then Secretary to the Government of India and Chairman, Company Law Board said:

"*A perusal of these clarifications, circulars, instructions and orders will show that the Department has tried to take a broad and balanced view of the various issues in the light of the intention underlying the statute and the accepted administrative policies of the Government relating to trade, industry and corporate management. It should, however, be noted that these clarifications, etc., only reflect the thinking of the Department at the time when they were issued and do not bind it to that line of thinking. The Department has always an open mind and will be perfectly willing to change its thinking on any particular aspect of the matter, if a better view is shown to be possible. These clarifications should not, therefore, be cited as an authority of a binding character as is usually done in courts.*"

Therefore, delegated legislations are valid laws but inter alia are subject to the parent act and should be based on principle of Natural Justice.

CONFLICT BETWEEN STATUTE, RULES AND REGULATIONS

It is well settled rule of statutory interpretation that when a rule or form prescribed under a statute conflicts with a statutory provision, the latter will prevail.

In *General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav AIR 1988 SC 876,* the Supreme Court inter alia stated *that:*

"It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (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 rule so framed would be void."

In the case *Union of India v. Namit Sharma 2013 AIR SCW 5382*, it was inter alia stated that if the rules are made by the rule making authority and the rules are not in accordance with the provisions of the Act, the Court can strike down such rules as ultra vires the Act, but the Court cannot direct the rule making authority to make the rules where the Legislature confers discretion on the rule making authority to make rules.

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 ensures. 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.[7]

CASE LAW

In the case of *Umesh Challiyil vs K.P. Rajendran 2008 AIR SCW 1743*, the matter of minor defect has been decided. It may be summarized as under:

Where in an affidavit it was stated "no part thereof is false" instead of "I believe to be true", the Supreme Court held that the substance and the essence had been conveyed by the words used; both the phraseologies convey the same meaning; practically the same sense was conveyed and it was not such a defect which could entail dismissal of the election petition.

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.

CASE LAW

In the case of *Raj Kumar Dey and Others vs Tarapada Dey and Others 1987 AIR 2195, 1988 SCR (1) 118,* where the arbitrators could not take back the award from the custody of the Court to take any further steps for its registration, the Supreme Court held that the entire period during which award remained in custody of Court should be excluded and it could not be said that they failed to get the award registered as the law required i.e. within period of four months.

7 J. P. Srivastava & Sons v. Gwalior Sugar Co. Ltd. [2004] 122 Com Cas 696 (SC)
8. Maxwell on the Interpretation of Statutes, 12th edition, page 326.

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]

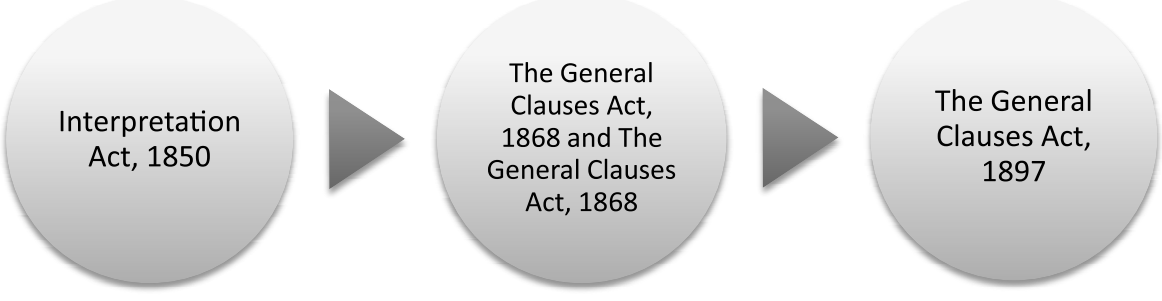
The rule of strict interpretation of penal statutes in favour of an accused may not be of rigid or universal application. It may be considered along with other well established rules of interpretation. When it is seen that the scheme and object of the statute are likely to be defeated by a strict interpretation, 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.[10]

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;

9. State of Madhya Bharat v. Hiralalji and another [1953] 23 Comp Cas 201
10. Smt. Sosamma vs Rajendran And Anr. 994 80 CompCas 503 Ker, 1993 CriLJ 2196

(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.

CASE LAW

In the case of *Chief Inspector of Mines vs. K.C.Thapar, AIR 1961, SC 838, 843,* Supreme Court has observed that "Whatever the General Clauses Act say whether as regards the meaning of words or as regards legal principles, has to be read into every Act to which it applies."

Definitions

Section 3 is the principal section of the Act which contain 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 *(N. Subramania Iyer v. Official Receiver, AIR 1958 SC 1*).

Even when a definition given in an Act is exhaustive, it may have to be read differently in the context in which it occurs. That is why definition sections always begin with the words "unless the context otherwise requires" (which is another variation of the expression "unless there is anything repugnant in the subject or context"). It has been observed in cases like *Knightsbridge Estates Trust Ltd. v. Byrne & Co. (1940) AC 613* and *Choudhary Mohammed v. Sebait of Sri Sri Ishwar etc., AIR 1943 Cal. 36,* that the omission of words like "unless there is anything repugnant in the subject or context" may be of little import in certain cases because some such words would always be implied in statutes where the expressions which are interpreted by a definition clause are used in a number of section with meanings sometimes of a wide and sometimes of an obviously limited character.

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

1. **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".

2. **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".

3. **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.

4. **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.

5. **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.

6. **Revival of repealed enactment: I**t shall be necessary, for the purpose of reviving` either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.

7. **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.

8. **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.

9. **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.

10. **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 and express provision to the contrary.

11. **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.

12. **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.

The Principal Legislation/Statute

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

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.

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; and (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.

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.

Notifications under Section 462 exempt certain companies from the applicable provision of the Act. At the time of reading a Section mentioned under an Exemption Notification dealing with a certain class of companies, one must read such Section in respect of that class of companies as amended by the Exemption Notification for that class. Exemption notifications effectively amend these Sections for the purpose of the class of companies with which the Exemption Notification deals.

The Central Government may amend schedules of the Act using power given under Section 467. Schedules must be read with the main Section.

Wherever a Section of the Companies Act, 2013 use words "*as may be prescribed*" it is an indication the Legislature has delegated powers to the Executive on that particular point. Section 469 empowers the Central Government to make rules for Sections which do not delegate such powers to the Central Government.

While provisions of the Act along with Exemption Notifications and Schedules, deals with the policy framework of the law; rules deals with the procedures. Rules cannot change policy framework in any manner and cannot override substantial provision of the Section empowering the Rules.

Secretarial Standards are standards prepared by Institute of Company Secretaries of India to standardize secretarial practices under the Companies Act and other areas related to Secretarial Practices. By virtue of Explanation to Section 205(1), secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government are part of law itself. Further Section 118(10) mandates that every company shall observe secretarial standards with respect to General and Board meetings.

This whole ecosystem is called the Companies Law and should be read collectively and comprehensive.

How to read and understand a Section?

The Companies Act, 2013 is to be read with relevant Rules, Schedules under Companies Act, Circulars/ Clarifications issued by Ministry of Corporate Affairs.

For example Section 135 (Relating to Corporate Social Responsibility) is to be read with the Companies (Corporate Social Responsibility Policy) Rules 2014, Schedule VII (Activities relating to Corporate Social Responsibility) and circulars/clarifications issued by Ministry of Corporate Affairs on Section 135 & Rules made thereunder.

Reading provisions of Companies Act, 2013 with delegated legislations

For example when you read sections relating to issue of capital you should read the sections with Companies (Share Capital and Debentures) Rules, Companies (Prospectus and Allotment of Securities) Rules. Besides, other legislative aspects including the provisions of SEBI Act, SEBI (ICDR) Regulations, SEBI (LODR) Regulations, provisions of Depositories Act for dematerialization provisions and even the provisions of FEMA when the shares are issued to non-residents, wherever applicable, are required to be read in collusion.

Breaking sections into parts and preparing notes for each section:

Company law is so wide that it cannot be easily remembered after only one reading. Students may make notes for each topic about sections, the genesis, amendments notified, reasons for amendments along with delegated legislation. They may also make notes on exemptions provided, exceptions and the reasons behind such exemptions/ exceptions. This will help in understanding the background of the provisions, the spirit of law and would help in remembering the provisions also. The exemptions provided for certain class of companies under Section 462 of Companies Act are provided in the e-book at MCA portal under respective sections.

Students may break the sections at relevant places and giving emphasis on critical words and read for getting more clarity.

For examples Section 2(6) deals with the Definition of "Associate Company" which may be read with the following breaks.

"associate company", in relation to another company ...../,

means a company in which that other company has a significant influence ...../,

but which is not a subsidiary company of the company having such influence and...../.

includes a joint venture company.

Explanation. – For the purpose of this clause, –

(a) the expression "significant influence" means control of at least twenty percent of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

Thus the definition can be read by breaking at the places as indicated above, by understanding the terms 'joint venture company', 'significant influence' and the definition of subsidiary as mentioned in section 2(87).

Interpretations of some standard words and Phrases used in Statutes

"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.

It is well settled that "the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

"Notwithstanding anything contained"

Notwithstanding means, in spite of; without being opposed or prevented by; nevertheless; although, regardless of. A provision in a statute beginning with the words 'Notwithstanding anything contained' is called a 'non-obstante' provision and is generally used in a statute to give an overriding effect to a particular section or the

statute as a whole. A non-obstante clause is used in a statutory drafting to create an exception to or override the provision which this phrase follows.

"Subject to"*- The ordinary meaning of the phrase 'subject to' is being dependent upon; conditional upon; subordinate to; subservient to something else to happen or to be true; that on the condition of the provisions of the specified section being observed or complied with. It is used to express the intention that when while complying with one statutory provision, another provision relating to the subject matter also must be complied with.*

"Nothing contained in this section" shall apply

The phrase "Nothing in this section shall apply" or "Nothing contained in this section shall apply", is frequently used in legislative drafting. Literally, it means anything contained in the preceding part of the section would not apply in the situation stated in the provision that begins with this phrase.

"Without prejudice to the provisions contained in this Act/any other Act"

The phrase 'without prejudice' means without dismissing, damaging, or otherwise affecting; without detriment; harm. So when one provision says 'without prejudice to any other provision', it means that no other provision is affected by that provision or that other provisions remain unaffected. This is a qualifying phrase used in statutory drafting in a provision to protect the operation of another provision which it refers to. In other words, both the provisions operate independently.

"That is to say"

This phrase explains or clarifies the preceding word, phrase or expression.

"For the purposes of this section/provision/definition"

It has limited applicability; it apples to only the relevant section / provision/ definition but applies to the whole of it.

"As the case may be"- The phrase is used when in a provision two or more things are covered and the provision is applicable to both or all of them.

"Shall"-When used in a statute, the presumption is that its use is mandatory and not merely directory.

"May" is either permissive or directory.

LESSON ROUND-UP

- A statute normally denotes the Act enacted by the legislature. The object of interpretation in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.
- The General Principles of Interpretation are Primary Rules and other Rules of Interpretation.
- The primary rules are:
  - Literal Construction
  - The Mischief Rule or Heydon's Rule
  - Rule of Reasonable Construction, i.e., *Ut Res Magis Valeat Quam Pereat*

  - Rule of Harmonious Construction
  - Rule of *Ejusdem Generis*
- Other Rules of Interpretation are:
  - *Expressio Unis Est Exclusio Alterius*
  - *Contemporanea Expositio Est Optima Et Fortissima in Lege*
  - *Noscitur a Sociis*
  - Strict and Liberal Construction
- Internal Aids in Interpretation are: Title; Preamble; Heading and Title of a Chapter; Marginal Notes; Interpretation Clauses; Proviso; Illustrations or Explanations; and Schedules.
- External Aids in Interpretation: Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. There are: Parliamentary History; Reference to Reports of Committees; Reference to other Statutes; Dictionaries and Use of Foreign Decisions.
- 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.
- The words "shall" or "may" used in a provision depends on the nature of compliance and gravity of non-compliance. The standard rule is that the provision containing 'shall' is mandatory and the provision containing 'may' is either permissive or discretionary.
- 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.
- 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.
- While dealing with a taxing provision, the principle of 'strict interpretation' should be applied.
- The "doctrine of impossibility of performance" which is reflected in the legal maxims which court apply in interpreting a statutory provision
- 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.
- 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.

GLOSSARY

Statute Law: A Body of Law contained in Acts of the Parliament.

Delegated Legislation: A legislation made under the under powers conferred by an Act of parliament

Literal Construction: It is when 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 Mischief Rule or Heydon's Rule: The construction which "shall suppress the mischief and advance the remedy".

Reasonable Construction: It means to have regard to the subject matter of the statute and the object which it is intended to achieve in place of the words construed in their ordinary meaning.

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.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the need and object for interpretation of statutes.
2. Write notes on the following indicating their importance as an aid to interpretation of statutes:
   (i) Marginal Notes
   (ii) Interpretation clause.
3. What are the internal and external aids which could be taken into account while interpretation. Write short notes on:
   (i) Rule of Reasonable Construction, i.e., *Ut Res Magis Valeat Quam Pereat*
   (ii) The Mischief Rule or Heydon's Rule
4. Briefly discuss general principles of interpretation.
5. Explain the benefits of "Rule of Literal Interpretation".
6. Write a note on "Rule of *Ejusdem Generis"*.
7. Write a short note on reading methodology of the Companies Act, 2013.
8. Explain the importance of General Clauses Act, 1897.

LIST OF FURTHER READINGS

- Essential Rules of Interpretation of Statutes for Company Secretaries by CS (Dr.) K.R. Chandratre
  ICSI Publication
- Jagdish Swarup : Legislation and Interpretation
- Lawman's : General Clauses Act
- G.P. Singh : Principles of Statutory Interpretation; Wadhwa Publishing Company, Nagpur.
- B.M.Gandhi : Interpretation of Statutes; Eastern Book Company, 34, Lalbagh, Lucknow-226 001

Administrative Laws

Lesson 4

KEY CONCEPTS

■ Sources of Administrative Law ■ Rule of Law ■ Principle of Natural Justice ■ Regulations ■ Rules ■ Notifications

Learning Objectives

To understand:

- Administrative Law as a Branch of Public Law
- The necessity of Administrative Laws
- Origin and process of development of Administrative Laws
- Rule of law and its applicability
- The extent of discretion
- Principles of Natural Justice
- Responsibility of the government and contracts with government

Lesson Outline

- Introduction – Conceptual Analysis
- Need for Administrative Law
- Sources of Administrative Law
- Administrative Discretion
- Judicial Review & Other Remedies
- Principles of Natural Justice
- Liability of the Government, Public Corporation
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

Administrative law determines the organisation, power and duties of the administrative authorities.

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Constitution of India
- Delegated Legislations
- Judicial Precedents

INTRODUCTION – CONCEPTUAL ANALYSIS

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

A subset of public law is administrative law. It establishes the administrative and quasi-judicial authorities' organisational framework and power structure in order to enforce the law. It establishes a control system by which administrative agencies maintain their boundaries and is primarily concerned with official actions and processes.

Kenneth Culp Davis

He was a leading an American legal scholar on administrative law. He defines it as the law concerning the powers and procedures of administrative agencies, including especially the law governing the judicial review of administrative action. An administrative agency, according to him, is a government authority, other than a court and other than a legislative body, which affects the rights of private parties either through adjudication or rule-making. He further adds that apart from judicial review, the manner in which public officials handle business unrelated to adjudication or rule-making is not a part of administrative law. The formulation of administrative agency in this definition is restrictive as it seeks to exclude agencies having administrative authority pure and simple and not having adjudicative or legislative functions. This definition also does not cover purely discretionary functions which may be called (administrative) of administrative agencies not falling within the category of legislative or quasi-judicial.

Albert Venn Dicey

He was the great British constitutional scholar. According to him administrative law relates to that portion of a nation's legal system which determines the legal status and liabilities of all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced. Dicey's formulation focuses on one aspect of administrative law, i.e., judicial control over public officials. This definition is narrow as it leaves out of consideration many aspects of administrative law, e.g., Public Corporations would not be covered under this definition because, strictly speaking, they are not state officials.

Ivor Jennings

He defined administrative law as the law relating to administration. It determines the organization, powers and duties of administrative authorities. This formulation is too broad and general as it does not differentiate between administrative and constitutional law. It excludes the manner of exercise of powers and duties.

Administrative law is the by-product of ever increasing functions of the Governments. States are no longer police states, limited to maintaining internal order and protecting from external threats. These, no doubt continue to

be the basic functions but a state that is limited to this traditional role will de-legitimize itself. With the rise of political consciousness, the citizens of a state are no longer satisfied with the state's provisioning of traditional services. The modern state is, therefore, striving to be a welfare state. It has taken the task to improve social and economic condition of its people. It involves undertaking a large number of complex tasks. Development produces great economic and social changes and creates challenges in the field of health, education, pollution, inequality etc. These complex problems cannot be solved except with the growth of administration. States have also taken over a number of functions, which were previously left to private enterprise. All this has led to the origin and the growth of administrative law.

NEED AND SOURCES OF ADMINISTRATIVE LAW

Need for Administrative Law

The modern state has three organs- legislative, executive and judiciary. Traditionally, the legislature was tasked with the making of laws, the executive with the implementation of the laws and judiciary with the administration of justice and settlement of disputes. However, this traditional demarcation of role has been found wanting in meeting the challenges of present era. The legislature is unable to come up with the required quality and quantity of legislations because of limitations of time, the technical nature of legislation and the rigidity of their enactments. The traditional administration of justice through judiciary is technical, expensive and dilatory. The states have empowered their executive (administrative) branch to fill in the gaps of legislature and judiciary. This has led to an all pervasive presence of administration in the life of a modern citizen. In such a context, a study of administrative law assumes great significance.

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.

The ever-increasing administrative functions have created a vast new complex of relations between the administration and the citizen. The modern administration is present everywhere in the daily life of an individual and it has assumed a tremendous capacity to affect their rights and liberties.

Since the whole purpose of bestowing the administration with larger powers is to ensure a better life for the people, it is necessary to keep a check on the administration, consistent with efficiency, in such a way that it does not violate the rights of the individual. There is an age-old conflict between individual liberty and government control. There must be a constant vigil to ensure that a proper balance be evolved between private interest and government which represents public interest. It is the demand of prudence that when large powers are conferred on administrative organs, effective control-mechanism be also evolved so as to ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose. It is the task of administrative law to ensure that the governmental functions are exercised according to law and legal principles and rules of reason and justice.

The goal of administrative law is to ensure that the individual is not at receiving end of state's administrative power and in cases where the individual is aggrieved by any action of the administration, he or she can get it redressed. There is no antithesis between an effective government and controlling the exercise of administrative powers. Administrative powers are exercised by thousands of officials and affect millions of people. Administrative efficiency cannot be the end-all of administrative powers and the interests of people must be at the centre of any conferment of administrative power. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state.

A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control on the exercise of administrative powers.

***Example*:**

There are many areas of law where economic stakes of the public are involved. In these areas, offenders find new ways of non-compliances to gain unjust enrichment. Therefore, it is very difficult for Parliament to provide a comprehensive law covering all the aspects due to paucity of time and the dynamic nature of these laws.

So, the parliament delegates the power to legislate to the executive branch of government. Power of Government to make rules under the Companies Act, 2013 and power of Securities Exchange Board of India to make regulations under SEBI Act, 1992 may be seen as good examples of delegated legislation i.e. is administrative law.

Sources of Administrative Law

There are four principal sources of administrative law in India. They are as under -

1. ***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.

   Example: Article 318 of the Constitution of India empowers the President (Union Public service Commission) and Governor (State Public service commission) to make regulations with respect to the number of members or staff of the Commission(s) and their conditions of service.

2. ***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.

   Example: Insolvency and Bankruptcy Board of India is empowered to make regulations under Insolvency and Bankruptcy Code, 2016.

3. ***Ordinances, Administrative directions, Notifications 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.

   Example: *Ordinance* – President of India promulgated The Criminal Law (Amendment) Ordinance, 2013.

   Notifications – State Government may notify the rates of Minimum Wages for that particular state.

4. ***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.

   Example: Article 141 provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

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.

Dicey was highly influenced by the French concept of administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*). According to this, a citizen's lawsuit against a public servant for a wrongdoing done in that capacity will be handled by a special court rather than a regular court of law. *Droit administratif* contains a regulation that was created by the judges of the administrative court rather than laws and rules created by the French parliament.

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.

Few jurists have criticized his rule of law theory being not clear between administrative discretion with arbitrary discretion, emphasising on equality before law and feels that specific tribunals should not exist, opposition between ordinary courts and special courts, failed to recognise the need of specific laws and bodies etc.

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.

Judicial Aspect

Rule of Law in India has evolved with time. It can be understood with the help of given cases hereafter.

CASE LAW

State of Madhya Pradesh and Ors. vs. Thakur Bharat Singh (23.01.1967 - SC) : AIR 1967 SC 1170

The Supreme Court in this case, held that section 3 of Madhya Pradesh Public Security Act, 1959 is unconstitutional on grounds that it vest wide discretionary powers to the District Magistrate without any proper safeguards over such powers. It was observed that -

"Our federal structure is founded on certain fundamental principles : (1) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people....the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State - legislative, executive and judicial - each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive actions. We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority."

Kesavananda Bharati Sripadagalvaru and Ors. vs. State of Kerala and Anr. (1973) 4 SCC 225

The most critical case in Indian Judicial history with respect to the evolution of Rule of Law in India was Kesavananda Bharati case. This case changed the entire notion of doctrine of basic structure. A constitutional bench, consisting of 13 judges stated that Rule of law is the part of basic structure of the constitution of India. They observed -

"That Article 31C subverts seven essential features of the Constitution, and destroys ten Fundamental Rights, which are vital for the survival of democracy, the rule of law and integrity and unity of the Republic.

An amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the Federal Government, nor relinquish to the State those which already have been granted to it"

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.

Example

Mr. A approaches RTO office for confirmation of his driving license. It is the administrative discretion of RTO office to issue him his driving license after observing performance in driving tests.

JUDICIAL REVIEW AND OTHER REMEDIES

Judiciary has played a key role in imposing restrictions on administrative discretion and has from time to time directed the law makers to formulate the necessary guidelines and rules to maintain the conduct of administrative officers.

Any country which claims to have a rule of law cannot have a government authority which has no checks on its power. Administrative organs have wide powers and their exercise of discretion can be vitiated by a number of factors. Therefore, the government must also provide for proper redressal mechanism. For India, it is of special significance because of the proclaimed objectives of Indian polity to build a socialistic pattern of society that has led to huge proliferation of administrative agencies and processes

In India the modes of judicial control of administrative action can be conveniently grouped into three heads:



(A) *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.

It is the power of the both Supreme and High Court to determine the validity of the legislature and executive actions of the government. Constitution is considered as Supreme law and all other laws follows from it. Public authorities are bound by supreme law, i.e., Constitution and are bound to act in good faith.

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.

The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of authority or power conferred on the authority exercising the power. Where the act of executive or administration is found *ultra vires* the Constitution or the relevant Act, it is declared as such and, therefore, void. The Courts attitude appears to be stiffer in respect of discretionary powers of the executive or administrative authorities. The Court is not against the vesting of discretionary power in the executive, but it expects that there would be proper guidelines for the exercise of power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretion.

CASE LAWS

Airport Authority of India vs. Centre for Aviation Policy, Safety and Research and Ors. (30.09.2022 - SC) : CIVIL APPEAL NOS. 6615-6616 OF 2022

In this case, the Supreme Court observed that the Court has erred in interfering with the administration/policy decision of the tender making authority in exercise of powers Under Article 226 of the Constitution of India even deciding it on merits. The Court observed that -

"as per the settled position of law, setting of terms and conditions of invitation to tender are within the ambit of the administration/policy decision of the tender making authority and as such are not open to judicial scrutiny unless they are arbitrary, discriminatory or mala fide. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted"

S. Pratap Singh vs. The State of Punjab: AIR1964SC72

In this case Supreme Court summarised the power of judicial review by stating that -

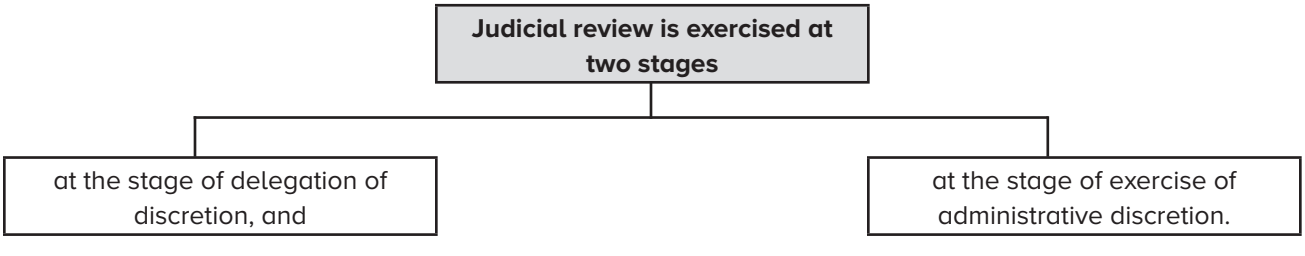
"The Court is not an appellate forum where the correctness of an order of Government could be canvassed and, indeed, it has no jurisdiction to substitute its own view as to the necessity or desirability of initiating disciplinary proceedings, for the entirety of the power, jurisdiction and discretion in that regard is vested by law in the Government. The only question which could be considered by the Court is whether the authority vested with the power has acted in mala fide for satisfying a private or personal grudge of the authority against the officer. If the act is in excess of the power granted or is an abuse or misuse of power, the matter is capable of interference and rectification by the Court."

Hind Construction and Engineering Co. Ltd. vs. Their Workmen: AIR1965SC917

In this case the Supreme Court held that the action taken by the employer was unreasonable, unjust and disproportionate. Court observed that -

"The Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice."

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.

In certain situations, the statute though does not give discretionary power to the administrative authority to take action, may still give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowing of such discretion on the ground of excessive delegation.

The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has been held violative of a fundamental right.

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.

The Court in determining the question of validity of such statute examines whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of executive to such an extent as to enable it to discriminate.

CASE LAW

State of West Bengal v. Anwar Ali, AIR 1952 SC 75

In this case, 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 Article19(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.

In a large number of cases, the question as to how much discretion can be conferred on the executive to control and regulate trade and business has been raised. The general principle laid down is that the power conferred on the executive should not be arbitrary, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority. Where the Act provides some general principles to guide the exercise of discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the executive has been granted unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision of law.

CASE LAW

Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211,

In this case, 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.

Hari v. Deputy Commissioner of Police, AIR 1956 SC 559,

The Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provision of law, which apparently appears to be a violation of the residence, was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order.

H.R. Banthis v. Union of India, 1979 1 SCC 166,

The Supreme Court in this case, declared a licensing provision invalid as it conferred an uncontrolled and unguided power on the executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, *inter alia,* the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand' was vague one. The expression 'suitability of the applicant and 'public interest' did not contain any objective standards or norms.

(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:

1. Authority has not exercised its discretion properly- 'abuse of discretion'.
2. Authority is deemed not to have exercised its discretion at all- 'non-application of mind."

1. ***Abuse of discretion***

   i. ***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. Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

   CASE LAW

   Tata Cellular v. Union of India, AIR 1996 SC 11

   The Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

   ii. **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.

   iii. **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.

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

   v. **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.

   vi. **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.

   vii. **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.

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

2. ***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. For example in *Commissioner of Police* v. *Gordhandas Bhanji, AIR 1952 SC 60*, the Police Commissioner empowered to grant license for construction of cinema theatres, granted the license but later cancelled it on the direction of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

(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 imposes 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.

(B) Statutory

The method of statutory review can be divided into two parts:

(i) ***Statutory appeals*:** There are some Acts, which provide for an appeal from statutory tribunal to the High Court or Supreme Court on point of law.

> ***Example***
>
> Under section 53B of the Competition Act, 2002 the Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT).
>
> Further, under section 53T of the said act, the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order.

(ii) ***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.

> ***Example***
>
> 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.

(C) Ordinary or Equitable

Apart from the remedies as discussed 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:

(i) **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.

(b) ***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.

(ii) **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.

(iii) **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. Principles of natural justice are not precise rules of unchanging content; their scope varies according to the context. Nevertheless it provides the foundation on which the whole super- structure of judicial control of administrative action is based.

In India, the principles of natural justice are derived from Article *14* and *21* of the Constitution. The courts have always insisted that the administrative agencies must follow a minimum of fair procedure, i.e. principles of natural justice. 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: (i) rule against bias and (ii) rule of fair hearing. In the course of time many sub-rules were added which are explained as under:

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:

(1) ***Pecuniary bias*:** The judicial approach is unanimous on the point that any financial interest of the adjudicatory authority in the matter, howsoever small, would vitiate the adjudication. Thus a pecuniary interest, howsoever insufficient, will disqualify a person from acting as a Judge.

CASE LAW

J. Mohapatra and Co. and Ors. vs. State of Orissa and Ors. (10.08.1984 - SC) : 1984 AIR 1572

In this case Odisha government formed an assessment committee to recommend books of certain authors to be sent to government schools. Committee consisted of authors whose books were recommended. The Supreme Court struck down the recommendation stating that one cannot be both a writer and part of recommending committee, stating possibility of bias. Court observed that-

"when a book of an author-member comes up for consideration, the other members would feel themselves embarrassed in frankly discussing its merits. Such author-member may also be a person holding a high official position whom the other members may not want to displease. It can be that the other members may not be influenced by the fact that the book which they are considering for approval was written by one of their members. Whether they were so influenced or not is, however, a matter impossible to determine. It is not, therefore, the actual bias in favour of the author-member that is material but the possibility of such bias. All these considerations require that an author-member should not be a member of any such committee or sub-committee."

(2) ***Personal bias:*** There are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or related to him through family, professional or business ties. The judge might also be hostile to one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

CASE LAWS

*Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468***.**

This is the leading case on the matter of personal bias. In this case, the petitioner company was owned by Raja Kamakhya Narain Singh, who was a lessee for 99 years of 3026 villages, situated in Bihar, for purposes of exploiting mica from them. The minister of revenue acting under Bihar Mica Act cancelled his license. The owner of the company Raja Kamakhya Narain Singh, had opposed the minister in general election of 1952 and the minister had filed a criminal case under section 500, Indian Penal Code, against him. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

*Manek Lal v. Prem Chand, AIR 1957 SC 425***.**

Here the respondent had filed a complaint of professional misconduct against Manek Lal who was an advocate of Rajasthan High Court. The Chief Justice of the High Court appointed Bar Council tribunal to enquire into the alleged misconduct of the petitioner. The tribunal consisted of the Chairman who had earlier represented the respondent in a case. He was a senior advocate and was once the advocate-General of the State. The Supreme Court held the view that even though Chairman had no personal contact with his client and did not remember that he had appeared on his behalf in certain proceedings, and there was no real likelihood of bias, yet he was disqualified to conduct the inquiry on the ground that justice not only be done but must appear to be done to the litigating public. Actual proof of prejudice was not necessary; reasonable ground for assuming the possibility of bias is sufficient.

(3) ***Subject matter bias:*** A judge may have a bias in the subject matter, which means that he himself is a party, or has some direct connection with the litigation. To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute. To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias. Such bias can be classified into four categories.

(1) Partiality or connection to the issue

(2) Departmental bias

(3) Prior utterances and pre-judgment of issues

(4) Acting under dictation

Rule of fair hearing (*audi alteram partem*):

The second 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 opportunity to submit his explanation thereto. Following are the ingredients of the rule of fair hearing:

(1) ***Right to notice:*** Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the

case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly. However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own fault.

The notice must give sufficient time to the person concerned to prepare his case. Whether the person concerned has been allowed sufficient time or not depends upon the facts of each case. The notice must be adequate and reasonable. The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.

CASE LAW

Annamalai Cotton Mills (P) Ltd. vs. The Chairman, Tamilnadu Electricity Board (02.01.1996 - MADHC) : AIR 1996 Mad 364

In this case the court insisted upon the adequacy of the show cause notice with respect to alleged electricity theft without any details such as meter reading, time period, authority taking the action etc. Court observed that –

"where an authority makes an order in exercise of a quasi judicial function, it must record its reasons in support of the order it makes and that every quasi judicial order must be supported by reasons. In the instant case, the 3rd respondent, who passed the impugned order, has not recorded his reasons in support of the order. Therefore, it is clear that the impugned order has been passed in violation of the principles of natural justice and that it is without jurisdiction. The show cause notice is also as vague as any notice can be since it only states that the petitioner's service connection was inspected and theft of energy was reported. The notice itself, therefore, has to be quashed for the reason of vagueness. As no one can be condemned unless he is given full and adequate opportunity of being heard, issue of notice calling upon to show cause is always the first step in that direction. Therefore, the show cause notice as well as the impugned order are bad in law as they both violated the basic principle of natural justice."

(2) ***Right to present case and evidence*****:** The party against whom proceedings have been initiated must be given full opportunity to present his or her case and the evidence in support of it. The reply is usually in the written form and the party is also given an opportunity to present the case orally though it is not mandatory.

(3) ***Right to rebut adverse evidence*****:** For the hearing to be fair the adjudicating authority is not only required to disclose to the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material.

(i) ***Cross-examination*****:** Examination of a witness by the adverse party is called cross-examination. The main aim of cross-examination is the detection of falsehood in the testimony of the witness. The rules of natural justice say that evidence may not be read against a party unless the same has been subjected to cross-examination or at least an opportunity has been given for cross-examination.

CASE LAW

S.C. Girotra vs. United Commercial Bank (UCO Bank) and Ors. (18.02.1994 - SC) : 1995 Supp (3) SCC 212

In this case, bank dismissed the petitioner on the basis of a committee report. Report was prepared by an enquiry officer. The petitioner claimed that he was not given the opportunity to cross examine enquiry offer. Court held that, denial of such opportunity is in violation of principle of natural justice, since he was not given the opportunity to cross examine the officer it was stated that the:

"It is also clear that no opportunity was given to the appellant to cross-examine either the makers of that report, Mr. ..... and Mr ..... or the officers who had granted such certificates which formed evidence to prove the charges which led to the order of dismissal passed by the disciplinary authority, even though those persons were examined for the purpose of proving the documents relating to them. In our opinion, the grievance made by the appellant that refusal of permission to cross-examine these witnesses was denial of reasonable opportunity of defence to the appellant, is justified."

(ii) ***Legal Representation*:** Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However, in certain situations denial of the right to legal representation amounts to violation of natural justice. Thus where the case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice because in such conditions the party may not be able to meet the case effectively and therefore he must be given the opportunity to engage professional assistance to make his right to be heard meaningful.

CASE LAWS

Nandini Satpathy vs. P.L. Dani and Ors. (07.04.1978 - SC) : 1978 AIR 1025

The Supreme Court in this case stated that the accused must be allowed the legal representative during custodial interrogation and police must wait for reasonable time for arrival of such representative. If not allowed, it would not only be violative of Article 22(1) of Constitution of India but also against the principle of natural justice. It was observed that -

"The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to' the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation."

Suresh Koshy George vs. University of Kerala and Ors. (15.07.1968 - SC) : 1969 AIR 198

In this case a committee was appointed to inquire about the alleged malpractice by petitioner during examination. Committee gave a show cause notice to petitioner to represent his case but was not given inquiry report. Court held that there was no breach of principle of natural justice. It observed that -

"the officer appointed to inquire was an impartial person; he cannot be said to have been biased against the appellant; the charge against the appellant was made known to him before

the commencement of the inquiry; the witnesses who gave evidence against him were examined in his presence and he was allowed to cross-examine them and lastly he was given every opportunity to present his case before the Inquiry Officer. Hence we see no merit in the contention that there was any breach of the principles of natural justice"

(4) ***Disclosure of evidence:*** A party must be given full opportunity to explain every material that is sought to be relied upon against him. Unless all the material (e.g. reports, statements, documents, evidence) on which the proceeding is based is disclosed to the party, he cannot defend himself properly.

(5) ***Speaking orders:*** Reasoned decision may be taken to mean a decision which contains reason in its support. When the adjudicatory bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. It is also called speaking order. In such condition the order speaks for itself or it tells its own story. Reasoned decision introduces a check on the administrative powers because the decisions need to be based on cogent reasons. It excludes or at least minimizes arbitrariness. It has been asserted that a part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself. Reason based judgments and orders allow the party affected by it to go into the merits of the decision and if not satisfied, exercise his right to appeal against the judgment/ order. In the absence of reasons, he might not be able to effectively challenge the order.

CASE LAWS

Canara Bank and Ors. vs. Debasis Das and Ors. (12.03.2003 - SC) : [(2003) 4 SCC 557].

The Supreme Court in this case held that Natural Justice rules are not codified, written but can be traced backed in statues especially in Constitution. In this case, it was observed that

"Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

Sunil Batra v. Delhi Administration AIR 1980 SC 1579,

The Supreme Court while interpreting section 56 of the Prisons Act, 1894, observed that there is an implied duty on the jail superintendent to give reasons for putting bar fetters on a prisoner to avoid invalidity of that provision under Article 21 of the Constitution. Thus, the Supreme Court laid the foundation of a sound administrative process requiring the adjudicatory authorities to substantiate their order with reasons.

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.

1. ***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. The statute may exclude them. When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate. But one thing may be noted that in India, Parliament is not supreme and therefore statutory exclusion is not final. The statute must stand the

test of constitutional provision. Even if there is no provision under the statute for observance of the principle of natural justice, courts may read the requirement of natural justice for sustaining the law as constitutional.

2. ***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.

CASE LAWS

Maneka Gandhi v. Union of India AIR 1978 SC 597

In this case the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post decisional hearing, remedial in aim, should be given to the person concerned. In the case, it has also been held that "public interest" is a justiciable issue and the determination of administrative authority on it is not final.

3. ***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.

CASE LAWS

Abhay Kumar v. K. Srinivasan AIR 1981 Delhi 381

In this case an order was passed by the college authority debarring the student from entering the premises of the college and attending the class till the pendency of a criminal case against him for stabbing a student. The Court held that the order was interim and not final. It was preventive in nature. It was passed with the object to maintain peace in the campus. The rules of natural justice were not applicable in such case.

4. ***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.

5. ***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.

CASE LAWS

P. Radhakrishna v. Osmania University, AIR 1974 AP 283,

In this case, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

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.

CASE LAWS

Nawabkhan v. Gujarat. 1974 AIR 1471

In this case, Section 56 of the Bombay Police Act, 1951 is talked about. It empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the Commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void *ab initio*; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Court's own decision invalidating the order in question was not retroactive and did not render it a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment.

However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a fundamental right (Article 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void *ab initio* and ineffectual to bind the parties from the very beginning and a person cannot be convicted for non-observance of such an order. The Supreme Court held that where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement and failure to comply with such a duty is fatal.

Question: 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. Choose the most suitable option relating to said principle.

Options:

(A) Principle of Bias
(B) Principle of Natural Justice
(C) Principle of Administrative Justice
(D) Principle of Pecuniary Bias

Answer: (B)

LIABILITY OF THE GOVERNMENT, PUBLIC CORPORATION

The liability of the government can either be contractual or tortious.

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.

The Supreme Court has made it clear that the provisions of Article 299 (1) are mandatory and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of estoppel.

According to section 65 of the Indian Contract Act, 1872, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. Therefore if the agreement with the Government is void as the requirement of Article 299(1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he has received it.

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*.

In the case of *Shrilekha Vidyarathi v. State of U.P., 1991 SCC 212,* the Supreme Court has made it clear that the

State has to act justly, fairly and reasonably even in contractual field. In the case of contractual actions of the State the public element is always present so as to attract Article 14. State acts for public good and in public interest and its public character does not change merely because the statutory or contractual rights are also available to the other party. The court has held that the State action is public in nature and therefore it is open to the judicial review even if it pertains to the contractual field. Thus the contractual action of the state may be questioned as arbitrary in proceedings under Article 32 or 226 of the Constitution. It is to be noted that the provisions of sections 73, 74 and 75 of the Indian Contract Act, 1872 dealing with the determination of the quantum of damages in the case of breach of contract also applies in the case of Government contract.

Quasi-Contractual Liability

According to section 70 of the Indian Contracts Act, 1872, where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of section 70 of the Indian Contract Act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State. Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved.

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 beach 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 contact 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 falls on another person, it is called vicarious liability. For example, when the servant of a person harms another person through his act, we held the servant as well as his master liable for the act done by the servant. Similarly, sometimes the State is held vicariously liable for the torts committed by its servants in the exercise of their duty. The State would of course not be liable if the acts done were necessary for protection life or property. Acts such as judicial or *quasi-judicial* decisions done in good faith would not invite any liability. There are specific statutory provisions which protect the administrative authorities from liability. Such protection, however, would not extend to malicious acts. The burden of proving that an act was malicious would lie on the person who assails the administrative action. The principles of law of torts would apply in the determination of what is a tort and all the defenses available to the respondent in a suit for tort would be available to the public servant also.

Damages

It may happen that a public servant may be negligent in exercise of his duty. It may, however, be difficult to recover compensation from him. From the point of view of the aggrieved person, compensation is more important than punishment. Therefore, like all other employers the State must be made vicariously liable for the wrongful acts of its servants.

The Courts in India are now becoming conscious about increasing cases of excesses and negligence on the part of the administration resulting in the negation of personal liberty. Hence, they are coming forward

with the pronouncements holding the Government liable for damages even in those cases where the plea of sovereign function could have negatived the governmental liability. One such pronouncement came in the case of *Rudal Shah v. State of Bihar, AIR 1983 SC 1036.* Here the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trial. The court awarded Rs. 30,000 as damages to the petitioner.

In *Bhim Singh v. State of J&K, AIR 1986 SC 494***,** where the petitioner, a member of Legislative Assembly was arrested while he was on his way to Srinagar to attend Legislative Assembly in gross violation of his constitutional rights under Articles 21 and 22(2) of the Constitution, the court awarded monetary compensation of Rs. 50,000 by way of exemplary costs to the petitioner.

Another landmark case namely*, C. Ramkonda Reddy v. State, AIR 1989 AP 235*, has been decided by the Andhra Pradesh, in which State plea of sovereign function was turned down and damages were awarded despite its being a case of exercise of sovereign function.

In *Saheli a Women's Resource Center v. Commissioner of Police, Delhi, AIR 1990 SC 513,* where the death of nine years old boy took place on account of unwarranted atrocious beating and assault by a police officer in New Delhi, the State Government was directed by the court to pay Rs. 75,000 as compensation to the mother of victim.

In *Lucknow Development Authority v. M.K. Gupta, 1994 1 SCC 245,* the Supreme Court observed that where public servant by *malafide*, oppressive and capricious acts in discharging official duty causes injustice, harassment and agony to common man and renders the State or its instrumentality liable to pay damages to the person aggrieved from public fund, the State or its instrumentality is duly bound to recover the amount of compensation so paid from the public servant concerned.

Liability of the Public Servant

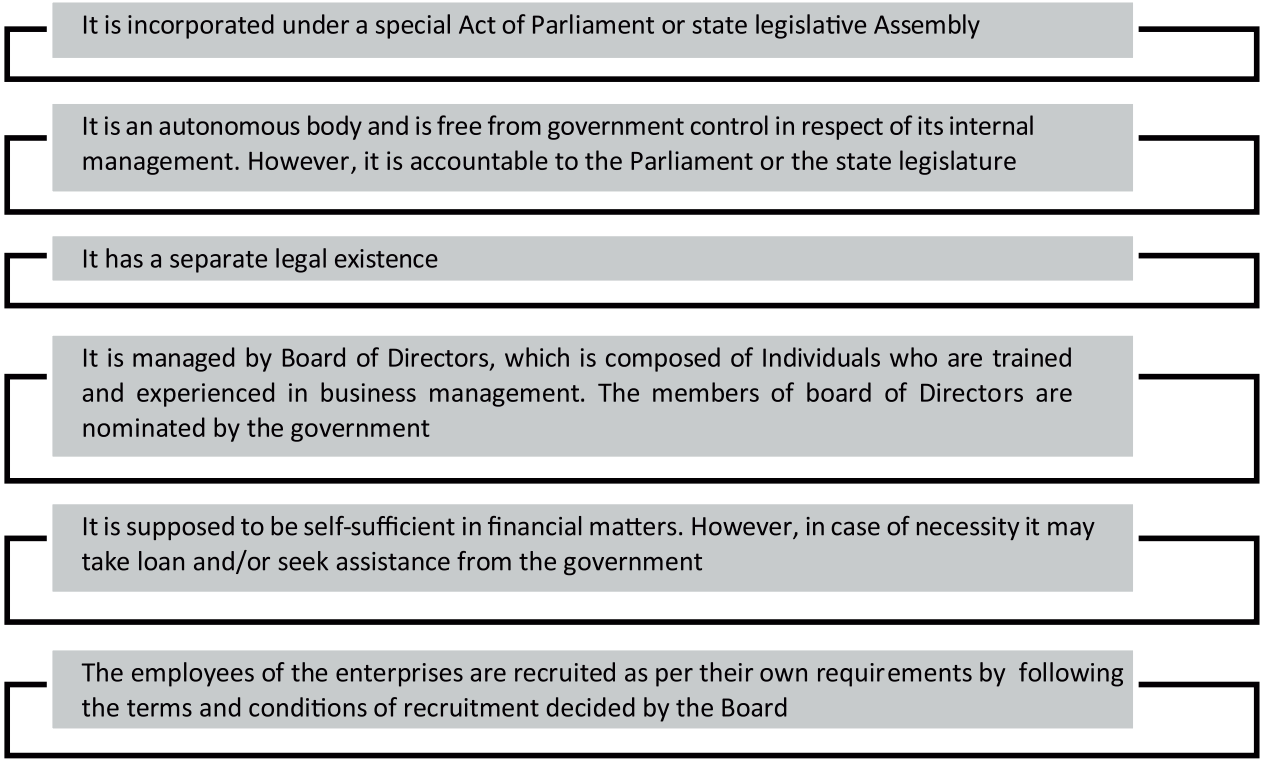
Liability of the State must be distinguished from the liability of individual officers of the State. So far as the liability of individual officers is concerned, if they have acted outside the scope of their powers or have acted illegally, they are liable to same extent as any other private citizen would be. The ordinary law of contact or torts or criminal law governs that liability. An officer acting in discharge of his duty without bias or *malafides* could not be held personally liable for the loss caused to other person. However, such acts have to be done in pursuance of his official duty and they must not be *ultra vires* his powers. Where a public servant is required to be protected for acts done in the course of his duty, special statutory provisions are made for protecting him from liability.

The term 'Statutory Corporation' (or Public Corporation) refers to such organisations which are incorporated under the special Acts of the Parliament/State Legislative Assemblies. Its management pattern, its powers and functions, the area of activity, rules and regulations for its employees and its relationship with government departments, etc. are specified in the concerned Act. It may be noted that more than one corporation can also be established under the same Act. State Electricity Boards and State Financial Corporation fall in this category.

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 main features of Statutory Corporations are as follows:



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 Article12 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.

For the validity of the corporation contract, the requirements of a valid contract laid down in Article 299 are not required to be complied with. On principles of vicarious liability, corporation is liable to pay damages for wrong done by their officers or servants. They are liable even for tort requiring a mental element as an ingredient, e.g. malicious prosecution. In India, local authorities like Municipalities and District Boards have been held responsible for the tort committed by their servants or officers.

LESSON ROUND-UP

- 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 things within its ambit:-
  - It makes policies
  - It executes and administers the law
  - It adjudicates
  - It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.
- Dicey gave the principle of Rule of Law and stated that the government should be ruled by rule of law instead of rule of individuals. Law of land is the fundamental.
- Four principal sources of administrative law in India are: (a) Constitution of India (b) Acts/ Statutes (c) Ordinances, Administrative directions, Notifications and Circulars (d) Judicial decisions.
- In India the modes of judicial control of administrative are grouped into three heads (a) Constitutional (b) Statutory (c) Ordinary or Equitable.
- 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. In India, the principles of natural justice are derived from Article 14 and 21 of the Constitution.
- The liability of the government can either be contractual or tortious.

GLOSSARY

Administrative Discretion: 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.

Rule of Law: Everyone should be governed by rule of law instead of rule of individuals. Everyone stands equivalent in front of law.

Arbitrary orders: The order which are at whims and fancies of the adjudicatory authority.

Colourable exercise of power: Where the discretionary power is exercised ostensibly but in reality for some other purpose.

Natural Justice: Natural justice is a concept of Common Law and represents procedural principles developed by judges. It supports the statement "Justice must not only be done but also seen to be done".

***Nemo judex in causa sua*:** No one can be a judge in his own case.

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What are the four principal sources of administrative law in India?
2. Briefly enumerate the various modes of judicial control of administrative action in India.
3. Write a short note on:
   (i) Judicial relief at the stage of delegation of discretion.
   (ii) Judicial relief at the stage of exercise of administrative discretion.
4. The liability of the government can either be contractual or tortious. Discuss.
5. The liability of the State is vicarious for the wrongful acts of its servants. Comment.
6. Write short note on 'Constitution' as a source of Administrative Law.
7. Distinguish between 'Tortious Liability' and 'Contractual Liability' of a State.
8. Where does Rule of Law embedded under the Constitution of India?
9. An Accountant, an employee of public corporation was prosecuted for offences under Section 161 IPC and Section 5(2) of the Prevention of Corruption Act, 1947 and was ultimately convicted and sentenced. This was upheld by the High Court in appeal. The appellant contended that the entire proceedings before the trial court as also the High Court are liable to be set aside as there was no valid sanction within the meaning of Section 6 of the Prevention of Corruption Act, 1947 with the consequence that the trial court had no jurisdiction to take cognizance of these offences. This contention is challenged by the State of Gujarat, who has contended that there was proper and valid sanction granted within the meaning of the Act. In this case, it was observed by the court that *that* while exercising the power of judicial review the Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision.

   Discuss the above situation with the help of case *Mansukhlal Vithaldas Chauhan v. State of Gujarat, AIR 1997 SC 3400*

LIST OF FURTHER READINGS

- I.P. Massey, Administrative Law (7th ed., 2008)
- S.N. Jain, Administrative Tribunals in India (1977)
- A.V. Dicey, Law of the Constitution (1885)
- Lectures on Administrative Law by C.K. Takwani

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.icsi.edu/cs-journal/

Law of Torts

Lesson 5

KEY CONCEPTS

■ Liquidated Damages ■ Unliquidated Damages ■ Strict Liability ■ Vicarious Liability ■ Tortfeasor ■ Battery ■ Assault ■ Libel ■ Slander ■ Restitution ■ Abatement ■ Collateral ■ Negligence

Learning Objectives

To understand:

- The applicability and operation of Law of Torts
- Essential elements which constitute and fixes liability under Law of Torts
- Kinds of Liabilities
- The role of mens rea in fixing liability under Law of Torts
- Liability of the State under Law of Torts
- Torts against safety and freedom of individuals
- Remedies available against the torts

Lesson Outline

- Introduction to Law of Torts
- Kinds of Tortious Liability and General Condition of Liability for a Tort
- Torts or wrongs to personal safety and freedom
- Remedies in Torts
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings & References

The purpose of law is not to prevent a future offense, but to punish the one actually committed.

Ayn Rand

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Judicial Precedents
- Section 2(m) of the Limitation Act, 1963

INTRODUCTION TO LAW OF TORTS

"Law is the great civilizing machinery. It liberates the desire to build and subdues the desire to destroy. And if war can tear us apart, Law can unite us – out of fear, or love or reason, or all three. Law is the greatest human invention. All the rest, give man mastery over his world. Law gives him mastery over himself". *Lyndon B. Johnson, TIME September 24, 1965 page 48.*

Justice has been regarded as one of the greatest concerns of mankind on this planet. Edmund Burke said, that justice is itself the "great standing policy of civil society". Scholars of political Science and legal theory tell us, that the administration of justice is one of the primary objects for which society was formed. Our Constitution, in its preamble, speaks of justice as one of the great values which its makers have cherished.

The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin language from the word *Tortum.* Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.

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."

Fraser describes it as "an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party."

Winfield says: "Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages".

Two important elements can be derived from all these definitions, namely:

(i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and

(ii) that every civil wrong is not a tort.

Accordingly, it is now possible to distinguish tort from a crime and from a contract, a trust and a quasi-contract. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

Elements of Tort

1. A civil wrong.
2. This civil wrong is not a breach of contract or breach of trust.
3. 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 pre-determined or decided by the parties, they are not known beforehand.

Question: Which type of wrong the torts is?

Option: (A) Civil Wrong

(B) Criminal Wrong

(C) Both Civil & Criminal Wrong

(D) Constitutional Wrong

Answer: (A)

CASE LAW

In the case of *Jay Laxmi Salt Words (P) Ltd vs State Of Gujarat, 1994 SCC (4) 1, JT 1994 (3) 492 judgement dated 4 May, 1994* the Supreme Court of India observed that " Truly speaking entire law of torts is founded and structured on morality that no one has a right to injure or harm others intentionally or even innocently. Therefore, it would be primitive to class strictly or close finality the ever-expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural refineness, the liberal approach to tortious liability by courts is more conducive" .....

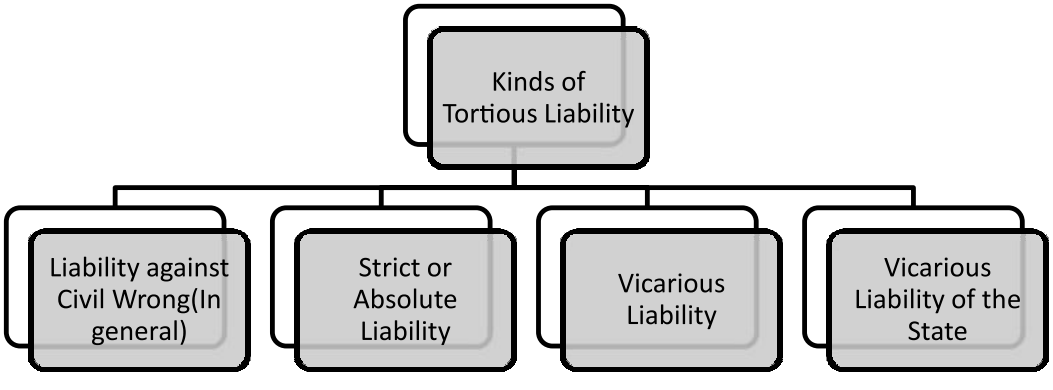
Example

An action against the railway company for loss of goods in carriage is due to presence of contract but any action by a passengers for any injuries occurred due to negligence of the railway employees is tort.

Example

A patient while getting operated his injuries got seriously injured due to the negligence of surgeon. The surgeon shall be liable for breach of contract as well as in law of torts because his negligence caused the harm to other person without any lawful justification.

KINDS OF TORTIOUS LIABILITY & GENERAL CONDITIONS

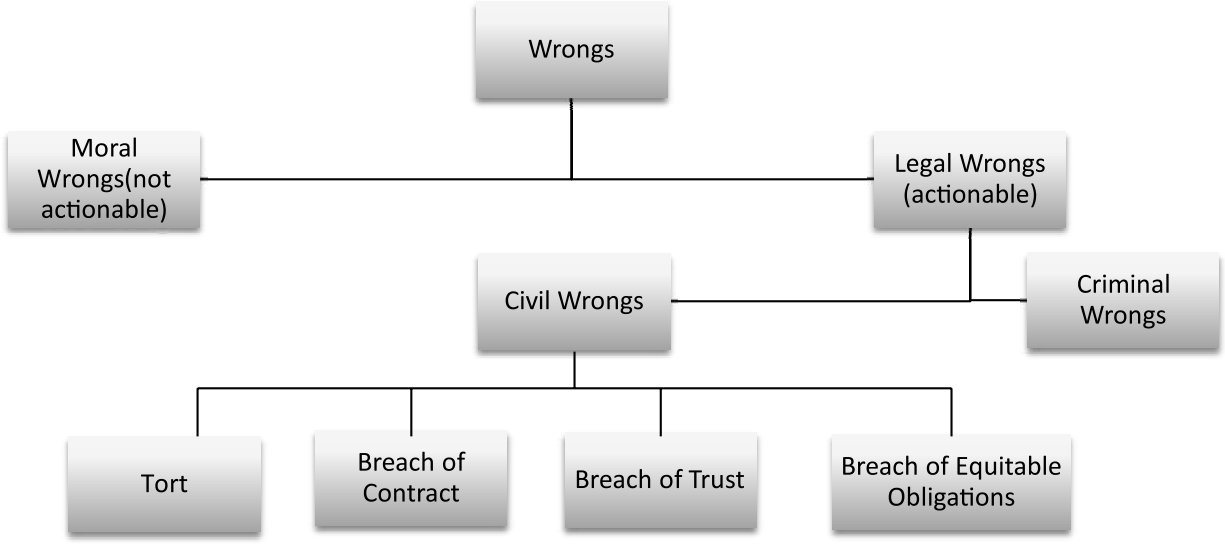


(A) Liability against Civil Wrong (In general)

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.

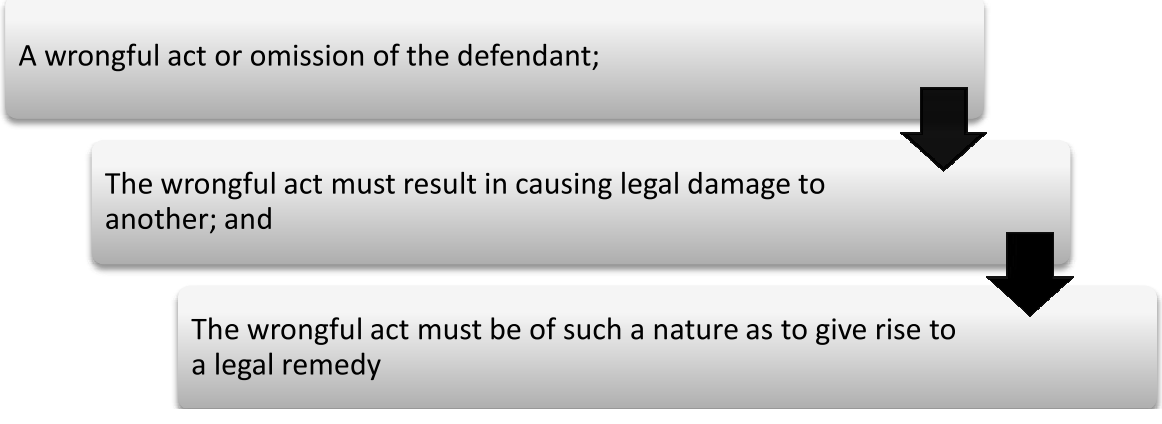
It includes Tort, Breach of Contract, Breach of Trust and Breach of Equitable Obligation.



General Conditions of Liability for a Tort

As stated earlier, there is no fixed catalogue of circumstances, which along and for all time mark the limit of what are torts. Certain situations have been held to be torts and will continue to be so in the absence of statutory repeal, and others have been held not to be torts. However, certain general conditions for tortuous liability can be laid down.

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be:



(i) ***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 or not.

CASE LAW

In a case, Glasgow Corporation v. Taylor, 1922 , a corporation failed to put proper fencing to keep the children away from a poisonous tree and a child plucked and ate the fruit of the same tree and died. Court held corporation liable for such omission.

In a case, General Cleaning Corporation v. Christmas, 1953, an employer failed to provide safety belt for safe system of work resulting in an employee suffering injuries. The employer shall be liable for the consequences of such omission.

(ii) ***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.

Two maxims, namely :

(a) Damnum sine injuria (Damage without injury), and

(b) Injuria sine damnum (injury without damage),

explain this proposition.

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.

CASE LAW

Gloucester Grammar School Case, 1410

In this case, defendant after leaving Plaintiff's School where he worked as a teacher, started his own school. Being a teacher of standing, many students of Plaintiff's school left and enrolled themselves into defendant's school. Plaintiff filed a suit for monetary damages incurred by his own. Court held that defendant is not liable because competition is no ground of action even though monetary loss is caused.

Chasemore V Richards, 1859

In this case, water supply to Plaintiff's mill was disrupted due to defendant's digging of his well. This resulted in cutting of water supply to plaintiff's mill due to which it was shut down. Court held defendant not liable because although monetary losses were incurred there was no violation of legal right.

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.

Case Law

Ashby V White, 1703

In this case, the plaintiff was prevented from voting at an election by the defendant. Plaintiff sued defendant for compensation even if no monetary loss was incurred by him. It was held that defendant was liable to pay compensation because he has violated legal right of plaintiff to cast his vote. Defendant had committed a tort.

(iii) ***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. Self-help 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.

Example :

if "A" finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

Mens Rea

How far a guilty mind of persons is required for liability for tort?

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 –

a) **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.

b) 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.

Example

1. In case of defamation, the defendant is liable even when he did not intend to defame but acted in a way that turned out to be defamatory.
2. The provisions regarding no fault liability are covered in Section 140 of Motor Vehicle Act, 1988, it says.

Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, be jointly and severally, liable to pay compensation in respect of such death or disablement. The amount of compensation in respect of the death is fifty thousand rupees and in case of permanent disablement twenty-five thousand rupees.

(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. *Flethcer* (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."

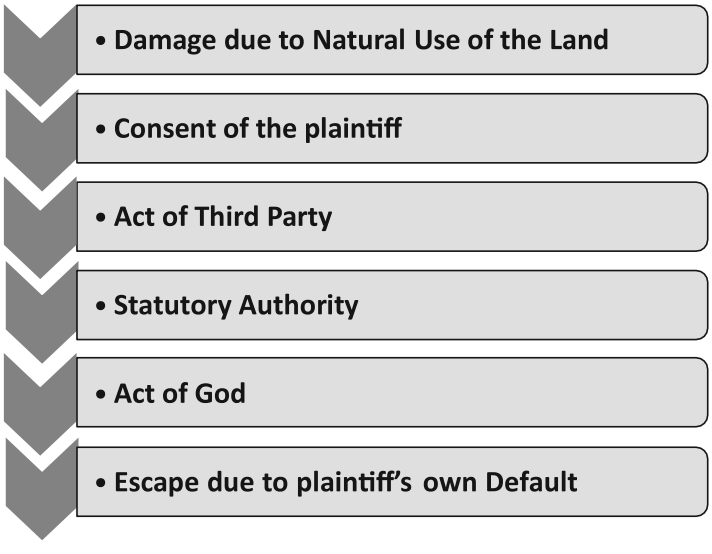
Later in the caser of *Read* v. *Lyons* [(1946) 2 All. E.R. 471 (H.L.)], it has been explained that two conditions are necessary in order to apply the rule in *Ryland* v. *Fletcher*, these are:

(i) **Escape from the Control:** Escape from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and

(ii) **Non-natural use of Land:** The defendant is liable if he makes a non-natural use of land. If either of these conditions is absent, the rule of strict liability will not apply.

If either of these conditions is absent, the rule of strict liability will not apply.

Exceptions to the Rule of Strict Liability



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 non-natural 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.

Example

Establishing a reservoir for generating power on a residential land amounts to the non-natural use of land. Building a swimming pool, or water storage tanks for domestic use is a 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. Flethcher 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.

Example

A and B living in the same housing complex gives permission to install water pipes. One of the water pipes leaks thereby causing leakage problem. Neither A nor B will can seek for damages under Law of Torts.

(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.

Example

A has a bull tied in his garden which is properly fenced. B, a passerby opens the fence and the bull is on the loose. Bull ends up hitting C, A will not be liable under law of tort since he had taken due care for the safe keep of the bull.

(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. *Chelzea 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.

Example

Sudden bursting of water lines after taking due care causes flooding in nearby areas. It will not impose a liability on the water authorities if they have taken due care to prevent such situations.

(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, there is then said to exist the defence of Act of God.

Example

The artificial lake of plaintiff overflowed due to excessive rainfall and caused damage to the nearby crops. Defendant cannot be held liable as heavy rainfall is an act of god.

(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, he cannot complain for the damage so caused.

Example: A dangerous chemical stored in the containers was kept in basement of a building. A, a thief went inside the building for committing theft. He arranged the containers one on the other for the purpose of reaching at one place. He fell and chemical in the containers spilled on him.

He cannot claim damages as this escape was due to his own default.

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 to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part."

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands* v. *Fletcher*, need not be proved in India.

CASE LAW

M. C Mehta & Ors. v. Union of India, AIR 1987 SC 1086

Commonly known as Oleum Gas Leak, this case law changed the face of applicability of the rule of strict liability in India. There was an escape of Oleum gas from Units of Shriram Food & Fertilizers Industries on 4th and 6th December, 1985 and applications were filed for award of compensation to the persons who had suffered harm on account of escape of oleum gas. Court held that an industry is required to make sure that no one is harmed when engaging in risky operations that could endanger the health and safety of adjacent workers and residents. As part of the social cost of conducting such risky activities on its property, this industry is required to carry out its operations in accordance with the highest standards of safety and must be fully accountable for compensating for any harm caused.

(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:

a) There must be an existing relationship between master and servant

b) Servant has committed some tortious act

c) This tortious act must be done during the course of employment

Types of vicarious liability

The common examples of such a liability are:

(a) Principal and Agent [Specific authority]

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.

(b) 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.

(c) 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 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.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim ***Respondeat Superior*** (Let the principal be liable) or on the maxim ***Qui facit per alium facit per se*** (he who does an act through another is deemed to do it himself).

The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

(d) 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. These definitions show that a person is a servant where the employer "retains the control of the actual performance" of the work.

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:

(i) When employer authorizes him to commit a tort.

(ii) In torts of strict liability

(iii) Negligence of independent contractor

Employers of independent contractors are liable for the "collateral negligence" of their contractors in the course of his employment. Where A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the still of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the still on to a passer by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

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. *Britania 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.

(e) 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.

So for as the first alternative is concerned there is no difficulty in holding the master liable for the tort of his servant. A few examples, however, are necessary to explain the working of the rule in the second. These are as follows:

In *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (1942) A.C. 509, the driver of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of

carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

Similarly, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rly. Co.* (1873) L.R. 7 C.P. 415, erroneously thinking that the plaintiff was in the wrong train, a porter of the defendants forcibly removed him. The defendants were held liable.

CASE LAWS

Dinbai R. Wadia and Ors. v. Farukh Mobedjna and anr. AIR 1958 Bom 218

In this case Bombay High Court stated that a principal may be held liable for fraud or any other illegal or malafide activity committed by his agent well within his authority. Also, whether any particular act falls within the scope of his employment or not must necessarily depend upon the merits of each case.

Lakshminarayan Ram Gopal and Sons v. Govt of Hyderabad, AIR 1954 SC 364

In this case, Supreme Court stated that "*A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference, and merely undertakes to produce a specified resulted employing his own means to produce that result. An ament, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant*"

(D) 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 tortuous 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.

Role of the State in Law of Torts[1]

In any modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problems so arising fall within the area of the law of torts. This is because, where relief through a civil court is desired, the tort law figures much more frequently, than any other branch

1. A Consultation Paper on Liability of the State in Tort of National Commission to Review the Working of the Constitution.

of law. By definition, a tort is a civil wrong, (not being a breach of contract or a breach of trust or other wrong) for which the remedy is unliquidated damages. It thus encompasses all wrongs for which a legal remedy is considered appropriate. It is the vast reservoir from which jurisprudence can still draw its nourishing streams. Given this importance of tort law, and given the vast role that the State performs in modern times, one would reasonably expect that the legal principles relating to an important area of tort law, namely, liability of the State in tort, would be easily ascertainable.

The law in India with respect to the liability of the State for the tortious acts of its servants has become entangled with the nature and character of the role of the East India Company prior to 1858. It is therefore necessary to trace the course of development of the law on this subject, as contained in article 300 of the Constitution.

Article 300(1) of the Constitution provides first, that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State; secondly, that the Government of India or the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or be sued, "if this Constitution had not been enacted", and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.

So far as the Supreme Court is concerned, ***State of Rajasthan vs. Vidyawati, AIR 1962 SC 933*** **is** the first post- Constitution judgment on Liability of the State in Tort. That was a case where the driver of a Government jeep, which was being used by the Collector of Udaipur, knocked down a person walking on the footpath by the side of a public road. The injured person died three days later, in the hospital. The legal representatives of the deceased sued the State of Rajasthan and the driver for compensation / damages for the tortious act Committed by the driver. It was found by the court, as a fact, that the driver was rash and negligent in driving the jeep and that the accident was the result of such driving on his part. The suit was decreed by the trial court, and also by the High Court. The appeal against the High Court judgment was dismissed by the Supreme Court.

The Supreme Court in ***State of Rajasthan vs. Vidyawati, AIR 1962 SC 933*** which held as under:

"The State of Rajasthan has not shown that the Rajasthan Union, its predecessor, was not liable by any rule of positive enactment or by Common Law. It is clear from what has been said above, that the Dominion of India, or any constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate the Rajasthan Union form vicarious liability for the acts of its servants, analogous to the Common Law of England. It was impossible, by reason of the maxim "The King can do no wrong", to sue the Crown for the tortious act of its servant. But it was realised in the United Kingdom, that that rule had become outmoded in the context of modern developments in statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2 (1) of the Act provides that the "Crown shall be subject to all those liabilities, in tort, to which it would be subject, if it were a private person of full age and capacity, in respect of torts committed by its servants or agents, subject to the other provisions of this Act...."

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of tortious acts committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to "be sued in tort or in contract, and the Common law immunity never operated in India. Now that we have, by our Constitution, established

a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for tortious acts of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of *State of Bihar vs. Abdul Majid, (1954) SCR 786: (AIR 1954 SC 24 5)*, this Court has recognised the right of a Government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State.

However, a different note was struck by the Supreme Court itself in ***Kasturi Lal vs. State of UP, AIR 1965 SC 1039***. In that case, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. On a search of his person, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned, as the Head Constable in charge of the malkhana (wherein the said gold was stored) had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for the return of the gold (or in the alternative) for damages for the loss caused to him. It was found by the courts, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations. The trial court decreed the suit, but the decree was reversed on appeal by the High Court. When the matter was taken to the Supreme Court, the court found, on an appreciation of the relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had also not complied with the provisions of the UP Police Regulations in that behalf. In spite of the said holding, the Supreme Court rejected the plaintiff's claim, on the ground that "the act of negligence was committed by the police officers while dealing with the property of Ralia Ram, which they had seized in exercise of their statutory powers. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained."

Having thus rejected the claim, the Supreme Court made the following pertinent observations in ***Kasturi Lal vs. State of UP (AIR 1965 SC 1039)***:

"Before we part with this appeal, however, we ought to add that it is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this, on the same lines as has been done in England by the Crown Proceedings Act, 1947.

Distinction between Sovereign and Non-Sovereign Functions

This distinction between sovereign and non-sovereign functions was considered at some length in ***N. Nagendra Rao vs. State of AP (AIR 1994 SC 2663); (1994) 6 SCC 205***. All the earlier Indian decisions on the subject were referred to. The court enunciated the following legal principles, in its judgment:

"In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but, since it is an exercise of legislative power, a person affected by it may challenge its

validity but he cannot approach a court of law for negligence in making the law. Nor can the Government, in exercise of its executive action, be sued for its decision on political or policy matters. It is in (the) public interest that for acts performed by the State, either in its legislative or executive capacity, it should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty".

The court in the above case suggested the following tests –

"One of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred."

The court proceeded further, as under:

"But there the immunity ends. No civilized system can permit an executive to play with the people of its county and claim that it is entitled to act in any manner, as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above (the law) as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy.

...Any watertight compartmentalization of the functions of the State a "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for (the) sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an officer of the State; duty of its officials and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken".

The court emphasised the element of Welfare State in these words:

"In a Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order, but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers, for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. Which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity.

The Court linked together the State and the officers:

"The determination of vicarious liability of the State being linked with (the) negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued."

In the case of ***Jay Laxmi Salt Words (P) Ltd vs. State Of Gujarat, 1994 SCC (4) 1, JT 1994 (3) 492*** *judgement dated 4 May, 1994* the Supreme Court of India observed that injury and damage are two basic ingredients of tort. Although these may be found in contract as well but the violations which may result in tortious liability are breach of duty primarily fixed by the law while in contract they are fixed by the parties themselves. Further in tort the duty is towards persons generally. In contract it is towards specific person or persons. An action for tort is usually a claim for pecuniary compensation in respect of damages suffered as a result of the invasion of a legally protected interest. But law of torts being a developing law its frontiers are incapable of being strictly

barricaded. Liability in tort which in course of time has become known as 'strict liability', 'absolute liability', 'fault liability' have all gradually grown and with passage of time have become firmly entrenched. 'Absolute liability' or "special use bringing with it increased dangers to others"(Rylands v. Fletcher') and 'fault liability' are different forms which give rise to action in torts. The distance (sic difference) between 'strict liability' and 'fault liability' arises from presence and absence of mental element. A breach of legal duty wilfully, or deliberately or even maliciously is negligence emanating from fault liability but injury or damage resulting without any intention yet due to lack of foresight etc. is strict liability. Since duty is the primary yardstick to determine the tortious liability its ambit keeps on widening on the touchstone of fairness, practicality of the situation etc.

CASE LAW

Anita Bhandari and Ors. v. Union of India (2005) ACC 780

In this case, the husband of the petitioner went to bank to deposit the cash and alongside cash box of the bank was also being carried inside, the security guard in a haste ended up firing the petitioner's husband thereby killing him. The petitioner claimed that the bank was vicariously accountable for the incident since the security guard had committed the conduct while on the job, but the bank argued that it had not given the employee permission to fire. The bank was found to be responsible by the court because providing the guard with a gun amounted to giving him permission to shoot when he felt it was necessary, even though the guard had acted too vigorously in the performance of his duty.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:

- Battery
- Assault
- Bodily Harm
- False Imprisonment
- Malicious Prosecution
- Nervous Shock
- Defamation
- Negligence

(a) 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.

Example

A incites a bull to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z and has thereby committed the act of battery.

Defence

According to the decision of the case *Coward v. Baddeley*, touching a person with not more than reasonable force is not battery.

This principle has also been implied in Indian decision in the case *Sitaram v. Jaswant Singh 1951 NLJ 477,* it was held that an occupier is entitled to expel a trespasser and if necessary even forcibly remove from his premises. But the force exercised should be reasonable and not greater than necessary, quite disproportionate to the evil to be prevented.

(b) 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. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind. To point a loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

Example

A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(c) 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.

Example

Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z with an intention to cause bodily harm.

Question: When the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him. He commits .....

Options: (A) Attempt to Battery

(B) Assault

(C) Slander

(D) Defamation

Answer: (B)

(d) 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.

Example

A causes Z to go within a walled space, and locks Z in, Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z thereby making false imprisonment.

(e) 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.

The following are the essential elements of this tort:

(i) There must have been a prosecution of the plaintiff by the defendant.

(ii) There must have been want of reasonable and probable cause for that prosecution.

(iii) The defendant must have acted maliciously (i.e. with an improper motive and not to further the end of justice).

(iv) The plaintiff must have suffered damages as a result of the prosecution.

(v) The prosecution must have terminated in favour of the plaintiff.

To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his own initiative.

Example

A had a grudge against B. A falsely implicated B for theft. The prosecution was launched against the plaintiff on the basis of a False report made by the B.. The court subsequently acquitted A after finding that the allegation was false. After the acquittal A filed a suit for recovery of damages for his malicious prosecution.

In this case an action for malicious prosecution may be initiated.

(f) 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.

Example

A negligently drove the carriage onto the railway tracks while the train was on the verge of crossing the place and by this accident there was a lady received a nervous shock which leads to bad impact on her health. A would be liable for damages for the consequences of the nervous shock.

(g) 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 356 of the Bharatiya Nyaya Sanhita, 2023 recognizes both libel and slander as an offence. However, torts in criminal law are stricter than in law of tort.

Example

A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

A newspaper publishes the photo of Mr X and Miss Y together stating their engagement has been announced. Mrs A, wife of X filed a suit for defamation against the newspaper company. She was entitled for compensation.

(h) 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.

Following the ruling of the Supreme Court in the landmark judgement of *Indian Medical Association v. V.P. Shantha & Ors.,* services rendered by medical practitioners were brought under the ambit of Section 2(1)(o) of the Consumer Protection Act, 1986 i.e. medical treatment was to be considered to be a service and accordingly, medical practitioners could be liable for deficiency of service.

As per the decision of *Poonam Verma vs. Ashwin Patel & Ors 1996 AIR 2111, 1996 SCC (4) 332,* the definition of negligence involves the following constituents:

(1) a legal duty to exercise due care;

(2) breach of the duty; and

(3) consequential damages.

CASE LAW

Poonam Verma vs. Ashwin Patel & Ors 1996 AIR 2111, 1996 SCC (4) 332

The court was of the opinion that Respondent No.1, having practised in Allopathy, without being qualified in that system, was guilty of Negligence per se and, therefore, the appeal against him has to be allowed in consonance with the maxim *Sic Utere tuo ut alienum non loedas* (a person is held liable at law for the consequences of his negligence)...

The court also observed that if a person practices medicine without possessing either the requisite qualification or enrollment under the Act on any State Medical Register, he becomes liable to be punished with imprisonment or fine or both.

This matter has earlier been raised before the National Consumer Disputes Redressal Commission.

LIABILITY OF A CORPORATE ENTITY/COMPANY IN TORTS

Corporates contributes 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 facet alium facet per se*" which means He who acts through another, acts through himself.

CASE LAW

Union Carbide Corporation vs. Union of India 1987 AIR 1086, 1987 SCR (1) 819

On the night intervening 2nd and 3rd of December 1984 there occurred at Bhopal in the State of Madhya Pradesh in India the worst and the most tragic industrial disaster known to mankind. There was a massive escape of a night noxious and abnormally dangerous gas called Methyl Isocyanate (hereinafter called 'MIC'). Thousands of persons sustained serious, and permanent injuries including acute respiratory distress syndrome, ocular and gastro-intestinal injuries and pain, suffering and mental distress. Court upheld the No Fault Liability or Absolute Liability Rule. Court stated –

"where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher"

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.

CASE LAW

Branch Manager, Indigo Airlines and Anr. v. Kalpana Rani Debbarma and ors

The Complainants/respondents were the family members and were returning from Kolkata to Agartala through the Indigo Airlines. Boarding passes were issued to the complainants. The Airlines left all the complainants at Kolkata Airport without informing them despite all the Complainants being the Airport premises. A written complaint was lodged at Indigo Office at Kolkata Airport but the office staff as well as the Airport staff at their counter did not accept the Complaint Application and forcibly snatched away their boarding passes and further did not pay heed to their request for making alternate arrangements for their flight to Agartala. The Complainant Approached the District Forum and was awarded with the compensation. State forum also enhanced the compensation. Aggrieved by the decision, the Indigo Arline's filed this Revision Petition contended that the Airport Manager has stated that there were many announcements at regular intervals and that the Indigo Airlines is not responsible if the passengers did not report at the gate on time.

The NCDRC held that Indigo Airlines not only forcibly taking the boarding passes from the Complainants, no effort was made by the Airline to compensate them by arranging for their travel in the next scheduled flight to Agartala. It is not in dispute that the Complainants were put to lot of mental agony and inconvenience as they had to stay in a hotel for two days. The NCDRC dismissed the Revision Petitions with cost of Rs. 20,000/- to be paid to Complainants.

According to the decision in a case *Bolitho v. City and Hackney Health Authority*, the factors which have to be assessed in medical negligence are:

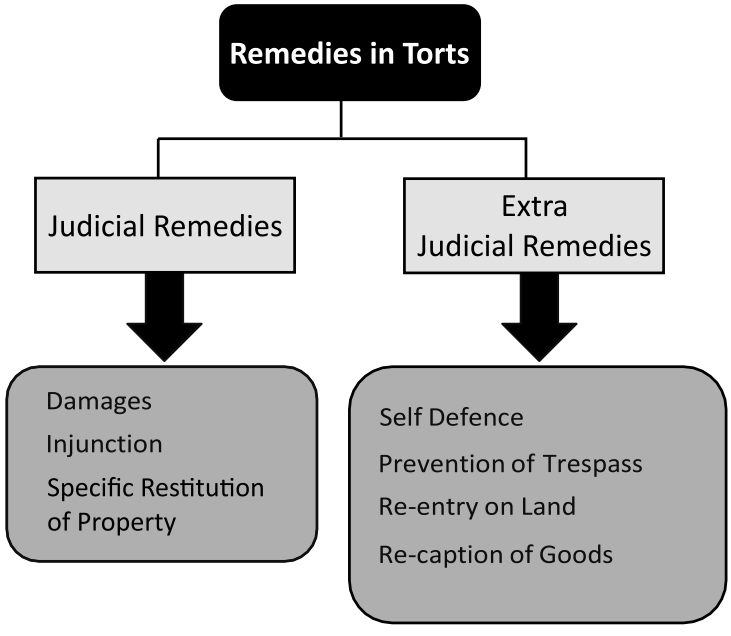
1. Whether the medical practitioner acted as per a practice accepted by a competent medical practitioner.
2. If no, if the deviation from the norm can be justified as being reasonable

It must be noted that the liability of the medical practitioner is three-fold: liability under the Consumer Protection Act, 1986 for payment of damages; civil liability for tort of negligence where the provisions of the Consumer Protection Act, 1986 do not apply; or criminal proceedings under the Bharatiya Nyaya Sanhita, 2023.

According to Statement and Objects for the law relating to consumer protection, the emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new options and opportunities for consumers. Equally, this has rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e-commerce pose new challenges to consumer protection and will require appropriate and swift executive interventions to prevent consumer detriment. Therefore, it has become inevitable to amend the Act to address the myriad and constantly emerging vulnerabilities of the consumers.

On analysis of the cases and object of the Consumer Protection Act, it can be said that the complaints under the Consumer Protection are in the nature that may be covered under Law of Torts in absence of Law relating to Consumer protections.

REMEDIES IN TORTS



Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely:

(i) Damages,

(ii) Injunction, and

(iii) Specific Restitution of Property.

(i) 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.

(ii) 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. Rule 1 Order 39 of Civil Procedure Code 1908 provides for the Cases in which temporary injunction may be granted. Injunctions can also be granted under Specific Relief Act, 1963.

(iii) 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.

For example, in case of immovable property, plaintiff may bring an action for restitution under Section 6 of Specific Relief Act, 1963.

Extra Judicial Remedies

In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

(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.

> ***Example***
>
> X seeks a restraining order against F due to stalking, fearing injuries. This recourse is a part of self defence.

(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.

> ***Example***
>
> A uses fence to avoid people from entering his personal garden. The fencing will be taken as reasonable force to prevent trespass.

(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.

> ***Example***
>
> X trespasses into B's property, his home. B has the right to use reasonable force to remove him from his property and re-enter himself.

(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.

> ***Example***
>
> A wrongfully acquires the possession of B's watch, B is entitled to use reasonable force to get it back from A. only reasonable force may be used.

(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.

> ***Example***
>
> X and Y are neighbors. Branches of a tree growing in X's garden enter B's personal pathway from over the wall. After giving due notice to X, Y cuts the branches as they were causing him nuisance. Y is entitled to do so.

> **Question:** Which of the following is not an Extra Judicial Remedy of law of Torts.
>
> **Options:** (A) Abatement of Nuisance
>
> (B) Prevention of Trespass
>
> (C) Injunction
>
> (D) Self Defence
>
> **Answer:** (C)

(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. The right is known as that of distress damage feasant-to distrain things which are doing damage.

Example

C's cattle wrongfully move to D's property and spoil his crops, the D is entitled to take possession of the cattle until he is compensated for the loss suffered by him.

LESSON ROUND-UP

- Tort means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
- A tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be: (i) a wrongful act or omission of the defendant; (ii) the wrongful act must result in causing legal damage to another; and (iii) the wrongful act must be of such a nature as to give rise to a legal remedy.
- Tortious Liabilities may be of Four types (a) Liability against Civil Wrong(In general) (b) Strict or Absolute Liability, (c) Vicarious Liability and (d) Vicarious Liability of the State.
- An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:
    - o Battery
    - o Assault
    - o Bodily harm
    - o False imprisonment
    - o Malicious prosecution
    - o Nervous shock
    - o Defamation
    - o Negligence
- Remedies in tort are of two type judicial remedies and extra judicial remedies. Three types of judicial remedies are available to the plaintiff in an action for torts are:
    - (i) Damages,
    - (ii) Injunction, and
    - (iii) Specific Restitution of Property.
- Extra judicial remedies are:
    - (i) Self Defence,
    - (ii) Prevention of Trespass,

(iii) Re-entry on Land,

(iv) Re-caption of Goods,

(v) Abatement of Nuisance and

(vi) Distress Damage Feasant

- The liablities of the companies are fastened on the bais of the principle in the lega maxim "*Qui Facet alium Fact Per Se*".

GLOSSARY

***Right in rem*:** Right against the public.

Right in personem : Right against the individual.

Damnum sine injuria: Damages without legal injury.

Injuria sine damnum: Legal injury without damage.

Strict liability: No fault liability.

Vicarious liability: Liability for the act of other in a case of relationship of Master-Servant and alike.

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.

Respondeat Superior : Let the principal be liable.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the general conditions of liability for a tort?
2. Distinguish between *Damnum Sine Injuria* and *Injuria Sine Damnum.*
3. Discuss the types of tortuous liability.
4. Explain the rule of Strict Liability or Absolute liability with the help of case *Ryland* v. *Fletcher*.
5. Explain Vicarious Liability with the help of examples.
6. State the conditions where employer is liable for the acts of Independent Contractor.
7. Write a short note on:
   (a) Battery
   (b) Assault
   (c) Malicious Prosecution
8. P is an owner of the shop and Q is the employee. P asks Q to destroy certain article since they were found to be unfit for consumption. Q instead of destroying them, sold them off and as a result A fell gravely ill and sued P for the damages. Examine the liability of P along with cases laws.

9. XYZ Limited is a company engaged in the business of manufacturing of Sun glasses. It has stored 1000 litres of transparent spirit which is dangerous, if consumed by humans. A with the intent to committing theft, entered into the property of XYZ Limited. After entering into the premises, he changed his mind and dropped the idea of theft and decided to go back. While leaving the premises, he saw the spirit and drank one glass out of it, misconceiving it with water. He had to hospitalize for 6 Months due to this. A intends to claim damages under Law of Torts.

   Advice 'A' the chance of his succeeding under Law of Torts in this case.

10. An autonomous body was entrusted with the duty of constructions of dams. It constructed a Dam near the property of XYZ Limited. XYZ requested the autonomous body to change the location of the dam on ground of ancipated loss to its property due the dam. The request of the company was not acceded to. The overflow of the water caused a loss to the valuable property of the company. The company intends to claim damages.

    Advice the company in the light with the decided case 'Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat'.

11. A disaster occurred in a cricket stadium. Security agency was held responsible for allowing large number of spectators. The scenes were boroacasted live on television. The viewers of the match on television brought the claims against the defendant for nervous shock resulting in psychiatric injury.

    Discuss the criteria laid down in the case *Alcock & Ors. v. Chief Constable of South Yorkshire [1992] AC 310* House of Lords for secondary victims.

LIST OF FURTHER READINGS

- W.V.H. Rogers, Winfield & Jolowicz on Tort (Sweet & Maxwell, 19th edn., 2016)
- Avtar Singh (Rev.), P.S. Atchuthen Pillai Law of Torts (Eastern Book Company, 9th edn., 2022).
- Law of Torts

  Dr. R. K Bangia
- Ramaswamy Iyer : The Law of Torts; N.M. Tripathi, Private Ltd., Bombay

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.icsi.edu/cs-journal/
- https://www.icsi.edu/students/student-company-secretary/

Law relating to Civil Procedure

Lesson 6

KEY CONCEPTS

■ Judgement ■ Decree ■ Order ■ Adjudication ■ Decree-holder ■ Judgement- debtor ■ Acquiesce ■ Set-off ■ Counter-claim ■ Temporary Injunction ■ Interlocutory Orders ■ Commercial Courts

Learning Objectives

To understand:

- Basic definitions and concepts under Code of Civil Procedure
- Structure, Venue and Jurisdiction of Civil Courts
- The doctrine of *Res Judicata* and sub-judice
- The basics of Institution of Suits
- The stages of institution of civil suits
- The process of issue of summons
- The provisions relating to appeals, reference, review and revisions
- Procedure of institution of summary suits
- The applicability of Commercial Courts Act
- Pre institution mediation under Commercial Courts Act

Lesson Outline

- Introduction
- Aim and scope of Civil Procedure Code, 1908 [C.P.C.]
- Some important terms
- Structure of Civil Courts
- Stay of Suit (Doctrine of Res Sub Judice)
- Res Judicata
- Jurisdiction of Courts and Venue of Suits
- Place of Suing (Territorial)
- Set-off, Counter-claim and Equitable Set-off
- Temporary Injunctions and Interlocutory Orders (Order XXXIX)
- Detention, Preservation, Inspection etc. of Subject-matter of Suit
- Institution of Suit (Order IV)
- Important stages in Proceedings of a Suit
- Delivery of Summons by Court
- Appeals
- Reference, Review and Revision
- Suits by or Against a Corporation
- Suits by or against Minors and Lunatics
- Summary Procedure
- Powers of Civil Courts and their Exercise by Tribunals
- Commercial Courts Act, 2015
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

"Civil Procedure" means, body of law concerned with the methods, procedures and practices used in civil litigation.

- Black's Law Dictionary 6th Edn.

REGULATORY FRAMEWORK

- Code of Civil Procedure, 1908
- Orders under the Code of Civil Procedure, 1908

INTRODUCTION

The Company Secretary and the Secretarial Staff of a Company need to be familiar with the essentials of the basic procedural 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. Such law is often termed "adjective law", in the handling of corporate business, even in initial stages, which could have legal implications at some subsequent stage. Such monitoring and guidance is required to be rendered by the Company Secretary and other Secretarial Executives to the line management for safeguarding the interests of the company. It has been endeavoured in this Chapter to summarise one of such aspects of Indian procedural laws which have to be referred to by the Company Secretaries.

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

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.

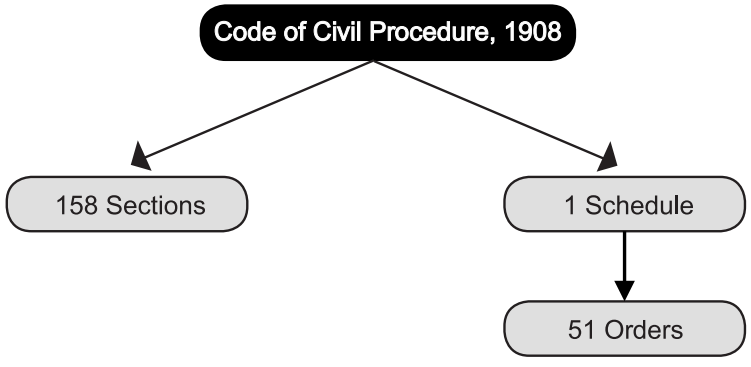
One of the defining characteristics of Indian judicial system is the time it takes to settle a dispute. While some of it is because of huge pendency of cases and lack of infrastructure, the procedural laws like Civil Procedure Code also have a role to play. With the current focus on Ease of Doing Business (EoDB) and 'enforcement of contract' being one of the sub-parameters for the determination of EoDB rank, judicial delays has been one of the focus areas of judicial reforms. Keeping this in mind the Government came up with 'The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015' (Commercial Courts Act, 2015 for short). Section 16 of this new Act has amended CPC in its application to Commercial Disputes which are covered under the Act.

Question: Where a general statute and a specific statute relating to the same subject matter cannot be reconciled, which law shall prevail?

Options: A. General Law B. the special or specific statute C. Both shall cease to operate

Answer: B

SCHEME OF THE CODE



The Civil Procedure Code consists of two segments. 158 Sections form the first segment and the rules and orders contained in Schedule I, form the second segment. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised. Thus the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.

Question: How many sections are in Code of Civil Procedure, 1908?

Options: (A) 156 (B) 157 (C) 158 (D) 159

Answer: (C)

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.

It may also be described as a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed and is the foundation of suit.

Section 20 of CPC introduces the concept of cause of action. A cause of action in respect of a suit is essentially its *raison d'etre* – the factual circumstances which led to the dispute arising between the parties. Section 20(c) provides jurisdiction to the court which is located in the local limits of where the cause of action, "*wholly or in part*", arises. The phrase "*wholly or in part*" is an important qualifier. The Supreme Court, in *South East Asia Shipping v. Nav Bharat Enterprises*, has held that cause of action is essentially a bundle of facts which led to the genesis of the dispute, and to the plaintiff obtaining a right in law to approach the court for legal redress. The cause of action, therefore, necessarily includes an act of the defendant, in the absence of which the suit itself could not possibly exist. Mentioning the cause of action in pleadings is prerequisite under the CPC, with Order II Rule 2 and Order VII Rule 1.

Judgement, Decree and Order

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.

According to the explanation to the definition, a decree may be partly preliminary and partly final. A decree comes into existence as soon as the judgement is pronounced and not on the date when it is sealed and signed. (Order 20 Rule 7)

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The preliminary decree is not dependent on the final. On the other hand, final decree is dependent and subordinate to the preliminary decree, and gives effect to it. The preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. If the preliminary decree is set aside the final decree is automatically superseded.

Example

In a matter of suit of possession of an agricultural land (immovable property), A approaches to the Court along with the evidence of title he claimed along with claim of mesne profit over the same, and the court may -

1. Pass a decree ascertaining the possession of the property.
2. Give a direction to conduct an enquiry regarding mesne profit.

Passing of a decree deciding the possession will be ***final decree,*** *whereas the part wherein the enquiry regarding the mesne profit is directed will be a* ***preliminary decree.***

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)]

The definition does not include legal representative of a deceased judgement-debtor.

Example

Due to negligence of Y, person X suffers some injuries and approaches to the court to claim compensation against Y for the same. Court decides the case in favor of X providing him the compensation for the injuries inflicted to him due to Y's negligence.

- *X will be the decree-holder here*
- *Y will be the judgment debtor*

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.

any order made under rules from which an appeal is expressly allowed by the rules. No appeal lies from any order passed in appeal under this section.

In the case of other orders, no appeal lies except where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case which is to be set forth as a ground of objection in the memorandum of appeal.

A *decree*, shall be deemed to include the rejection of a plaint but not any adjudication from which an

appeal lies or any order of dismissal for default. A preliminary decree decides the rights of parties on all or any of the matters in controversy in the suit but does not completely dispose of the suit. A preliminary decree may be appealed against and does not lose its appellate character by reason of a final decree having been passed, before the appeal is presented. The Court may, on the application of any party to a suit, pass orders on different applications and any order which is not the final order in a suit is called an "interlocutory order". An interlocutory order does not dispose of the suit but is merely a direction to procedure. It reserves some questions for further determination.

Question: Which of the given is not an essential of Decree?

Options: (A) Formal expression of adjudication

(B) Adjudication should have been given in a suit

(C) It shall be made on the same day of pronouncement of Judgement

(D) Conclusive determination of the suit of the parties

Answer: (C)

The main difference between an order and a decree is that in an adjudication which is a decree appeal lies and second appeal also lies on the grounds mentioned in Section 100 of CPC. However, no appeal lies from an order unless it is expressly provided under Section 104 and Order 43 Rule 1. No second appeal in any case lies at all even in case of appealable orders [Section 104(2)]. A decree conclusively determines the rights and liabilities of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final but this is not the case in order.

A person in whose favour a decree has been passed not only includes a plaintiff but in cases like decree for specific performance of an agreement executable by either party, also includes a defendant.

CASE LAW

Vidyacharan Shukla vs. Khubchand Baghel and Ors. (20.12.1963 - SC) : 1964 AIR 1099

Court stated that "a decree is a formal expression of adjudication conclusively determining the rights of parties with regard to all or any of the controversies in a suit, whereas order is a formal expression of any decision of a civil court which is not a decree. Judgment is a statement given by the judge of his grounds in respect of a decree or order. Ordinarily judgment and order are engrossed in two separate documents. But the fact that both are engrossed in the same document does not deprive the statement of reasons and the formal expression of a decision of their character as judgment or order, as the case may be"

STRUCTURE OF CIVIL COURTS

Section 3 of the Civil Procedure Code lays down that for the purposes of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior, to that of a District and every Court of Small Causes is subordinate to the High Court and District Court.

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).

Even though if a case is not governed by the provisions of the Section and matters in issue may not be identical, yet the courts have inherent powers to stay suit on principle analogous to Section 10.

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

If these conditions exist, the later suit should be stayed till the disposal of earlier suit, the findings of which operate as *res judicata* on the later suit.

For the applicability of Section 10, the two proceedings must be suits, e.g. suit for eviction of tenant in a rent control statute cannot be sought to be stayed under Section 10 of Civil Procedure Code on the ground that tenant has earlier filed a suit for specific performance against the landlord on the basis of agreement of sale of disputed premises in favour of the tenant.

In such a case, it can not be said that the matter in earlier suit for specific performance is directly and substantially in issue in later suit for eviction. The reason is that a suit for specific performance of contract has got nothing to do with the question on regarding the relationship of landlord and tenant.

Regarding the inherent powers under Section 151, these would also not be used for staying the eviction suit as the same would frustrate the very purpose of the legislation. Therefore, invoking the powers of the Court under this Section, on the facts and circumstances of the case amounts to an abuse of the process of the Court and there can be no doubt that such a course cannot be said to subserve the ends of the justice (*N.P. Tripathi* v. *Dayamanti Devi*, AIR 1988 Pat. 123).

CASE LAW

In ***National Institute of MH & NS v. C.Parameshwara AIR 2005 SC 242,*** Supreme court stated- the fundamental test to attract section 10 is whether on final decision being reached in previous suit, such decision would operate as res judicata in subsequent suit.

Question: Which of the following section of Code of Civil Procedure, 1908 provides for Stay of Suits in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties?

Option: (A) Section 9

(B) Section 10

(C) Section 12

(D) Section 15

Answer: (B)

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 an 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.

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (*S.B. Temple* v. *V.V.B. Charyulu,* (1971) 1 SCJ 215). The doctrine of *res judicata* prevails over the doctrine of *lis pendens* where there is a conflict between the two.

It prevents two different decrees on the same subject. Section 11 says that once a *res* is *judicata*, it shall not be adjudged again. The principle applies to suits in Section 11 of the Code; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of giving finality to litigation. For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

(1) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit. The expression "directly and substantially in issue" means an issue alleged by one party and denied or admitted by the other either expressly or by necessary implications (*Lonakutty* v. *Thomman*, AIR 1976 SC 1645).

In the matter of taxation for levy of municipal taxes, there is no question of *res judicata* as each year's assessment is final for that year and does not govern latter years (*Municipal Corporation* v. *Madan Mohan,* AIR 1976 43)

A suit for eviction on reasonable requirement was compromised and the tenant was allowed to continue as tenant for the subsequent suit for ejectment on the ground of reasonable requirement, it was found that some reasonable requirement had been present during the earlier suit. The second suit was not maintainable.

(2) The former suit has been decided – former suit means which is decided earlier.

(3) The said issue has been heard and finally decided.

The issue or the suit itself is heard and finally decided, then it operates as *res judicata* and not the reasons leading to the decision (*Mysore State E. Board* v. *Bangalore W.C. & S. Mills,* AIR 1963 SC 1128). However, no *res judicata* operates when the points could not have been raised in earlier suit. (See *Prafulla Chandra* v. *Surat Roit* AIR 1998 Ori. 41). But when a suit has been decided on merits, and the appeal is dismissed on a preliminary point, it amounts to the appeal being heard and finally decided

and the decision operates as *res judicata* (*Mukunda Jana* v. *Kanta Mandal,* AIR 1979 NOC 116).

(4) Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above (*Isher Singh* v. *Sarwan Singh,* AIR 1965 SC 948).

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.

The rule of *res sub judice* relates to a matter which is pending judicial enquiry while *res judicata* relates to a matter adjudicated upon or a matter on which judgement has been pronounced. *Res sub judice* bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. *Res judicata* arises out of considerations of public policy *viz.*, that there should be an end to litigation on the same matter. *Res judicata* presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case. It is however essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

An application for amendment of a decree is not a 'suit' and may be entertained. But if such an application is heard and finally decided, then it will debar a subsequent application on general principles of law analogous to *res judicata*. However, dismissal of a suit for default, where there has been no adjudication on the merits of the application, will not operate as *res judicata*. Similarly an application for a review of judgment if refused does not bar a subsequent suit for the same relief on the same grounds. In the case of conflicting decrees, the last decree alone is the effective decree which can operate as *res judicata*.

According to Explanation to the Section, the expression 'former' suit has been set out as stated above. The competence of a Court to decide an issue or suit is to be determined irrespective of any provisions as to a right of appeal from the decision of such Court. It is stated in Explanation III that the matter must have been alleged by one party and either denied or admitted expressly or impliedly by the other. Constructive *res judicata* is the doctrine which has been provided for in Explanation IV. According to Explanation IV any matter which might or ought to have been made a ground of defence or attach in such former suit shall be deemed to have been a matter directly and substantially in issue in such (former) suit.

Example

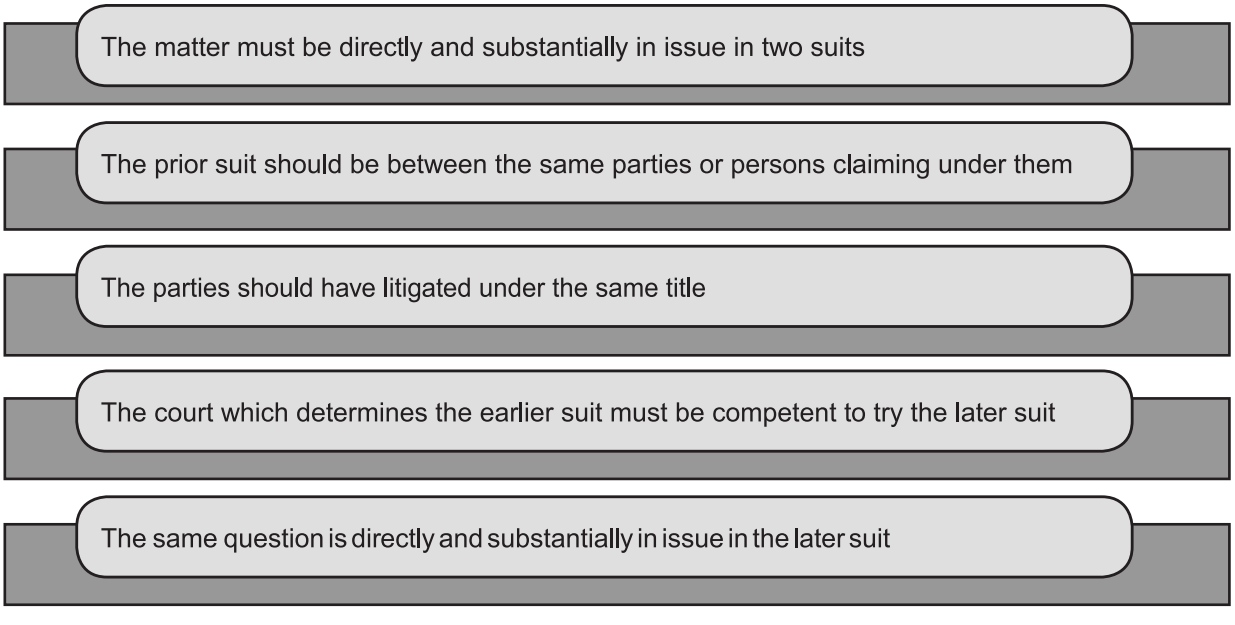
P sues Q for arrears on rent. Q contends that there are no arrears and therefore this suit is baseless and false. P's claim for arrears on rent here is therefore the matter directly and substantially in issue.

Doctrine of *Res Judicata* is based on these grounds of public policy			
There should be an end to litigation.	The parties to a suit should not be harassed to agitate the same issues or matters already decided between them	The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties	It is a rule of convenience and not a rule of absolute justice.

Explanation V states that any relief claimed in the plaint but not expressly granted shall be deemed to have been refused. By Explanation VI it is provided that in the case of a representation suit or class action all persons interested in any public or private right claimed in common for themselves and others are to be deemed to claim under the persons so litigating and *res judicata* shall apply to them.

Explanations VII and VIII have been added by the Amendment Act of 1976. Explanation VII specifically lays down that the principles of *res judicata* apply to execution proceedings. The general summarized of *res judicata* have been summarized in Explanation VIII. It provides that the decisions of a "Court of limited jurisdiction competent to decide such issue" operates as *res judicata* in a subsequent suit though the former Court had no jurisdiction to try the subsequent suit. The general principle of *res judicata* is wider in scope than Section 11 which is applied when a case does not come within four corners of Section 11. However, when the case falls under Section 11 but the conditions are not fulfilled, the general principles of *res judicata* cannot be resorted to. The conditions may be summarized as follows:

Conditions of res judicata:



Example

District Court passed an order over a dispute. In this case, the matter cannot be reinstated in District Court again due to the principle of *Res Judicata*. However, it may be brought before Appellate Court as an appeal.

Bar to further suit

Section 12 puts a bar to every suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action. Section comes into force only when a plaintiff is precluded by rules.

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	*Appellate Jurisdiction*	*Criminal and appellate Jurisdiction*
A Court tries and decides suits filed before it.	A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.	The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to try all civil suits unless barred **:** Section 9 of Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. The explanation appended to Section 9 provides that a suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision on questions as to religious rites or ceremonies.

Civil Courts have jurisdiction to entertain a suit of civil nature unless barred by law. Every person has an inherent right to bring a suit of a civil nature. Civil Court has jurisdiction to decide the question of its jurisdiction although

as a result of the enquiry it may be found that it has no jurisdiction over the matter. Jurisdiction depends not on the truth or falsehood of facts, but upon their nature. Jurisdiction is determinable at the commencement not at the conclusion of the inquiry [*Rex* v. *Boltan,* (1841) 1 QB 66, 74].

A suit is expressly barred if a legislation expressly says so and it is impliedly barred if a statute creates new right or liability and prescribes a particular tribunal or forum for its assertion. When a right is created by a statute and a special tribunal or forum is provided for its assertion and enforcement, the ordinary Civil Court would have no jurisdiction to entertain such disputes.

Question: *Which of the given is not a criteria for determining jurisdiction of the courts under Code of Civil Procedure, 1908?*

Options: (A) Subject Matter

(B) Territorial Jurisdiction

(C) Pecuniary Jurisdictions

(D) Jurisdiction of Police station

Answer: (D)

Example

Pecuniary jurisdictions of the Courts may be decided on the basis of amounts involved in each case. This may be understood with the help of below example.

Suits amounting to –

- Rs. 1 Lakh – Rs. 3 Lakh may lie with Civil Judge in a particular state
- Rs. 3 Lakh – Rs. 2 crore may lie with District Court in a particular state
- Above Rs. 2 crore may lie with High Court in a certain state

CASE LAW

In A.R. Antulay vs. R.S. Nayak and Ors. (29.04.1988 - SC) : 1988 AIR 1531

The issue was whether the a case triable by Special Judge as provided under Criminal Law Amendment Act, 1952 could be transferred to High Court or not. It was held that Court by its directions cannot confer jurisdiction to High Court of Bombay to try any case by itself for which it does not possess such jurisdiction.

The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no Court, whether superior or inferior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal.

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:

(a) for recovery of immovable property with or without rent or profits;

(b) for partition of immovable property;

(c) for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually distraint 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 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.

Where there might be two or more competent courts which could entertain a suit consequent upon a part of cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute such an agreement would be valid. (*Angile Insulations* v. *Davy Ashmore India Ltd.,* (1995) 3 SCALE 203).

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 counter-claim 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.

CASE LAW

Jitendra Kumar Khan and Ors. vs. The Peerless General Finance and Investment Company Limited and Ors. (07.08.2013 - SC) : 2013 ALL SCR 3259

The court stated that equitable set-off is different from legal set-off. Equitable set-off is based on principle of justice, equity and good conscience. It was stated:

"that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not."

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, or

b) the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

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)

CASE LAW

Dalpat Kumar and Ors. vs. Prahlad Singh and Ors. (16.12.1991 - SC) : AIR 1993 SC 276 Court held that three main requirements are to be satisfied while granting temporary injunction-

1. *There should be Prima facie case*
2. *If injunction not granted, it would lead to irreparable loss and,*
3. *Balance of convenience*

It was stated by the Court that :

"satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury. The third condition also is that "the balance of convenience" must be in favor of granting injunction.

Example

X file a suit to recover possession of a movable property against Y. During the hearing, X alleged that Y may dispose of the property to his benefit. Court may pass interlocutory order to deposit the same in safe custody as he may deem fit.

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:

(a) 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;

(b) 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; and

(c) 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 –

(1) 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.

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

(3) 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.

The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question. In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides. If the object of granting a temporary injunction is liable to be defeated by the delay, the Court while passing an order granting interim or temporary injunction, has a notice served on the defendant to show cause why the order granting the interim injunction should not be confirmed. On hearing the objection of the defendant to such injunction, the Court either confirms the interim injunction or cancels the order of injunction.

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 –



The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant. A suit for a tort may be brought either where the wrong was committed or where the defendant resides or carries on business. A suit for a breach of contract may be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain, or where any of the defendants so resides or works for gain or carries on business provided the leave of the Court is given or that the other defendants acquiesce in such situation. 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:

(a) *mesne* profits or arrears of rent;

(b) damages for breach of contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action.

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.

Regarding other suits, they shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant or each of the defendants if there are more than one at the time of the commencement of the suit actually or voluntarily resides or carries on business or personally works for gain; or

(b) any of the defendants, where there are more than one at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action wholly or in part arises.

'Necessary party' and 'Proper party'

A "necessary party" is one whose presence is indispensable for proceeding with the suit and for final decision thereof, on the other hand "proper party" is one in whose absence an effective order can be passed, but whose presence is required for complete and final decision of the suit.

In case of *Hardeva v. Ismail, AIR 1970 Raj 167* two tests have been mentioned for determining the question whether a particular party is a necessary party to a proceeding:

(1) there must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and

(2) it should not be possible to pass an effective decree in absence of such a party.

Order I, rule 8 provides that there are numerous persons having the same interest in one suit, one or more or such persons may with the permission of court sue on behalf of or for the benefit of all persons so interested.

There is essential distinction between 'Necessary Party' and 'Proper Party'. A 'Necessary Party' is one whose presence is indispensable or against whom relief is sought and without whom no effective order can be passed. A 'Proper Party is one in whose absence an effective order can be passed but whose presence is necessary for complete and final decision on question involved in proceedings.

Order I, rule 9 of the Code of Civil Procedure, 1908 reads: No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.

Therefore, general rule is that no suit can be decided without necessary parties to it. However, rule 10 of Order I of the Code of Civil Procedure, 1908, provides for substitution or addition of parties to suit on either of the following two grounds:

(i) He ought to have been joined as plaintiff or defendant and is not so joined; or

(ii) without his presence, the question/issue involved in the suit cannot be completely decided.

Mis-joinder or non-joinder of parties (Order I, rule 9)

Order I, rule 9 says: "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court in every suit may deal with the matter in controversy so far as the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.

So, where a person, who is necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non-joinder. Conversely, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order I, rules 1 and 3 respectively and they are neither necessary party nor proper party, it is a case of mis-joinder of the parties.

Order I, rule 13, provides that all the objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Non-joinder (meaning) - Where a person who is a necessary party to a suit has not been joined as a party to the suit, it is a case of non-joinder. A suit should not be dismissed on the ground of non-joinder.

But if the decree cannot be effective without the absent parties, the suit is liable to be dismissed. In case where the joinder of a person as a party is only a matter of convenience, the absent party may be added or the suit may be tried without him.

Mis-joinder - Where there are more plaintiffs than one and they are joined together is one suit, but the right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions alleged to exist in such persons does not arise out of the same act, or transaction and if separate suits were brought, no common question of law or fact would arise, it is case of mis-joinder of plaintiff. Misjoinder of defendants takes place in reverse position.

In case of *B.P. Rao v. State of Andhra Pradesh, 1985 Supp (1) SCC 432: AIR 1986 SC 210: 1985 (51) FLR 501: 1985 Lab IC 1555: (1985) 2 SCALE 256: (1985) Supp 2 SCR 573*, it was held by the Supreme Court that, where the affected persons had not been joined as parties to the petition, and some of them only were joined, the interests

of the persons who were not joined as parties were identical with those persons who were before the court and were sufficiently and well represented, and therefore, the petition was not liable to be dismissed on that ground alone.

"*Cause of action*" means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Thus, cause of action is a bundle of essential facts which the plaintiff has to prove in order to sustain his action. The cause of action must be antecedent to the institution of the suit. It consists of two factors (a) a right, and (b) an infringement for which relief is claimed.

Every breach of contract gives rise to a cause of action and a suit may be instituted to secure the proper relief in the place –

(a) where the contract was made, or

(b) where the breach has occurred, or

(c) the place where money is payable.

The place of breach is the place where the contract had to be performed or completed.

Where the place of payment is not specified, it is to be ascertained with reference to the intention of the parties and the circumstances of each case.

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.

Example: There is a property dispute between X and Y over a piece of land which is in possession of Y.

X filled a suit against Y and also made Z(a reputed businessman) the brother of Y as party to the suit. This is misjoinder of parties.

X filled a suit against Y not for the property in issue but referred to a property that was never in possession of Y. This is misjoinder of cause of action.

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

1. Presentation of Plaint - According to Order 4, of CPC, every suit shall be instituted by Presentation of Plaint.

2. 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.

3. Filling 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.

4. Appearances of Parties - According to Order 9, the parties should appear on the day fixed by summons.

5. Examination of Parties - Order 10, the court examines the parties to the court.

6. Framing of Issues - The court frames the Issues according to Order 14.

7. Hearings - The court hears the parties according to Order 18.

8. Judgement - The court pronounces the decree according to Order 20.

Question: *Which of the given Order of Code of Civil Procedure, 1908 provides the provision relating to Institution of Suit?*

Option: (A) II (B) IV (C) IX (D) X

Answer: (B)

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 defendant may appear in person or by a duly instructed pleader or by a pleader accompanied by some person to be able to answer all material questions relating to the suit.

Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint. (Order 5)

If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance. The summons must contain a direction that it is for the settlement of issues only or for the final disposal of the suit. Every summons must be accompanied by a copy of the plaint. Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

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;

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

Where the Court is satisfied that there is reason to believe that the person summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way the Court shall order the service of the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the person summoned is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. (O.5, R.20, 'substituted service')

Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.

The above provisions shall apply also to summons to witnesses.

In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed. In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on 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. (O.29, R.2)

Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon

one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

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.

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court (O.8, R.1 and 1A). However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handed over to a witness merely to refresh his memory.

Besides, particulars of set-off must be given in the written statement. A plea of set-off is set up when the defendant pleads liability of the plaintiff to pay to him, in defence in a suit by the plaintiff for recovery of money. Any right of counter claim must be stated. In the written statement new facts must be specifically pleaded. The defendant must deal specifically with each allegation of fact of which he does not admit the truth. An evasive denial is not permissible and all allegations of facts not denied specifically or by necessary implication shall be taken to be.

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 *ex-parte* and the defendant appears at or before such hearing and assigns a good cause for his previous non-appearance, 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:

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

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

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

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

It is open to a party at the trial of a suit to use in evidence any one or more of the answers or any part of the answer of the opposite party to interrogatories without putting in the others or the whole of such answers. But the court may direct that any connected answer should also be put in.

Example

Suit between A (plaintiff) and B (respondent) was initiated. Court decided in favor of A on account of non-appearance by B. Court here passed an ex-parte decree. B can apply for setting aside ex-parte order stating sufficient cause.

Discovery and interrogatories and production of documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts. Discovery may be of two kinds – (a) by interrogatories (b) by documents.

The objects of discovery are to:

(a) ascertain the nature of the case of the adversary or material facts for the adversary's case.

(b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.

(c) narrow the points at issue.

(d) avoid expense and effort in proving admitted facts.

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.

Discovery by documents

All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court may on hearing the application either refuse or adjourn it, if it is satisfied that such discovery is not necessary at all or not necessary at the stage. Or if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents.

Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party. If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence (O.11, R.15), unless he satisfies the Court that such document relates only to his own title, he being a defendant to the suit or any other ground accepted by the Court. Documents not referred to in the pleadings or affidavits may be inspected by a party if the Court allows (O.11, R.18).

A party may refuse to produce the document for inspection on the following grounds:

(i) where it discloses a party's evidence;

(ii) when it enjoys a legal professional privilege;

(iii) when it is injurious to public interest;

(iv) denial of possession of document.

If a party denies by an affidavit the possession of any document, the party claiming discovery cannot cross-examine upon it, nor adduce evidence to contradict it, because in all questions of discovery the oath of the party making the discovery is conclusive [*Kedarnath* v. *Vishwanath,* (1924) 46 All. 417].

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.

Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law.

It is incumbent on the Court at the first hearing of the suit after reading the plaint and the written statement and after ascertaining and examination of the parties if necessary regarding the material propositions of law and facts, to frame the issues thereon for decision of the case. Where the Court is of the opinion that the suit can be disposed off on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following –

(i) Allegations made in the plaint and written statement,

(ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,

(iii) Allegations in answer to interrogatories,

(iv) Contents of documents produced by the parties,

(v) Statements made by parties or their representatives when examined,

(vi) From examination of a witness or any documents ordered to be produced.

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.

Following the decision of the Supreme Court in the above mentioned case, the Gujarat High Court in *Ramkishan Guru Mandir* v. *Ramavtar Bansraj,* AIR 2006 Guj. 34, set aside the judgment which was passed after two and a half years after conclusion of arguments holding that where a judgment was delivered after two years or more, public at large would have reasons to say bad about the Court and the judges.

The judgement must be dated and signed by the judge. Once the judgement is signed it cannot afterwards be altered or added to except as provided under Section 152 or on review.

It is a substantial objection to a judgement that it does not dispose of the question as it was presented by the parties [*Reghunatha* v. *Sri Brozo Kishoro,* (1876) 3 I.A., 154].

If a judgement in unintelligible, the appellate court may set it aside and remand the case to the lower court for the recording of judgement according to law after hearing afresh the arguments of the pleaders (*Harbhagwan Ahmad,* AIR 1922 Lah. 12)

Decree

On judgement a decree follows. Every endeavour must be made to ensure that decree is drawn up expeditiously and in any case within a period of 15 days from the date on which the judgement is pronounced. It should contain the:

(i) number of the suit(s);

(ii) names and descriptions of the parties and their registered addresses;

(iii) particulars of the claim;

(iv) relief granted or other determination of the suit;

(v) amount of cost incurred and by whom is to be paid.

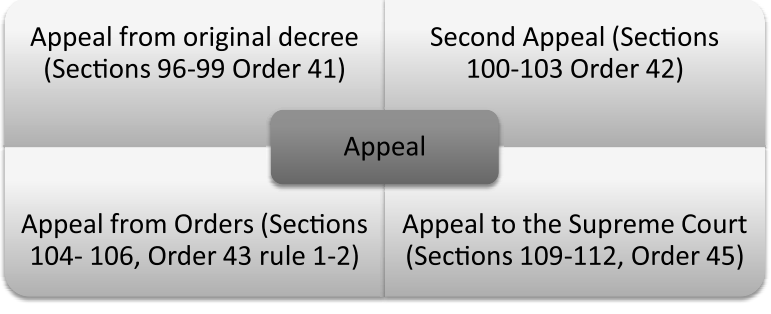
Execution

Execution is the enforcement of decrees or orders of the Court. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. (Section 36. For details refer Order 21)

APPEALS

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:

(i) 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,

(ii) from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,

(iii) 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:

(i) When the lower court has refused to admit evidence which ought to have been admitted.

(ii) When the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.

(iii) 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, REVIEW AND REVISION

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 foe 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.

Question: *Which of the following courts have the power of revision under Code of Civil Procedure, 1908?*

Options: (A) District Court

(B) High Court

(C) Executive Magistrate

(D) Judicial Magistrate of First Class

Answer: (B)

A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

Example

On discovering that District Court erred in making a decision by exercising wrongful jurisdiction for which no further appeal lies, High Court may order revision of such decree.

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. (O.29, R.1)

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. (O.29, R. 2)

Question: *Which of the following officer is not recognized to sign and verify any pleading on behalf of the corporation?*

Options: (A) Secretary

(B) Principal Officer

(C) Director

(D) Senior Manager

Answer: (D)

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. (O.29, R.3)

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. (O.32, Rules 1 and 4).

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. (O.32, R.2).

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 [O.32, R.3(1)]. 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 [O.32, R.3(2)].

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continues as such throughout all proceeding arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree [O.32, R.3(5)]

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.

CASE LAW

In Ram Chandra Arya vs. Man Singh and Ors. (08.12.1967 - SC) : 1968 AIR 954

The Court held that a decree passed against a minor or lunatic without appointed legal guardian is void and not voidable. It was stated that

> *"if a decree is passed against a minor without appointment of a guardian, the decree is a nullity and is void and not merely voidable. This principle becomes applicable to the case of a lunatic in view of Rule. 15 of Order. 32 of the Code of Civil Procedure, so that the decree obtained against Ram Chandra was a decree which had to be treated as without jurisdiction and void. In these circumstances, the sale held in execution of that decree must also be held to be void"*

SUMMARY PROCEEDINGS/PROCEDURE

Order 37 provides for a summary procedure in respect of certain suits. A procedure by way of summary suit applies to suits upon bill of exchange, hundis or promissory notes, or to suits 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. The object is to prevent unreasonable obstruction by a defendant.

The rules for summary procedure are applicable to the following Courts:

(1) High Courts, City Civil Courts and Small Courts;

(2) Other Courts: In such Courts, the High Courts may restrict the operation of Order 37 by issuing a notification in the Official Gazette.

The debt or liquidated demand in money payable by the defendant should arise on a written contract or on an enactment or on a guarantee.

In the case of *Navinchandra Babulal Bhavsar vs Bachubhai Dhanabhai Shah, AIR 1969 Guj 124, (1968) GLR*

409, the Gujarat High Court has observed that the relevant provisions prima facie show that the object of the summary procedure is that in a large commercial town certain types of litigation concerning the commercial community should be expeditiously handled and brought to an end, including the realisation of the decretal amount, if a decree is passed. This is intended to give impetus to commerce and industry and thereby benefit the place as a whole by inspiring confidence in the large commercial population of the town that their causes in respect of monetary claims of liquidated amounts would be justly and expeditiously disposed of and their claims will not hang on for years blocking their money and transactions for long periods with a comparatively greater disadvantage to them than in litigation of other types.

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.

Leave to defend

Order 37 Rule 3 prescribes the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such terms as the Court or the Judge may think fit. However, such leave shall not be granted where:

(1) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or vexacious, and

(2) the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

At the hearing of such summons for judgement, the plaintiff shall be entitled to judgement provided the defendant has not applied for leave to defend or if such application has been made and is refused or where the defendant is permitted to defend but he fails to give the required security within the prescribed time or to carry out such other precautions as may have been directed by the Court.

After decree, the Court may, under special circumstances set-aside the decree and if necessary stay or set-aside execution, and may give leave to the defendant to appear and to defend the suit. (Rule 4 order 37)

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

CASE LAW

Uma Shankar Kamal Narain and Ors. vs. M.D. Overseas Ltd. (2007) 4 SCC 133

This appeal was filed against the order passed by the Delhi High Court granting conditional leave to the appellants to defend in a summary suit. The appellants filed an application for leave to defend in the same suit. Learned Single Judge of the High Court found that the grounds taken in the application for leave to defend were sham and moonshine. The appellants were directed to deposit the amount of Rs. 39,30,856/- to the registry of the division bench of High Court. Conditional leave to defend was granted to the appellants. Respondent wanted liberty to withdraw the amount on deposit. High Court refused to accede to the prayer.

The position of law was noted and highlighted relating to summary suits by the Supreme Court as under:

(a) If the defendant satisfied the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or made of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

Supreme Court directed to deposit a sum of Rs. 20,00,000/- within a period of three months in the registry of the High Court.

Southern Sales and Services and Ors vs. Sauermilch Design and Handels GMBH: 1982 AIR 1518

According to the ratio decidendi of this case "Deposit of amount admitted in the court is an essential for granting Unconditional leave to defend a suit"

CASE LAW

B.L. Kashyap and Sons Ltd. vs. JMS Steels and Power Corporation and Ors. (18.01.2022 - SC) : (2022) 3 SCC 294

Supreme Court held that leave to defend should only be granted in exceptional cases. The leave to defend shall be denied only on the grounds that there is no fair or reasonable defence. It was stated that:

"application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the Rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the Defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave"

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 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.

Example

National Company Law Tribunal and National Company Law Tribunal has, for the purposes of discharging their functions under the Companies Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

Few major enactments empowering the tribunals with the power of civil court are:

1. The Companies Act, 2013
2. The Securities and Exchange Board of India Act, 1992
3. Income-tax Act, 1961
4. The Information Technology Act, 2000
5. The Prevention of Money-Laundering Act, 2002

The respective tribunal may exercise these powers of the Civil Court to discharge the functions assigned to them under respective statute. However, the tribunals should exercise due care while using these powers ensuring the powers used are for the purpose of achieving the object of legislation delegating the powers.

CASE LAWS

Padam Sen and Ors. vs. The State of Uttar Pradesh (27.09.1960 - SC) : 1961 AIR 218

The Court held that inherent powers of court are not defined anywhere, it shall be freely exercised at the discretion of the Court, as it may deem fit, but it shall not be in conflict or against the intention of legislature. It was stated that:

> *"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in s. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."*

Yashpal Jain v. Sushila Devi & Others decided by Supreme Court on 20th October, 2023

In this case, in the preface of the Judgement, Hon'ble Supreme Court has stated that:

Even after 41 years, the parties to this lis are still groping in the dark and litigating as to who should be brought on record as legal representative of the sole plaintiff. This is a classic case and a mirror to the fact that litigant public may become disillusioned with judicial processes due to inordinate delay in the legal proceedings, not reaching its logical end, and moving at a snail's pace due to dilatory tactics adopted by one or the other party.

Further in this case, the Supreme Court has issued the following 12 directions for Speedy Trial of Civil Cases:

i. All courts at district and taluka levels shall ensure proper execution of the summons and in a time bound manner as prescribed under Order V Rule (2) of CPC and same shall be monitored by Principal District Judges and after collating the statistics they shall forward the same to be placed before the committee constituted by the High Court for its consideration and monitoring.

ii. All courts at District and Taluka level shall ensure that written statement is filed within the prescribed limit namely as prescribed under Order VIII Rule 1 and preferably within 30 days and to assign reasons in writing as to why the time limit is being extended beyond 30 days as indicated under proviso to sub-Rule (1) of Order VIII of CPC.

iii. All courts at Districts and Talukas shall ensure after the pleadings are complete, the parties should be called upon to appear on the day fixed as indicated in Order X and record the admissions and denials and the court shall direct the parties to the suit to opt for either mode of the settlement outside the court as specified in sub-Section (1) of Section 89 and at the option of the parties shall fix the date of appearance before such forum or authority and in the event of the parties opting to any one of the modes of settlement directions be issued to appear on the date, time and venue fixed and the parties shall so appear before such authority/forum without any further notice at such designated place and time and it shall also be made clear in the reference order that trial is fixed beyond the period of two months making it clear that in the event of ADR not being fruitful, the trial would commence on the next day so fixed and would proceed on day-to-day basis.

iv. In the event of the party's failure to opt for ADR namely resolution of dispute as prescribed under Section 89(1) the court should frame the issues for its determination within one week preferably, in the open court.

v. Fixing of the date of trial shall be in consultation with the learned advocates appearing for the parties to enable them to adjust their calendar. Once the date of trial is fixed, the trial should proceed accordingly to the extent possible, on day-to-day basis.

vi. Learned trial judges of District and Taluka Courts shall as far as possible maintain the diary for ensuring that only such number of cases as can be handled on any given day for trial and complete the recording of evidence so as to avoid overcrowding of the cases and as a sequence of it would result in adjournment being sought and thereby preventing any inconvenience being caused to the stakeholders.

vii. The counsels representing the parties may be enlightened of the provisions of Order XI and Order XII so as to narrow down the scope of dispute and it would be also the onerous responsibility of the Bar Associations and Bar Councils to have periodical refresher courses and preferably by virtual mode.

viii. The trial courts shall scrupulously, meticulously and without fail comply with the provisions of Rule 1 of Order XVII and once the trial has commenced it shall be proceeded from day to day as contemplated under the proviso to Rule (2).

ix. The courts shall give meaningful effect to the provisions for payment of cost for ensuring that no adjournment is sought for procrastination of the litigation and the opposite party is suitably compensated in the event of such adjournment is being granted.

x. At conclusion of trial the oral arguments shall be heard immediately and continuously and judgment be pronounced within the period stipulated under Order XX of CPC.

xi. The statistics relating to the cases pending in each court beyond 5 years shall be forwarded by every presiding officer to the Principal District Judge once in a month who (Principal District Judge/ District Judge) shall collate the same and forward it to the review committee constituted by the respective High Courts for enabling it to take further steps.

xii. The Committee so constituted by the Hon'ble Chief Justice of the respective States shall meet at least once in two months and direct such corrective measures to be taken by concerned court as deemed fit and shall also monitor the old cases (preferably which are pending for more than 05 years) constantly.

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 -

- If he is aggrieved by the judgment of Commercial court below District Judge, he may appeal to the Commercial Appellate Court.
- 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.

Amendments to the Provisions of the Code of Civil Procedure, 1908

Section 16 of the Act provides that the provisions of Code of Civil Procedure 1908 shall in their application to any suit in respect of a commercial dispute of specified value stands amended in manner provided under the schedule. The following provisions have been amended by the Schedule in their application-

- Section 26 – Institution of Suits
- Section 35-A- Compensatory Costs
- Section 35- Costs
- Order 5 – Issuance and Service of Summons
- Order 6, 7 and 8 – Pleadings
- Order 11- Discovery and Inspection of Documents
- Order 18 – Examination of Witness
- Order 20 – Judgment and Decree, etc.

Certain provisions were also inserted to enable the fast track process of Commercial Courts.

CASE LAWS

1. Daimler Financial Services India Pvt. Limited vs. Vikash Kumar and Ors. (24.06.2020 - JHRHC) : W.P. (C). No. 3941 of 2019

The petitioner is a non-banking finance company. The opposite parties obtained loan which they failed to repay and the matter was then referred to sole arbitrator. On being dissatisfied with the arbitral award they approached to Commercial Court, Dhanbad. The Commercial Court dismissed the petition on grounds of having no pecuniary jurisdiction. The court stated,

"The learned Court below observed that the said Court below is at present having pecuniary jurisdiction of one crore rupees or such higher value as may be notified by the Central Government as there is no notification of the State in compliance of Section 3(1-A) of the Commercial Courts Act, 2015 as amended by the amendment Act of 28 of 2018, and came to a conclusion that the Court below has no jurisdiction to decide the execution petition and dismissed the same for being non-maintainable."

2. Telangana State Tourism Development Corporation Limited vs. A.A. Avocations Pvt. Ltd. (09.06.2022 - TLHC) : 2022 SCC OnLine TS 1266

The court held that if the specified value of commercial suit is one crore and above it shall be referred to Commercial Courts Act under Section 9 of Arbitration and Conciliation Act 1996.

"On a cumulative reading of Section 2(1)(C)(vii), Section 101 and Section 122, it is apparent that if a dispute arising out of an agreement concerning immovable property which is exclusively used in trade or commerce and whose 'specified value' is more than one crore, then, it is a 'commercial dispute' and only the commercial Court has jurisdiction to deal with application filed under Section 9 of the Act, 1996."

3. The Court cited ***T. Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467*** to reiterate that the answer to an irresponsible suit or litigation would be a vigilant judge and comment that "an onerous responsibility rests on the shoulders of the presiding officer of every court, who should be cautious and vigilant against such indolent acts and persons who attempt to thwart quick dispensation of justice. A response is expected from all parties involved, with a special emphasis on the presiding officer. The presiding officer must exercise due diligence to ensure that proceedings are conducted efficiently and without unnecessary delays." The Court also suggested members of the Bar to be circumspect in seeking adjournments, particularly regarding old matters or those pending for decades....

The Court issued following directions towards curbing judicial delay: All courts at district and taluka levels to ensure proper and time bound execution of the summons as per Order V Rule (2) of CPC; Principal District Judges to monitor the same, collate the statistics and forward them to committee constituted by High Court for consideration and monitoring. All courts at district and taluka levels to ensure filing of written statement within the time prescribed under Order VIII Rule 1, preferably within 30 days, assign reasons in case of extending the limit beyond 30 days as per Order VIII sub-Rule (1) of CPC. All courts at district and taluka levels to ensure that after completion of pleadings, parties are called upon to appear on the day fixed as per Order X, and record admissions/denials; to direct parties to either opt for mode of settlement outside the Court as per Section 89(1) and fix date for appearance before appropriate forum/authority and make it clear in the reference order the date fixed in case of failure of ADR. In case of parties not opting for ADR as per Section 89(1), the Court to frame issues for its determination within 1 week, preferably in open court. Fix date of trial in consultation with advocates appearing for the parties, enabling them to adjust their calendar, and proceed with trial on a day-to-day basis to the possible extent. Trial Judges of district and taluka courts to maintain diary to ensure that only such number of cases are handled on a given day for trial and complete recording of evidence to avoid overcrowding of cases which as a sequence would result in adjournment sought and preventing inconvenience to stakeholders. Counsels representing parties to be enlightened of provisions under Order XI and XII to narrow down the scope of dispute, also the onerous responsibility of the Bar Associations and Bar Councils to have periodical refresher courses, preferably in virtual mode. Trial Courts to comply with Order XVII Rule 1 scrupulously, meticulously and without fail, and once commenced, trial to be proceeded with on a day-to-day basis as per Rule 2. Courts to give meaningful effect to effect to provisions for payment of cost to ensure no adjournment is sought for procrastination of litigation, and opposite party gets suitably compensated in case of adjournment so granted. On conclusion of trial, oral arguments to be heard immediately and continuously, and judgment to be pronounced within the period

stipulated under Order XX of CPC. Every presiding officer to forward statistics related to cases pending before each Court beyond 5 years to the Principal District Judge once in a month, who has to collate the data and forward it to review committee constituted by High Courts, enabling it to take further steps.

4. The Supreme Court in ***Eldeco Housing and Industries Limited v. Ashok Vidyarthi and Others (Special Leave Petition (C) No. 19465 of 2021)*** ruled that when invoking Order 7 Rule 11(d) of the CPC, the court cannot consider any evidence. The court also ruled that the issues of merit between the parties are not within the court's purview at that stage.

5. In *Civil Appeal No. 2308-2309 of 2016 (Arising out of SLP(C) No. 8536-8537 of 2008)* ***Vijay Prakash Jarath v. Tej Prakash Jarath*****it** was ruled that the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement.

6. In *Civil Appeal No. 3190 of 2016 (Arising out of S.L.P. (Civil) No. 6662 of 2016)* ***Raghavendra Swamy Mutt v. Uttaradi Mutt***, it was stated that Appeal under Section 100 CPC is required to be admitted only on substantial question/questions of law. It cannot be formal admission like an appeal under Section 96 CPC. That is the fundamental imperative. It is peremptory in character, and that makes the principle absolutely cardinal.

7. In *Civil Appeal No. 4543 of 2016 (Arising out of S.L.P.(C) No. 538 of 2014)* ***Rishabh Chand Jain & Another v. Ginesh Chandra Jain*****,** it was stated that the impugned order dismissing the suit on the ground of Res Judicata does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-Section (2) thereof. It is only appealable under section 96 read with Order XLI of the Code.

LESSON ROUND-UP

- The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.
- The Code defines important terms that have been used thereunder and deals with different types of courts and their jurisdiction. Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication.
- Under the Code of Civil Procedure, a civil court has jurisdiction to try a suit if two conditions are fulfilled:
  - (i) the suit must be of a civil nature; and
  - (ii) the cognizance of such suit should not have been barred. Jurisdiction of a court may be of four kinds:
    - (a) jurisdiction over the subject matter;
    - (b) local or territorial jurisdiction;
    - (c) original and appellate jurisdiction;
    - (d) pecuniary jurisdiction depending on pecuniary value of the suit.

- The Code embodies the doctrine of res-judicata that is, baror restraint on repetition of litigation of the same issues between the same parties. It enacts that since a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. 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 the absence of such a rule there would be no end to litigation and the parties would be put to constant trouble, harassment and expenses.
- The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question.
- The Code also provides for making certain interlocutory orders. The court has power to order sale of any moveable property which is the subject-matter of the suit or attached before judgement in such suit which is subject to speedy and natural decay or for any just and sufficient cause desirable to be sold at once.
- 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: (i) the opposing parties; (ii) the cause of action; (iii) the subject matter of the suit, and (iv) the relief(s) claimed.
- Every suit shall be instituted in the Court of the lowest grade competent to try it. The Code specifies the categories of suits that shall be instituted in the court within the local limits of whose jurisdiction the property is situated. This is subject to the pecuniary or other limitations prescribed by any law. The various stages in proceedings of a suit have been elaborately laid down under the Code.
- Commercial Courts were established for speedy adjudication of commercial disputes of specified value and matters pertaining to large economic interest.

GLOSSARY

Misjoinder of Parties: Where more than one persons 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'.

Reference: A court in which a suit has been instituted may state a case and refer the same for opinion of the High Court

Review: 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

Revision: In 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.

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.

Territorial jurisdiction: A territorial limit of jurisdiction for each court is fixed by the Government.

Pecuniary jurisdiction: Section 6 of 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.

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.

Doctrine of Res judicata: No Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit 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 an finally decided by such Court.

Specified Value: In relation to a commercial dispute, it means the value of the subject-matter in respect of a suit which shall not be less than three lakh rupees.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss Jurisdiction of Civil Courts.
2. Define the terms:
   - (i) Order
   - (ii) Judgement
   - (iii) Decree
   - (iv) Revision
   - (v) Appeal
   - (vi) Reference
   - (vii) Review.
3. What is *res judicata* and stay of suits?
4. Briefly discuss the provisions relating to inherent powers of the Court.
5. Explain in brief Summary Procedure.
6. Explain the important stages in proceeding of a suit
7. Write a short note on Commercial Court Act, 2015.
8. Discuss the provision related to pre mediation under the Commercial Courts Act, 2015.

LIST OF FURTHER READINGS

- Bare Act of Civil Procedure Code, 1908
- Civil Procedure Code, 1908; Allahabad Law Agency, Allahabad, M.P. Tandon
- AIR Manual of CPC

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/2191/1/A1908-05.pdf

Laws relating to Crime and its Procedure

Lesson 7

KEY CONCEPTS

■ Criminal Intention ■ Search ■ Abetting ■ *Mens Rea* ■ *Actus Reus* ■ Congnizable Offence ■ Non-Congnizable Offence ■ Criminal conspiracy ■ Misappropriation ■ Criminal breach of Trust ■ Accusation ■ Defamation ■ Grievous hurt ■ Attempt ■ Accomplishment ■ Presumption of Innocence ■ Burden of Proof ■ Mutiny ■ Personation

Learning Objectives

To understand:

- Ingredients of Crime and law dealing with the menace of Crime
- Structure of judicial system dealing with criminal cases
- The provisions relating to Bail
- Provisions relating to Compounding of Offences
- Offences relating to the property
- Criminal Breach of Trust
- Offences relating to documents and property marks
- Defamation
- Difference between fine and penalty

Lesson Outline

- Introduction
- The Stages of Crime
- Type of Punishments
- Difference between Fine and Penalty
- The Fundamental Elements of Crime
- Cognizable Offence and Non-cognizable Offence
- Classes of Criminal Courts
- Power of Courts
- Inherent Powers of the Court
- Arrest of Persons
- Summons and Warrants
- Proclamation and Attachment
- Summons to Produce
- Search Warrant
- Summary Trials
- Compounding of Offences
- Bail
- Limitation for Taking Cognizance of Certain Offences
- Offences against Property
- Criminal misappropriation of property (Section 314 and Section 315)
- Criminal breach of trust
- Fraudulent deeds and dispositions of property
- Offences Relating to Documents and Property Marks
- Defamation
- General Exceptions
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- **The Bharatiya Nagarik Suraksha Sanhita, 2023**
- **The Bharatiya Nyaya Sanhita, 2023**

INTRODUCTION

Bharatiya Nyaya Sanhita

The Bharatiya Nyaya Sanhita, 2023 is a modern day legislation which has replaced the colonial Indian Penal Code of 1860 which was retained as the main penal law of the country even after India became independent in 1947. Enforced from 1st July 2024, The Bharatiya Nyaya Sanhita (BNS) 2023 represents a transformative update to India's criminal laws, replacing the colonial-era Indian Penal Code (IPC) of 1860. By introducing modernized definitions and addressing new forms of crime, such as cyber offenses and organized crime, the BNS 2023 aims to make India's legal system more aligned with contemporary social and technological realities. It incorporates provisions for community service as punishment, refines terrorism and sedition laws, and eliminates obsolete offenses, reflecting India's commitment to justice and human rights. The BNS 2023 is a crucial step in enhancing the accessibility, relevance, and efficiency of the Indian criminal justice system, while upholding the constitutional rights of all citizens.

The Indian Penal Code, 1860 (IPC) was a colonial legislation which was retained as the main penal law of the country even after India became independent in 1947. The Bharatiya Nyaya Sanhita, 2023 which came into force on 1st July 2024 and applies to the whole of India replaced the colonial IPC.

Crime is a social phenomenon. It is a wrong committed by an individual in a society. It arises first when a state is organized, people set up rules, the breaking of which is an act called crime. Law regulates the social interest, arbitrates conflicting claims and demands. The security of persons and property which is an essential function for the State 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. 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 societal standards.

In India, the base of the crime and punitive provision has been laid down in Bharatiya Nyaya Sanhita, 2023. In BNS the definition of crime has not been attempted or defined but according to section 2(24) the word 'Offence' 'means a thing made punishable by BNS'. The word offence and crime are interchangeable. The BNS doesn't uses the word 'crime'. Instead it uses the term 'Offence' as defined under section 2(24).

The Bharatiya Nyaya Sanhita, 2023 is the 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 BNS is implemented is the Bhartiya Nagarik Suraksha Sanhita 2023(BNSS). BNS consists of 20 chapters and 358 sections.

Bharatiya Nagarik Suraksha Sanhita

The Bharatiya Nagarik Suraksha Sanhita(BNSS) is an Act to consolidate and amend the law relating to Criminal Procedure. BNSS was introduced to replace the Criminal Procedure Code, 1973 as part of India's efforts to modernize and streamline its criminal justice system in alignment with contemporary needs and societal expectations. The shift reflects an intent to enhance the efficiency of criminal procedures, ensure victim-centric justice, and integrate technological advancements into the investigative and judicial processes. By addressing delays, redundancies, and complexities in the earlier framework, the BNSS incorporates provisions to expedite trials, strengthen digital evidence mechanisms, and improve transparency. Furthermore, it emphasizes safeguarding the rights of individuals, ensuring fairness, and reducing procedural bottlenecks, thereby making the legal system more accessible and effective for citizens while maintaining the principles of justice and equity.

Company Secretaries and the secretarial profession would have relatively less to do with the Bharatiya Nagarik Suraksha Sanhita, 2023 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 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 Bharatiya Nyaya Sanhita (BNS). The two Codes are to be read together. The Code also provides machinery for punishment of offences under some other Acts.

Jurisdiction of Bharatiya Nyaya Sanhita, 2023

The geographical area or the subjects to which a law applies is defined as the jurisdiction of that law.

Ordinarily, laws made by a country are applicable within its own boundaries because a country cannot have legal machinery to enforce its laws in other sovereign countries. Thus, for most of the laws, the territorial jurisdiction of a law is the international boundary of that country. Countries, however, also make laws that apply to territories outside of their own country. This is called the extra-territorial jurisdiction.

Under the Bharatiya Nyaya Sanhita 2023, criminal courts in India exercise jurisdiction either because a crime is committed by any person (national, or foreigner) within the Indian territory or because a crime though committed outside India, the person committing the crime is liable to be tried for it under any Indian law. The former is known as intra-territorial jurisdiction and the latter as known as extra-territorial jurisdiction.

Intra-territorial jurisdiction: Where a crime under any provision of BNS is committed within the territory of India, the BNS applies and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Indian national or foreigner. This is called 'intra-territorial jurisdiction' because the submission to the jurisdiction of the court is by virtue of the crime being committed within the Indian territory. Section 1(4) and 1(5) of BNS deals with extra-territorial jurisdiction of the courts. This section declares the jurisdictional scope of operation of the BNS to offences committed within India and beyond India. The emphasis on 'any person' makes it very clear that in terms of considering the guilt for any act or omission, the law shall be applied equally without any discrimination on the ground of caste, creed, nationality, rank, status or privilege. BNS applies to any offence committed:

1. Within the territory of India as defined in Article 1 of the Constitution of India.
2. Any place without and beyond India;
3. Any person on any ship or aircraft registered in India wherever it may be;

4. Any person in any place without and beyond India committing an offence targeting a computer resource located in India.

It should be noted that it is not a defence that a foreigner/non-Indian citizen did not know that he was committing a wrong, the act itself not being an offence in his own country. In this regard the Supreme Court in *Mobarik Ali Ahmed* v. *State of Bombay*, 1957 AIR SC 857, held that it is obvious that for an Indian law to operate and be effective in the territory where it operates, i.e., the territory of India, it is not necessary that the laws should either be published or be made known outside the country in order to bring foreigners under its ambit. It would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India.

Exemption from intra-territorial jurisdiction of BNS:-

1. Article 361(2) of the Constitution of India protects criminal proceedings against the President or Governor of a state in any court, during the time they hold office.
2. In accordance with well-recognized principles of international law, foreign sovereigns are exempt from criminal proceedings in India.
3. This immunity is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India.

Section 3 of the IPC replaced with Section 1(4) of the BNS:

BNS: Section 1 (4)

- Any person liable, by any law for the time being in force in India, to be tried for an offence committed beyond India shall be dealt with according to the provisions of BNS for any act committed beyond India in the same manner as if such act had been committed within India.

Section 4 of the IPC replaced with Section 1(5) of the BNS:

BNS: Section 1 (5)

The provisions of BNS shall also apply to any offence committed by –

(a) any citizen of India in any place without and beyond India;

(b) any person on any ship or aircraft registered in India wherever it may be;

(c) any person in any place without and beyond India committing an offence targeting a computer resource located in India.

In this section, the word "offence" includes every act committed outside India which, if committed in India, would be punishable under BNS.

***Illustration**:* A, who is a citizen of India, commits a murder in any place without and beyond India. He can be tried and convicted of murder in any place in India in which he may be found.

Changes between Section 3 of the IPC and Section 1(4) of the BNS:

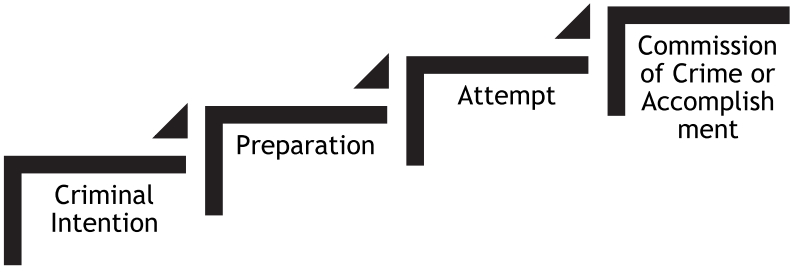
- Section is included as a subsection in BNS sans heading.
- "Indian laws" is replaced with "law" and "for the time being in force in India" is inserted.

Changes between Section 4 of the IPC and Section 1(5) of the BNS:

- Section is included as a subsection in BNS sans heading.
- In the illustration, "Uganda" has been replaced with "any place outside India."

THE 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 BNS, all these varied expressions find place in the various sections of BNS. Intention can also be imputed under the law. For example, if a man drives in a rash and reckless manner resulting in an accident causing death of a person, the reckless driver cannot plead innocence by stating that he never intended to cause the death of the person. It may be true in the strict sense of the term. But a reckless driver should know that reckless driving is likely to result in harm and can even cause death of the persons on the road, So, by virtue of definition of the word 'voluntarily' in BNS, a reckless driver who causes death of a person can be presumed or deemed to have intended to cause the death of the person.

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 BNS, mere preparation to commit a 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 190).

(ii) Preparation for counterfeiting of coins or Government Stamps (sections 178 and181).

(iii) Possessing counterfeit coins, false weights or measurements and forged documents (section 180 and 339).

(iv) Making preparation to commit dacoity (section 310 (4).

3. Attempt

Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. Though, section 62 of the BNS 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 whether 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 the attempt must be proximate to the intended result. Under the BNS, 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 well as 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 to compel or restrain from applying or restrain of lawful power specifically provided as an offence under section 226 of the BNS.

(iv) The fourth category relates to the attempt to commit offences for which no specific punishment has been provided in the BNS. Such attempts are covered under section 62. This section of BNS provides that whoever attempts to commit an offence punishable by BNS 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 BNS 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 BNS.

TYPE OF PUNISHMENTS

Types of Punishments					
Death	Imprisonment for life	Imprisonment, which is of two descriptions, namely: (1) Rigorous, that is, with hard labour; (2) Simple;	Forfeiture of property	Fine	Community Service

1. **Death:** A death sentence is the harshest of punishments provided in the BNS, which involves the judicial killing or taking the life of the accused as a form of punishment. The Hon'ble Supreme Court in various cases has ruled that death sentence ought to be imposed only in the 'rarest of rare cases'. This doctrine

was propounded by the Supreme Court in the case of *Bacchan Singh v. State of Punjab* (***AIR 1980 SC 898)***. The BNS provides for capital punishment for the following offences:

(a) Murder

(b) Dacoity with Murder.

(c) Waging War against the Government of India.

(d) Abetting mutiny actually committed.

(e) Giving or fabricating false evidence upon which an innocent person suffers death

(f) Abetment of a suicide by a minor or insane person;

(g) Attempted murder by a life convict.

The Bharatiya Nyaya Sanhita (BNS) has increased the number of offenses punishable by death. Some of the offenses that are now punishable by death under the BNS include:

1. **Murder**

   The punishment for murder is death or life imprisonment, and the offender may also be liable to a fine.

2. **Mob lynching**

   The punishment for murder or grievous hurt by five or more people on specified grounds is a minimum of seven years imprisonment to life imprisonment or death.

3. **Terrorism**

   The punishment for attempting or committing terrorism is death or life imprisonment and a fine of Rs 10 lakh if it results in death.

4. **Organized crime**

   The punishment for attempting or committing organized crime is death or life imprisonment and a fine of Rs 10 lakh if it results in death.

   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 has to give special reasons as to why the court came to this conclusion.

2. **Life Imprisonment:** Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.

3. **Imprisonment:** Imprisonment which is of two descriptions namely –

   (i) Rigorous Imprisonment, that is hard labour;

   (ii) Simple Imprisonment

4. **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 154 and 155 of the BNS.

5. **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.

6. **Community Service as Punishment:** The Bharatiya Nyaya Sanhita (BNS) 2023 includes community service as a form of punishment for minor offenses:

Purpose

The BNS aims to create a more balanced and rehabilitative criminal justice system by focusing on restorative justice. The goal is to promote rehabilitation and reduce the burden on the prison system. **Community** service has been used widely in **America** to **punish** petty offences, for example in cases of vandalism, petty theft, etc.

Examples of offenses under BNS

Community service can be an option for offenses like petty thefts, public nuisance, false defamation complaints, and drunken misconduct in public.

How it works

Courts can choose community service over incarceration or fines. For example, offenders involved in thefts of property valued under Rs 5,000 can avoid traditional punishments by returning the stolen goods and performing community service.

Community service for offences under the Bharatiya Nyaya Sanhita (BNS) 2023:

I. Involvement of public servants in illegal trade (Sec 202 BNS)
II. Non-appearance in response to a proclamation (Sec 209 BNS)
III. Attempt to commit suicide to influence legal authority (Sec 226 BNS)
IV. First conviction of petty theft involving property valued below Rs.5,000 and the property must have been recovered. (Sec 303 BNS)
V. Public misconduct by a drunken person (Sec 355 BNS)
VI. Defamation (Sec 356 BNS)

Difference between Fine and Penalty

Fine

According to merriam-webster dictionary fine “a sum imposed as punishment for an offense”.

Penalty

According to merriam-webster dictionary, “the suffering or the sum to be forfeited to which a person agrees to be subjected in case of non fulfillment of stipulations.”

Analysis

An inference may be drawn from the definitions above that punishments are against offences and penalties are against non-compliances.

According to section 2(38) of the General Clauses Act, 1897, offence shall mean any act or omission made punishable by any law for the time being in Force.

According to Merriam-webster dictionary, the meaning of Non-compliances is failure or refusal to comply with something (such as a rule or regulation) : a state of not being in compliance.

Accordingly, we can analyse that the mention of fine and penalty in a particular provision may depend upon the nature of provision i.e. Criminal or Civil.

Example

According to section 12(8) of the Companies Act, 2013, if any default is made in complying with the requirements of section 12, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.

In this provision, we may note that here the default is in nature of non-compliance there the provision creates the liability of penalty.

According to section 16(3) of the Companies Act, 2013, if a company makes default in complying with any direction given under section 16(1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

In this provision, we may note that here the default is in nature of offence and the provision provides for fine as a punishment.

Further, it may be noted that in the Companies Act, 2013, where monetary penalty is provided for any default, generally no punishment by way of imprisonment is provided. But, Fine and imprisonment are mostly provided together. Two such examples may be referred as under:

Section 8(11) of Companies Act, 2013

"If a company makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than twentyfive thousand rupees but which may extend to twenty-five lakh rupees, or with both"

Section 26(9) of the Companies Act, 2013

"If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both."

The same may also be analysed from SEBI Act, 1992, where imprisonment and fine and kept together for imposition but liability of penalties are provided for non-compliances.

THE FUNDAMENTAL ELEMENTS OF CRIME

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:

Elements of Crime		
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.

Types of *mens rea*:

- Intention
- Negligence
- Recklessness

Hon'ble Supreme Court in *Girja Nath* v. *State* said that *mens rea* is a loose term of elastic signification and covers a wide range of mental status and conditions the existence of which give criminal hue to *actus reus*. Intention, Negligence and recklessness are the important forms of *mens rea*.

(i) 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. For example: A poisons the food which B was supposed to eat with the intention of killing B. C eats that food instead of B and is killed. A is liable for killing C although A never intended it.

(ii) 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 *means rea*.

(iii) 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 Bharatiya Nyaya Sanhita, 2023, but the idea underlying in it is seen in the entire BNS. Generally, in the BNS, every offence is defined with precision embodying the necessary *mens rea* in express words.

The *mens rea* or evil intent of the wrong-doer is indicated by the use of such words as- intentionally, voluntarily, fraudulently, dishonestly, maliciously, knowingly etc.

Exception of *mens rea*

1. **Statutory Imposition:** 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.

2. **Difficulty in proving *mens rea*:** 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*.

3. **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.

4. **Offence 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' which means* ignorance of the law is no excuse.

Corporate Body and *Mens Rea*

With the proliferation in juristic persons and a growth in their activities which increasingly touch upon the daily lives of ordinary people, criminal law has evolved to bring such persons within its ambit. For example, according to section 2(26) of the BNS, the word 'person' includes any Company or Association, or body of persons, whether incorporated or not. Thus companies are covered under the provisions of the BNS. Virtually in all jurisdictions across the world governed by the rule of law, companies can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences. The criminal intent of the 'alter ego' of the company/ body corporate, i.e., the person or group of persons that guide the business of the company, is imputed to the company.

In *State of Maharashtra* v. *M/s Syndicate Transport*, *AIR 1964 Bom 195*, it was held that the question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of offence disclosed by the allegations in the complaint or in the charge sheet, the relative position of the officer or agent *vis-à-vis* the corporate body and other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act.

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 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. For example, if a number of people conspire to murder a person and only one of them actually shoots the person, every conspirator would be held liable for it. A person will also be held fully responsible if he has made use of an innocent agent to commit a crime.

COGNIZABLE OFFENCE AND NON-COGNIZABLE OFFENCE

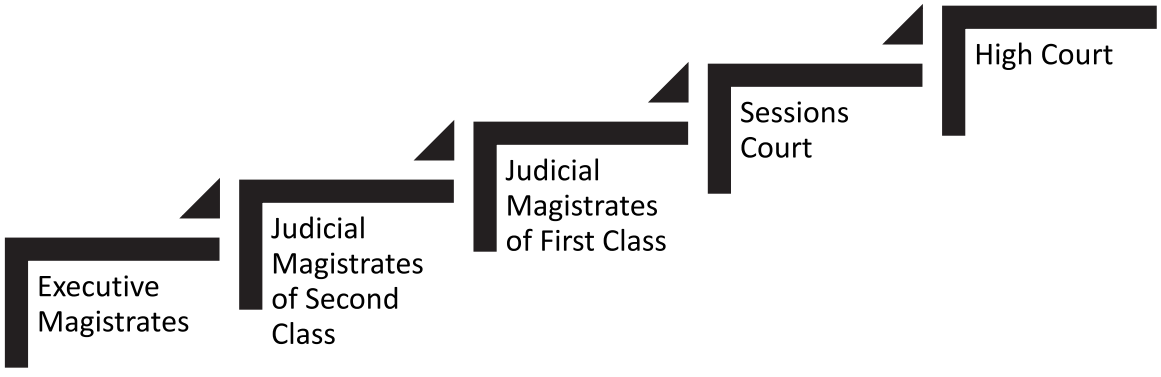
According to section 2(1)(g) of BNSS, "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

However, according to section 2(1)(*o*), "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.

(*Note:* It may be observed from the First Schedule that non-cognizable offences are usually bailable while cognizable offences are generally non-bailable).

CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:



Besides this, the Courts may also be constituted under any other law. The Supreme Court is also vested with powers to deal with some criminal matters. Article 134 confers *appellate* jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.

Changes introduced by BNSS

Section 6 of BNSS (Section 6 of CrPC): Words "in any Metropolitan area, Metropolitan Magistrates" are excluded.

POWER OF COURTS

Chapter III of BNSS deals with the power of Courts. One of such power is to try offences. Offences are divided into two categories:

(a) those under the Bharatiya Nyaya Sanhita; and

(b) those under any other law.

According to Section 21, any offence under the Bharatiya Nyaya Sanhita, 2023 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law and if not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.

This section is a general section and is subject to the other provisions of BNSS.

Power of the Court to pass sentences

(a) ***Sentences which High Courts and Sessions Judges may pass***

According to section 22 of BNSS, a High Court may pass any sentence authorised by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(b) ***Sentences which Magistrates may pass***

Section 23 lays down the quantum of sentence which different categories of Magistrates are empowered to impose. The powers of individual categories of Magistrates to pass the sentence are as under:

(i) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(ii) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding fifty thousand rupees, or of both, or of community service.

(iii) The Court of Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding ten thousand rupees, or of both, or of community service.

Explanation. – "Community service" shall mean the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration.

Changes introduced by BNSS

Section 23 of BNSS (Section 29 of CrPC): Change in amount of fine: ten thousand is replaced by fifty thousand, and five thousand is replaced by ten thousand. The explanation of Section 23 defines "community service." Sub-section 29(4) CrPC is excluded.

(c) ***Sentence of imprisonment in default of fine***

According to section 24, the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term –

(a) is not in excess of the powers of the Magistrate under section 23;

(*b*) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 23.

(d) Sentences in cases of conviction of several offences at one trial

Section 25 relates to the quantum of punishment which the Court is authorised to impose where the accused is convicted of two or more offences at one trial. Under this section, the Court may, subject to the provisions of section 9 (Limit of punishment of offence made up of several offences) of the BNS, sentence to the several punishments prescribed which such Court is competent to inflict. Such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

Changes introduced by BNSS

Section 25 of BNSS (Section 31 of CrPC): Sub section (1) is reframed but the essence is same. In subsection (2) (a) fourteen years is replaced by twenty years.

INHERENT POWERS OF THE COURT

Section 528 of the BNSS is one of the most important section of BNSS. It states that nothing in BNSS shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under BNSS, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

The powers of the High Court under section 528 of BNSS are partly administrative and partly judicial. Inherent powers under section 528 include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Court can always take note of any miscarriage of justice and prevent the same by exercising its powers under section 528 of BNSS. These powers are neither limited nor curtailed by any other provisions of BNSS. However, such inherent powers are to be exercised sparingly and with caution.

The Supreme Court in *Madhu Limaye v. State of Maharashtra, 1978 AIR 47***,** has held that the following principles would govern the exercise of inherent jurisdiction of the High Court:

1. Power is not to be resorted to, if there is a specific provision in the Code for redress of grievances of aggrieved party.
2. It should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice.
3. It should not be exercised as against the express bar of the law engrafted in any other provision of the code.

It is well settled that the inherent powers can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. If an effective alternative remedy is available, the High Court will not exercise its powers under this section, especially when the applicant may not have availed of that remedy.

ARREST OF PERSON

The word “arrest” when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one’s personal liberty to go where he pleases. 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. ection 35 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant.

Any police officer may without an order from a Magistrate and without a warrant, arrest any person –

(a) who commits, in the presence of a police officer, a cognizable offence; or

(*b*) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely: –

(*i*) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary –

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(*c*) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(*d*) to prevent such person from making 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 the police officer; or

(*e*) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest; or

(*c*) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence; or

(*d*) who has been proclaimed as an offender either under BNSS or by order of the State Government; or

(*e*) 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; or

(*f*) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(*g*) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(*h*) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(*i*) who, being a released convict, commits a breach of any rule made under sub-section (*5*) of section 394 of BNSS relating to notification of address of previously convicted offender; or

(*j*) 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 cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Changes introduced by BNSS:

Section 35 of BNSS (Section 41 of CrPC): A new subsection 7 is added: "No arrest shall be made without prior permission of an officer not below the rank of Deputy Superintendent of Police in case of an offence which is punishable for imprisonment of less than three years and such person is infirm or is above sixty years of age."

Certain measures to be followed in the exercise of power under Section 35

Section 35(3) says that the police officer shall, in all cases where the arrest of a person is not required under section 35(*1*) issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice. Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

However, where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

Procedure of Arrest

Section 36 provides the provisions relating to procedure of arrest and duties of officer making arrest

Every police officer while making an arrest shall –

(*a*) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be –

(*i*) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(*c*) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend or any other person named by him to be informed of his arrest.

According to Section 38 when any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

Even the above measures while exercising the power to arrest is not always followed. The Supreme Court in *Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273***,** observed that: "the need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive".

The Supreme Court in the above matter has directed that accused should not be arrested in routine manner and all the pre-conditions must be satisfied. The above judgement applies to crimes punishable with upto 7 years of imprisonment.

Arrest on refusal to give name and residence

According to section 39, when any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

When the true name and residence of such person have been ascertained, he shall be released on a bond or bail bond, to appear before a Magistrate if so required. However, if such person is not resident in India, the bail bond shall be secured by a surety or sureties resident in India.

If the true name and residence of such person is not ascertained within twenty-four hours from the time of arrest or if he fails to execute the bond or bail bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Arrest by private person

According to section 40, any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, but within six hours from such arrest, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

Changes introduced by BNSS

Section 40 of BNSS (Section 43 of CrPC): In subsection (1), without unnecessary delay is further specified by "but within six hours from such arrest." In subsection (2), "re-arrest" is replaced by "take him in custody"

Arrest by Magistrate

According to section 41, when any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Arrest how made

According to section 43, in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

However, where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

If any person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

The police officer may, keeping in view the nature and gravity of the offence, use handcuff while making the arrest of a person or while producing such person before the court who is a habitual or repeat offender, or who escaped from custody, or who has committed offence of organised crime, terrorist act, drug related crime, or illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency-notes, human trafficking, sexual offence against children, or offence against the State.

Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

Changes introduced by BNSS

Section 43 of BNSS (Section 46 of CrPC): A new subsection (3) is added regarding the handcuff of a habitual or repeat offender or accused who has committed certain offences mentioned in the sub-section, etc.

Section 44 is an enabling provision and is to be used by the police officer with regard to exigencies of a situation and provides for the provisions relating to search of place entered by person sought to be arrested. Section 45 authorises a police officer to pursue the offender whom he is authorised to arrest without warrant into any place in India for the purpose of effecting his arrest.

According to section 78, the police officer or other person executing a warrant of arrest shall (subject to the provisions of section 73 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person. However, such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Article 22(2) of the Constitution of India also provides the provision for producing the arrested person before the Magistrate within 24 hours.

When a person is arrested under a warrant, Section 78 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 187 order his detention.

The Magistrate to whom an accused person is forwarded under section 187 may, irrespective of whether he has or has no jurisdiction to try the case, after taking into consideration whether such person has not been released on bail or his bail has been cancelled, authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, or in parts, at any time during the initial forty days or sixty days out of detention period of sixty days or ninety days, as the case may be, as provided in section 187(*3*), and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

According to section 59, officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

According to section 60, no person who has been arrested by a police officer shall be discharged except on his bond, or bail bond, or under the special order of a Magistrate.

According to section 61, if a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India. The provisions of section 44 shall apply to arrests under this section although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest.

According to section 62, no arrest shall be made except in accordance with the provisions of BNSS or any other law for the time being in force providing for arrest.

SUMMONS AND WARRANTS

The general processes to compel appearance are:

(1) Summons

(2) Warrants

Summons

According to section 63, every summons issued by a Court under BNSS shall be, –

(*i*) in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court; or

(*ii*) in an encrypted or any other form of electronic communication and shall bear the image of the seal of the Court or digital signature.

Further as per section 64, every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant. However, by virtue of section 66, where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Changes introduced by BNSS

Section 66 of BNSS (Section 64 of CrPC): The word "male" is excluded to make the provision gender neutral.

Service of summons on corporate bodies, firms, and societies

Section 65 of BNSS provides the provisions relating to Service of summons on corporate bodies, firms, and societies. Service of a summons on a company or corporation may be effected by serving it on the Director, Manager, Secretary or other officer of the company or corporation, or by letter sent by registered post addressed to the Director, Manager, Secretary or other officer of the company or corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

In this section, "company" means a body corporate and "corporation" means an incorporated company or other body corporate registered under the Companies Act, 2013 or a society registered under the Societies Registration Act, 1860.

Service of a summons on a firm or other association of individuals may be effected by serving it on any partner of such firm or association, or by letter sent by registered post addressed to such partner, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Changes introduced by BNSS

Section 65 of BNSS (Section 63 of CrPC): In subsection (1), Director and Manager is added. New subsection (2) regarding service of summons on any partner of a firm or other association of individuals.

Procedure when service cannot be effected as before provided/Substituted Service of Summons

According to section 67, if service cannot by the exercise of due diligence be effected as provided in section 64, section 65 or section 66, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

According to section 68, where the person summoned is in the active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by section 64, and shall return it to the Court under his signature with the endorsement required by that section. Such signature shall be evidence of due service

As per section 69, when a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served.

Service of summons on witness

Section 71 provides the provisions relating to service of summons on witnesses. Notwithstanding anything contained in the preceding sections of this Chapter, a Court issuing a summons to a witness may, in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be served by electronic communication or by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.

When an acknowledgement purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received or on the proof of delivery of summons under section 70(3) by electronic communication to the satisfaction of the Court, the Court issuing summons may deem that the summons has been duly served.

PROCLAMATION AND ATTACHMENT

Where a warrant remains unexecuted, the Code of Procedure Code, 1973 provides for two remedies:



Section 84 provides that if any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

Section 85 also provides that the Court issuing a proclamation under section 84 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person. However, where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued, –

(a) is about to dispose of the whole or any part of his property; or

(*b*) is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment of property simultaneously with the issue of the proclamation.

The object of attaching property is not to punish him but to compel his appearance.

SUMMONS TO PRODUCE

Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under the BNSS 2023. This can be compelled to be produced by issuing summons (Sections 94 and 95) or a warrant (Sections 96 to 101).

SEARCH WARRANT

Serach Warrants may be issued in the following circumstances (Section 96)

- Where any Court has reason to believe that a person to whom a summons order under section 94 or a requisition under of section 95 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition; or
- such document or thing is not known to the Court to be in the possession of any person; or
- the Court considers that the purposes of any inquiry, trial or other proceeding under this BNSS will be served by a general search or inspection,

But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a Magistrate other than a District Magistrate or Chief Judicial Magistrate, nor would such warrant be issued so as to affect Sections 129 and 130 of the BSA 2023 or the Bankers' Book Evidence Act, 1891.

Search of place suspected to contain stolen property, forged documents, etc.

According to section 97, if a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable –

(a) to enter, with such assistance as may be required, such place;

(b) to search the same in the manner specified in the warrant;

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies;

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety;

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

The objectionable articles to which section 97 applies are –

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Coinage Act, 2011, or brought into India in contravention of any notification for the time being in force issued under section 11 of the Customs Act, 1962;

(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in section 294 of the Bharatiya Nyaya Sanhita, 2023;

(g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f).

Search for persons wrongfully confined

In terms of Section 100, any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class who has reasons to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant for the search of the person so confined. The person if found shall be immediately produced before the Magistrate for making such orders as in the circumstances of the case he thinks proper.

Recording of search and seizure through audio-video electronic means

According to section 105, the process of conducting search of a place or taking possession of any property, article or thing under Chapter VII or under section 185, including preparation of the list of all things seized in the course of such search and seizure and signing of such list by witnesses, shall be recorded through any audio-video electronic means preferably mobile phone and the police officer shall without delay forward such recording to the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of the first class.

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.

Section 283 (1) of the BNSS sets out the provisions for summary trials. It states:

Notwithstanding anything contained in BNSS –

(*a*) any Chief Judicial Magistrate;

(b) Magistrate of the first class,

shall try in a summary way all or any of the following offences: –

(*i*) theft, under sub-section (*2*) of section 303, section 305 or section 306 of the Bharatiya Nyaya Sanhita, 2023 where the value of the property stolen does not exceed twenty thousand rupees;

(*ii*) receiving or retaining stolen property, under sub-section (*2*) of section 317 of the Bharatiya Nyaya Sanhita, 2023, where the value of the property does not exceed twenty thousand rupees;

(*iii*) assisting in the concealment or disposal of stolen property under sub-section (*5*) of section 317 of the Bharatiya Nyaya Sanhita, 2023, where the value of such property does not exceed twenty thousand rupees;

(*iv*) offences under sub-sections (*2*) and (*3*) of section 331 of the Bharatiya Nyaya Sanhita, 2023;

(*v*) insult with intent to provoke a breach of the peace, under section 352, and criminal intimidation, under sub-sections (*2*) and (*3*) of section 351 of the Bharatiya Nyaya Sanhita, 2023;

(*vi*) abetment of any of the foregoing offences;

(*vii*) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(*viii*) any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871.

The Magistrate may, after giving the accused a reasonable opportunity of being heard, for reasons to be recorded in writing, try in a summary way all or any of the offences not punishable with death or imprisonment for life or imprisonment for a term exceeding three years. However, no appeal shall lie against the decision of a Magistrate to try a case in a summary way under section 283(2).

When, 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 shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by BNSS.

According to section 285, in trials under Chapter XXII, the procedure specified in BNSS for the trial of summons-case shall be followed except as hereinafter mentioned. No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXII.

Further according to section 287, in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.

COMPOUNDING OF OFFENCES

Section 359 of the BNSS 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 who can compound

Few examples: The offences punishable under the sections of the Bharatiya Nyaya Sanhita, 2023 specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table:

Offence	Section of the Bharatiya Nyaya Sanhita, 2023 applicable	Person by whom offence may be compounded
Voluntarily causing hurt.	115(2)	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	126(2), 127(2)	The person restrained or confined.

Offence	Section of the Bharatiya Nyaya Sanhita, 2023 applicable	Person by whom offence may be compounded
Assault or use of criminal force.	131, 133, 136	The person assaulted or to whom criminal force is used.
Theft.	303(2)	The owner of the property stolen.

Few examples: The offences punishable under the sections of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023) specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:

Offence	Section of the Bharatiya Nyaya Sanhita applicable	Person by whom offence may be compounded
Voluntarily causing grievous hurt.	117(2)	The person to whom hurt is caused.
Assault or criminal force in attempting wrongfully to confine a person.	135	The person assaulted or to whom the force was used.
Theft, by clerk or servant of property in possession of master.	306	The owner of the property stolen.
Criminal breach of trust.	316(2)	The owner of the property in respect of which breach of trust has been committed.

Bail

According to section 478, when any person other than a person accused of a 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, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail.

However, 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 bond from such person, discharge him on his executing a bond for his appearance as hereinafter provided.

Where a person is unable to give bail bond 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 above said.

Further nothing in section 478 shall be deemed to affect the provisions of section 135(3) or section 492.

Notwithstanding anything in section 478(*1*), where a person has failed to comply with the conditions of the bond or 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 or bail bond to pay the penalty thereof under section 491.

Direction for grant of bail to person apprehending arrest (Anticipatory Bails)

According to section 482, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

When the High Court or the Court of Session makes a direction under section 482(*1*), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including –

(*i*) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(*ii*) 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;

(*iii*) a condition that the person shall not leave India without the previous permission of the Court;

(*iv*) such other condition as may be imposed under sub-section (*3*) of section 480, as if the bail were granted under that section.

If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under section 482(*1*).

Nothing in section 482 shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and section 70(2) of the Bharatiya Nyaya Sanhita, 2023.

Under section 493, when any surety to a bail bond under BNSS becomes insolvent or dies, or when any bond is forfeited under the provisions of section 491, the Court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

In general, there is no limitation of time in filing complaints under BNSS but delay may hurdle the investigation. Further, the Limitation Act, 1963 provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVIII has been introduced in BNSS prescribing limitation period for taking cognizance of certain offences. (Sections 513 to 519).

According to section 514, except as otherwise provided in BNSS, no Court shall take cognizance of an offence of the category specified below, after the expiry of the period of limitation.

The period of limitation shall be –

(a) six months, if the offence is punishable with fine only;

(*b*) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together,

shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

For the purpose of computing the period of limitation, the relevant date shall be the date of filing complaint under section 223 or the date of recording of information under section 173.

Commencement of the period of limitation

According to section 515, the period of limitation, in relation to an offender, shall commence, –

(a) on the date of the offence; or

(*b*) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(*c*) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

In computing the said period, the day from which such period is to be computed shall be excluded.

Exclusion of time in certain cases

Section 516 provides provisions for exclusion of time in certain cases. These are as under:

(a) the period during which another prosecution was diligently prosecuted (the prosecution should relate to the same facts and is prosecuted in good faith);

(b) the period of the continuance of the stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;

(c) where notice of prosecution has been given, the period of notice;

(d) where previous sanction or consent for the institution of any prosecution is necessary, the period required for obtaining such consent or sanction including the date of application for obtaining the sanction and the date of the receipt of the order;

(e) the period during which the offender is absent from India or from territory outside India under Central Govt. Administration; and

(f) period when the offender is absconding or concealing himself. (Section 516)

If limitation expires on a day when the Court is closed, cognizance can be taken on the day the Court re-opens. (Section 517)

Continuing Offences

Continuing offence means an offence which is committed for a very long period. It is neither clearly defined in the Bhaartiya Nyaya Sanhita or Bharatiya Nagarik Suraksha Sanhita 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.

In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues. (Section 518)

CASE LAWS

In ***Udai Shankar Awasthi v. State of U.P. (2013),*** the Supreme Court observed that the expression, 'continuing offence' has not been defined in the Cr.P.C. because it is one of those expressions which does not have a fixed connotation, and therefore, the formula of universal application cannot be formulated in this respect.

In ***Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath (1991)*** the Supreme Court held that the question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates that offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence.

In Balakrishna Savalram Pujari Waghmare & Ors. v. Shree Dnyaneshwar Maharaj Sansthan & Ors., AIR 1959 SC 798, the Court observed that a continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury. In case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue. If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. The distinction between the two wrongs therefore depends, upon the effect of the injury.

In ***State of Bihar v. Deokaran Nenshi & Anr., AIR 1973 SC 908***, "A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

Extension of period of limitation – The Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied that (i) the delay is properly explained or (ii) it is necessary to do so in the interests of justice. (Section 519)

OFFENCES AGAINST PROPERTY

Chapter XVII (Section 303 to 334) of BNS, provides the provisions and law related to the offences against property.

The Property is of two kinds i.e. movable and immovable. The offence which is committed in regard to any kind of property whether it is movable or immovable is punishable under the provisions of the Chapter XVII of BNS.



Theft (Section 303)

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:

1. There should an intention to dishonestly take the property.
2. The property should be movable property.
3. The property should be taken out of the possession without that person's consent.
4. The property should be moved in order to take that property.

Explanation 1. – A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Example: Wood of the tree.

Explanation 2. – A moving effected by the same act which affects the severance may be a theft.

Example: Opening the tap for the purpose of taking the expensive liquid kept thereunder.

Explanation 3. – A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4. – A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5. – The consent mentioned in this section may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Situations which constitute theft

(*1*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(*2*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent. A has committed theft as soon as Z's dog has begun to follow A.

Situations which do not constitute theft

(3) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(4) A finds a ring lying on the highroad, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

Punishment for theft

According to section 303(2) of BNS, whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and in case of second or subsequent conviction of any person under this section, he shall be punished with rigorous imprisonment for a term which shall not be less than one year but which may extend to five years and with fine.

However, in cases of theft where the value of the stolen property is less than five thousand rupees, and a person is convicted for the first time, shall upon return of the value of property or restoration of the stolen property, shall be punished with community service.

However, there are different punishment for theft depending upon situation, which may understood with the help of below:

Description	Punishment
Theft in a dwelling house, or means of transportation or place of worship, etc.	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft by clerk or servant of property in possession of master	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Theft after preparation made for causing death, hurt or restraint in order to committing of theft	shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Snatching (Section 304)

A new sub-offence from Theft has been defined in the BNS namely "Snatching". Theft is snatching if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any movable property.

Whoever commits snatching, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Extortion (Section 308)

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 essential elements of extortion are:

1. There should be an intention to put any person in fear of any injury.
2. 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.

Situations which constitute extortion

(*1*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. A has committed extortion.

(*2*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

Punishment of Extortion

Description	Punishment
Whoever commits extortion	shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.
Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury	shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

CASE LAW

In **Jadunandan Singh v. Emperor (AIR 1941 Pat 129),** the accused, along with others, assaulted two persons and forcibly took their thumb impressions on three blank papers. The court observed that cases frequently occur which turn on the difference between the giving and taking of thumb impression. The forcible taking of the victim's thumb impression does not necessarily involve inducing the victim to deliver papers with thumb impressions. Therefore, the offence of extortion is not established. It is not a case of theft because papers were not taken from the victim's possession. It is a case of criminal force or assault.

Distinction between Extortion and Theft

Both are different from in following respects:

i. Extortion is done by wrongfully getting the consent of the owner while there is no present of consent in case of theft.

ii. Both movable and immovable property may be the subject of an extortion whereas theft is limited to movable property only because of its nature.

Robbery (Section 309)

As per Section 309 of BNS, in all robbery there is either theft or extortion.

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 or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Example:

If during committing of theft, the offender, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or the fear of these or of instant wrongful restraint, he Commits 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.

Example:

If during committing of extortion, the offender is present before victim and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint, he commits robbery.

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.

Situations which constitute robbery

(1) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Situation which does not constitute robbery

(2) A obtains property from Z by saying – "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

Punishment for Robbery

According to section 309(4), 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.

According to section 309, 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.

According to section 309 (6), If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dacoity (Section 310)

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 essentials elements of Dacoity are:

1. There should be at least five persons by active participation or aiding.
2. They will commit robbery or its attempt.
3. Every person whether committing or aiding is said to commit dacoity.

CASE LAW
In the case of **Emperor v. Lashkar (1921) 2 Lah. 275,** a gang of five dacoits, one of whom had a gun, raided the house of X. After looting, while they were running away with their booty, they shot down one villager. It was held that the murder committed by the dacoits while carrying away the stolen property was murder committed in the commission of dacoity, and every offender was therefore liable for the murder.

Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which shall not be less than ten years, and shall also be liable to fine.

Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Whoever is one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Whoever belongs to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

However, there are different punishment for dacoity and/or depending upon situation, which may understood with the help of below:

Description	Punishment
Robbery, or dacoity, with attempt to cause death or grievous hurt	shall be punished shall not be less than seven years.
Attempt to commit robbery or dacoity when armed with deadly weapon	shall be punished shall not be less than seven years
Punishment for belonging to gang of robbers, etc.	shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Criminal misappropiation of property (Section 314 and Section 315)

Dishonest misappropriation of property

The definition of criminal misappropriation has not been provided by the provisions. The section directly 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 shall not be less than six months but which may extend to two years and with fine.

Illustrations.

(*a*) A takes property belonging to Z out of Z's possession, in good faith believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B, being, joint owners of a horse. A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1. – A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2. – A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations.

(*1*) A finds a rupee on the high road, not knowing to whom the rupee belongs, A picks up the rupee. Here A has not committed the offence defined in this section.

(*2*) A finds a letter on the road, containing a bank-note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

Essential ingredients of Dishonest Misappropriation of Property

Dishonestly is an essential ingredient of the offence and BNS provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that 'dishonestly'. Misappropriation means the intentional, illegal use of the property or funds of another person for one's own use or other unauthorized purpose.

There are two things necessary before an offence under section 314 can be established. Firstly, that the property must be misappropriated or converted to the use of the accused, and, secondly, that he must misappropriate or convert it dishonestly.

CASE LAWS

In **Bhagiram Dome v. Abar Dome, (1888) 15 Cal 388, 400,** it has been held that under Section 403 criminal misappropriation takes place even when the possession has been innocently come by, but where, by a subsequent change of intention or from the knowledge of some new fact which the party was not previously acquainted, the retaining become wrongful and fraudulent.

In **Mohammad Ali v. State, 2006 CrLJ 1368 (MP)**, fifteen bundles of electric wire were seized from the appellant but none including electricity department claimed that wires were stolen property. Evidence on records showed that impugned electric wire was purchased by the applicant from scrap seller. Merely applicant not having any receipt for purchase of impugned wire cannot be said to be guilty of offence punishable under Section 403 of the Code. Order of framing charge was, therefore, quashed by the Supreme Court and the accused was not held guilty under section 403 of the Indian Penal Code, 1860.

In **U. Dhar v. State of Jharkhand, (2003) 2 SCC 219,** there were two contracts- one between the principal and contractor and another between contractor and sub-contractor. On completion of work sub-contractor demanded money for completion of work and on non-payment filed a criminal complaint alleging that contractor having received the payment from principal had misappropriated the money. The magistrate took cognizance of the case and High Court refused to quash the order of magistrate. On appeal to the Supreme Court, it was held that matter was of civil nature and criminal complaint was not maintainable and was liable to be quashed. The Supreme Court also observed that money paid by the principal to the contractor was not money belonging to the complainant, sub-contractor, hence there was no question of misappropriation.

Dishonest misappropriation of property possessed by deceased person at the time of his death (Section 315)

Whoever dishonestly misappropriates or converts to his own use any property, knowing that such property was in the possession of a deceased person at the time of that person's decease, 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 decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

The offence under this section consists in the pillaging of property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorized to take charge of it.

CRIMINAL BREACH OF TRUST

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.

Explanation 1. – A person, being an employer of an establishment whether exempted under section 17 of the

Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2. – A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Illustrations.

(*a*) 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.

(*b*) 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 316 of the Bharatiya Nyaya Sanhita, 2023 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:

1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. 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, or;
   (ii) of any legal contract made touching the discharge of such trust.

CASE LAWS

The Supreme Court of India in **V.R. Dalal v. Yugendra Naranji Thakkar, 2008 (15) SCC 625**, has held that the first ingredient of criminal breach of trust is entrustment and where it is missing, the same would not constitute a criminal breach of trust. Breach of trust may be held to be a civil wrong but when mens-rea is involved it gives rise to criminal liability also. The expression 'direction of law' in the context of Section 405 would include not only legislations pure and simple but also directions, instruments and circulars issued by authority entitled therefor. In a landmark judgment of Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628, the appellant alleged that her stridhan property was entrusted to her in-laws which they dishonestly misappropriated for their own use. She made out a clear, specific and unambiguous case against in-laws. The accused were held guilty of this offence and she was held entitled to prove her case and no court would be justified in quashing her complaint.

The Supreme Court in **Onkar Nath Mishra v. State (NCT of Delhi), 2008 CrLJ 1391 (SC)**, has held that in the commission of offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation an obligation in relation to property over which dominion or control is acquired by accused. The second is a misappropriation or dealing with property dishonestly and contrary to the terms of the obligation created. In another case, Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd., 2008 (13) SCC 678, it was held that a cheque is property and if the said property has been misappropriated or has been used for a purpose for which the same had not been handed over, a case under Section 406 of the Code may be found to have been made out.

In **S.K. Alagh v. State of U.P.and others, 2008 (5) SCC 662,** where demand drafts were drawn in the name of company for supply of goods and neither the goods were sent by the company nor the money was returned, the Managing Director of the company cannot be said to have committed the offence under Section 406 of Indian Penal Code. It was pointed out that in absence of any provision laid down under statute, a director of a company or an employer cannot be held vicariously liable for any offence committed by company itself.

Analysis of the cases

After analyzing all the cases, we may conclude that for an offence to fall under this section all the four requirements are essential to be fulfilled.

1. The person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them or to put him in position of trustee.
2. The accused must be in such a position where he could exercise his control over the property i.e; dominion over the property.
3. The term property includes both movable as well as immovable property within its ambit.
4. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Punishments for the criminal breach of trust

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

CASE LAWS

In **Bagga Singh v. State of Punjab,** the appellant was a taxation clerk in the Municipal Committee, Sangrur. He had collected arrears of tax from tax-payers but the sum was not deposited in the funds of the committee after collection but was deposited after about 5 months. He pleaded that money was deposited with the cashier Madan Lal, a co-accused, who had defaulted on the same but the cashier proved that he had not received any such sum and was acquitted by lower court. The mere fact that the co-accused cashier was acquitted was not sufficient to acquit accused in the absence of any proof that he had discharged the trust expected of him. As such the accused was liable under section 409 of Indian Penal Code, 1860.

In **Bachchu Singh v. State of Haryana, AIR 1999 SC 2285,** the appellant was working as 'Gram Sachiv' for eight gram panchayats. He collected a sum of Rs. 648 from thirty villagers towards the house tax and executed receipts for the same. As he was a public servant, and in that capacity he had collected money as house tax but did not remit the same, he was charged under Section 409 of Indian Penal Code, 1860. It was held that the appellant dishonestly misappropriated or converted the said amount for his own use and his conviction under section 409 of Indian Penal Code, 1860 was upheld by the Supreme Court.

In **Girish Saini v. State of Rajasthan,** a public servant was accused of neither depositing nor making entries of stationery required for official purpose. Accused public servant was in charge of the store in the concerned department at the time of commission of offence. Hence entrustment was proved. It was held accused could not take the benefit of misplacing of one of registers of company as he could not prove maintenance of two registers by department. Therefore, the accused was held guilty of committing criminal breach of trust.

Receiving Stolen Property (Section 317)

Property, the possession whereof has been transferred by theft or extortion or robbery or cheating, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as stolen property, whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India, but, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating (Section 318 and 319)

Sections 318 to 319 of BNS 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 318 states 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.

(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.

(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.

(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.

(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; or
    (ii) to consent that any person shall retain any property; or
    (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.

CASE LAWS

The Supreme Court in **Iridium India Telecom Ltd. v. Motorola Incorporated and Ors., (2005) 2 SCC 145,** has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.

The Supreme Court in **M.N. Ojha and others v. Alok Kumar Srivastav and anr, (2009) 9 SCC 682,** has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.

In **T.R. Arya v. State of Punjab, 1987 CrLJ 222,** it was held that negligence in duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

Whoever cheats shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

CASE LAWS

In **Kuriachan Chacko v. State of Kerala, (2004) 12 SCC 269,** the money circulation scheme was allegedly mathematical impossibility and promoters knew fully well that scheme was unworkable and false representations were being made to induce persons to part with their money. The Supreme Court held that it could be assumed and presumed that the accused had committed offence of cheating under section 420 of the IPC.

In **Mohd. Ibrahim and others v. State of Bihar and another, (2009) 3 SCC (Cri) 929,** the accused was alleged to have executed false sale deeds and a complaint was filed by real owner of property. The accused had a bonafide belief that the property belonged to him and purchaser also believed that suit property belongs to the accused. It was held that accused was not guilty of cheating as ingredients of cheating were not present.

In **Shruti Enterprises v. State of Bihar and ors, 2006 CrLJ 1961,** it was held that mere breach of contract cannot give rise to criminal prosecution under section 420 unless fraudulent or dishonest intention is shown right at the beginning of transaction when the offence is said to have been committed. If it is established that the intention of the accused was dishonest at the time of entering into the agreement then liability will be criminal and the accused will be guilty of offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be fastened on the accused and the only right which complainant acquires is to a decree of damages for breach of contract.

Cheating by personation (Section 319)

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 or another, or representing that he or any other person is a person other than he or such other person really is.

The offence is committed whether the individual personated is a real or imaginary person.

Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Illustrations

(*1*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(2) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

Fraudulent Deeds and Dispositions of Property are covered under section 320 to 323 of BNS.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors (Section 320)

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 shall not be less than six months but which may extend to two years, or with fine, or with both.

Example

A is the Debtor and B is the creditor. A has to pay INR 1 crore to B. Now, A has certain movable and immovable property. A does not wants to pay back INR 1 crore to B. For that, A transferred the properties to X just to prevent the distribution of his properties to B. A is liable under section 320.

CASE LAW

Guwahati High Court in **Ramautar Chaukhany v. Hari Ram Todi & Anr, 1982 CrLJ 2266,** held that an offence under this section has following essential ingredients:

a. That the accused removed, concealed or delivered the property or that he transferred, it caused it to be transferred to someone;

b. That such a transfer was without adequate consideration;

c. That the accused thereby intended to prevent or knew that he was thereby likely to prevent the distribution of that property according to law among his creditors or creditors of another person;

d. That he acted dishonestly and fraudulently. 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 321)

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.

Example

A is the Debtor and B is the creditor. A has to pay Rs. 1 crore to B. But A do not have any money. But X, a person, who has to pay INR 1 crore to A. If X pays back his money to A, A can pay back that money to B. But A does not want to make the payment to B and informs X not to pay any amount to B. This is clearly a fraudulent intention and A is liable under section 321.

This section, like the preceding section 320, is intended to prevent the defrauding of creditors by masking property.

The expression 'debt' has not been defined in the BNS or in the General Clauses Act but there are judicial pronouncements on the same.

CASE LAWS

In **Commissioner of Wealth Tax v G.D. Naidu, AIR 1966 Mad 74,** it was held that the essential requisites of debt are-

(1) ascertained or ascertainable,

(2) an absolute liability, in present or future, and

(3) an obligation which has already accrued and is subsisting. All debts are liabilities but all liabilities are not debt.

The Supreme Court in **Mangoo Singh v. Election Tribunal, AIR 1957 SC 871,** has laid down that the word 'demand' ordinarily means something more than what is due; it means something which has been demanded, called for or asked for, but the meaning of the word must take colour from the context and so 'demand' may also mean arrears or dues.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration (Section 322)

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 three years, or with fine, or with both.

Example

While making agreement of lease, the actual amount should be entered is INR 5 crore but parties made the lease agreement for only INR 4 crore just to avoid stamp duty and other taxes. The parties are liable under section 322.

This section deals with fraudulent and fictitious conveyances and transfers. The essential ingredient of an offence under section 423 is that the sale deed or a deed subjecting a property to a charge must contain a false statement relating to the consideration or relating to the person for whose use or benefit it is intended to operate.

Though dishonest execution of a benami deed is covered under this section, the section stands superseded by The Prohibition of Benami Properties Transactions Act, 1988 because the latter covers a wider field, encompassing the field covered by this section.

Dishonest or fraudulent removal or concealment of property (Section 323)

Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

OFFENCES RELATING TO DOCUMENTS AND PROPERTY MARKS

Forgery

According to section 336, 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.

Punishment for Forgery

Description	Punishment
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.
Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Whoever commits forgery, intending that the document or electronic record forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose	shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Further, the provisions relating to forgery in different circumstances has *inter alia* also been provided under 337 to 341 of BNS.

CASE LAWS

The Supreme Court in **Ramchandran v. State, AIR 2010 SC 1922,** has held that to constitute an offence of forgery document must be made with dishonest or fraudulent intention. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The Supreme Court in Parminder Kaur v. State of UP, has held that mere alteration of document does not make it a forged document. Alteration must be made for some gain or for some objective.

Similarly, in **Balbir Kaur v. State of Punjab, 2011 CrLJ 1546 (P&H),** the allegation against the accused was that she furnished a certificate to get employment as ETT teacher which was found to be bogus and forged in as much as school was not recognized for period given in certificate. However the certificate did not anywhere say that school was recognized. It was held that merely indicating teaching experience of the accused, per se, cannot be said to indicate wrong facts. So the direction which was issued for prosecution is liable to be quashed.

Offences relating to Property Mark (Section 345)

A mark used for denoting that movable property belongs to a particular person is called a property mark.

Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or

goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Whoever uses any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

DEFAMATION

(1) Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes in any manner, 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. – 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.

Explanation 2. – It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3. – An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4. – 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.

Illustrations.

(*a*) A says – "Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

Exception 1. – It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Exception 2. – It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Exception 3. – It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning

Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Exception 4. – It is not defamation to publish substantially true report of the proceedings of a Court, or of the result of any such proceedings.

Explanation. – A Magistrate or other officer holding an inquiry in open Court preliminary to a trial in a Court, is a Court within the meaning of the above section.

Exception 5. – It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations.

(*a*) A says – "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, in as much as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says – "I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, in as much as the opinion which expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Exception 6. – It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation. – A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z – "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind". A is within the exception, if he says this in good faith, in as much as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". A is not within this exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Exception 7. – It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department

censuring in good faith those who are under his orders, a parent censuring in good faith a child in the presence of other children; a school master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier are within this exception.

Exception 8. – It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father, A is within this exception.

Exception 9. – It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

(*a*) A, a shopkeeper, says to B, who manages his business – "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Exception 10. – It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation

Section 356(*2*): Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both, or with community service.

Section 356 (*3*): Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 356(*4*): Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

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.

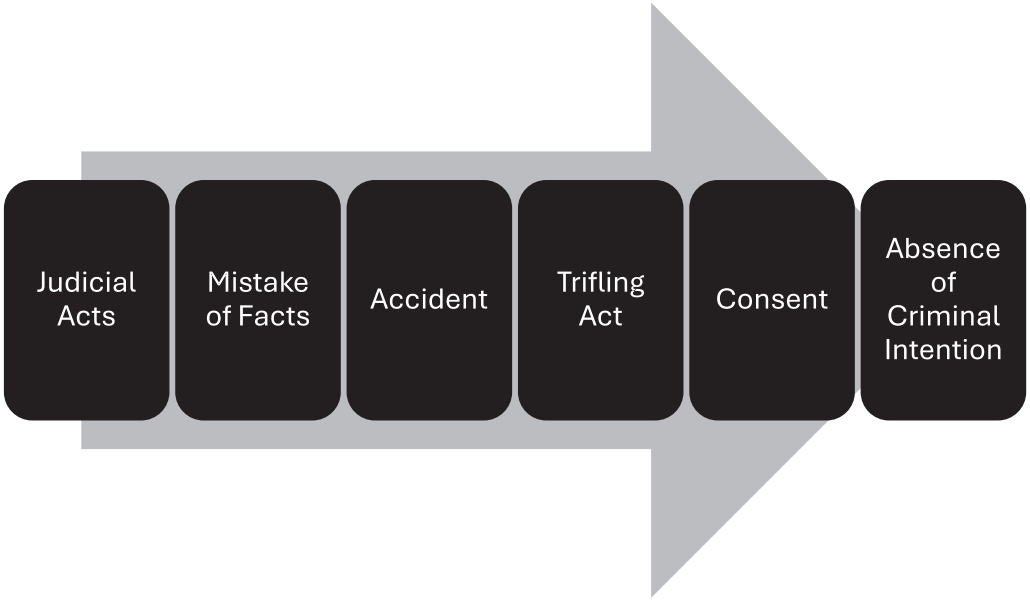
The ambit of 'publish' is very wide. The publication of defamatory matter means that it is communicated to some person other than the person about whom it is addressed.

CASE LAWS

In **Sankaran v. Ramkrishna Pillai, AIR 1960 Ker 141**, the defamatory matter was printed in Malayalam and the accused did not know the language, his mens rea was absent and he was not guilty.

GENERAL EXCEPTIONS

The Bharatiya Nyaya Sanhita, 2023 (BNS) also provides for general exceptions for a person accused of committing any offence under BNS to plead in his defense. General defences or exceptions are contained in sections 14 to 44 of the BNS (Chapter III). In general exceptions to criminal liability there will be absence of *mens rea* (guilty mind) on the part of the wrong-doer. If there is any general defense of the accused in a criminal case, the burden of proving lies on him under section 108 of the Bhartiya Sakshya Adhiniyam 2023. The exceptions strictly speaking came within the following six categories.



1. **Act done by a person bound, or by mistake of fact believing himself bound, by law:** According to section 14, nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

   The mistake or ignorance must be of fact, but not of law.

   Mistake of fact, is a general defence based on the Common Law maxim –*ignorantia facit excusat; igoranita juris non excusat*- (Ignorance of fact excuses; Ignorance of law does not excuse).

2. **Act of Judge when acting judicially:** According to section 15, nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

3. **Act done pursuant to judgment or order of Court:** According to section 16, nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court; if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

   Words “Court of Justice” is replaced by “Court” in the BNS.

Section 15 protects judges from any criminal liability for their judicial acts. Section 16 extends this protection to ministerial and other staff, who may be required to execute orders of the court. If such immunity was not extended, then executing or implementing court orders would become impossible.

4. **Act done by a person justified, or by mistake of fact believing himself justified, by law:** According to section 17, nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

5. **Accident in doing a lawful act:** According to section 18, nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

6. **Act likely to cause harm, but done without criminal intent, and to prevent other harm:** According to section 19, **n**othing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

   It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

7. **Act of a child under seven years of age:** According to section 20, nothing is an offence which is done by a child under seven years of age.

8. **Act of a child above seven and under twelve years of age of immature understanding:** According to section 21, nothing is an offence which is done by a child above seven years of age and under twelve years of age, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

9. **Act of a person of unsound mind:** According to section 22, nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

10. **Act of a person incapable of judgment by reason of intoxication caused against his will:** According to section 23, nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

11. **Offence requiring a particular intent or knowledge committed by one who is intoxicated:** According to section 24, in cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

12. **Act not intended and not known to be likely to cause death or grievous hurt, done by consent:** According to section 25, nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

This section is based on the principle of legal maxim '*volenti-non-fit injuria*' which means he who consents suffers no injury. The policy behind this section is that everyone is the best judge of his own interest and no one consents to that which he considers injurious to his own interest.

Illustration: A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

13. **Act not intended to cause death, done by consent in good faith for person's benefit:** According to section 26, nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

14. **Act done in good faith for benefit of child or person of unsound mind, by, or by consent of guardian:**

According to section 27, nothing which is done in good faith for the benefit of a person under twelve years of age, or person of unsound mind, by, or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

However, this exception shall not extend to –

(a) the intentional causing of death, or to the attempting to cause death;

(b) the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

(c) the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

(d) the abetment of any offence, to the committing of which offence it would not extend.

Words "insane person" are replaced with "person of unsound mind" in the BNS.

15. **Consent known to be given under fear or misconception:** According to section 28, a consent is not such a consent as is intended by any section of BNS, **–**

(*a*) if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

(*b*) if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

(*c*) unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

16. **Exclusion of acts which are offences independently of harm caused:** According to section 29, the exceptions in sections 25, 26 and 27 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration: Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

17. **Act done in good faith for benefit of a person without consent:** According to section 30, nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

    However, this exception shall not extend to –

    (a) the intentional causing of death, or the attempting to cause death;

    (b) the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

    (c) the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

    (d) the abetment of any offence, to the committing of which offence it would not extend.

18. **Communication made in good faith:** According to section 31, no communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

19. **Act to which a person is compelled by threats:** According to section 32, except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

    However, the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

    Explanation 1. **–** A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

    Explanation 2. **–** A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

20. **Act causing slight harm:** Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Right of Private Defence

Right of Private defence is also part of Chapter III under the BNS. 11 sections deals with Right to Private Defence. These defences are as follows:

1. **Things done in private defence:** According to section 34, **n**othing is an offence which is done in the exercise of the right of private defence.

2. **Right of private defence of body and of property:** According to section 35, every person has a right, subject to the restrictions contained in section 37, to defend –

(*a*) his own body, and the body of any other person, against any offence affecting the human body;

(*b*) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

3. **Right of private defence against act of a person of unsound mind, etc.:** According to section 36, when an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

4. **Acts against which there is no right of private defence: According to section 37(1),** There is no right of private defence,-

(*a*) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law;

(*b*) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law;

(c) in cases in which there is time to have recourse to the protection of the public authorities.

According to sub-section 2, the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

5. **When right of private defence of body extends to causing death:** According to section 38, the right of private defence of the body extends, under the restrictions specified in section 37, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely: **–**

(*a*) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(*b*) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(*c*) an assault with the intention of committing rape;

(d) an assault with the intention of gratifying unnatural lust;

(e) an assault with the intention of kidnapping or abducting;

(*f*) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release;

(*g*) an act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.

6. **When such right extends to causing any harm other than death:** According to section 39, if the offence be not of any of the descriptions specified in section 38, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions specified in section 37, to the voluntary causing to the assailant of any harm other than death.

7. **Commencement and continuance of right of private defence of body:** According to section 40, the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

8. **When right of private defence of property extends to causing death:** According to section 41, the right of private defence of property extends, under the restrictions specified in section 37, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely: –

   (a) robbery;

   (*b*) house-breaking after sunset and before sunrise;

   (*c*) mischief by fire or any explosive substance committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

   (*d*) theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

9. **When such right extends to causing any harm other than death:** According to section 42, If the offence, the committing of which, or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions specified in section 41, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions specified in section 37, to the voluntary causing to the wrong-doer of any harm other than death.

10. **Commencement and continuance of right of private defence of property:** According to section 43, the right of private defence of property, **–**

   (a) commences when a reasonable apprehension of danger to the property commences;

   (*b*) against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered;

   (*c*) against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues;

   (*d*) against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief;

   (*e*) against house-breaking after sunset and before sunrise continues as long as the house-trespass which has been begun by such house-breaking continues.

11. **Right of private defence against deadly assault when there is risk of harm to innocent person:** According to section 44, If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

LESSON ROUND-UP

- The Bharatiya Nyaya Sanhita, 2023(BSA) is a modern day legislation which has replaced the colonial Indian Penal Code of 1860 which was retained as the main penal law of the country even after India became independent in 1947. Enforced from 1st July 2024, The Bharatiya Nyaya Sanhita (BNS) 2023 represents a transformative update to India's criminal laws, replacing the colonial-era Indian Penal Code (IPC) of 1860.
- The Bharatiya Nagarik Suraksha Sanhita(BNSS) is an Act to consolidate and amend the law relating to Criminal Procedure. BNSS was introduced to replace the Criminal Procedure Code, 1973 as part of India's efforts to modernize and streamline its criminal justice system in alignment with contemporary needs and societal expectations.
- The geographical area or the subjects to which a law applies is defined as the jurisdiction of that law. Ordinarily, laws made by a country are applicable within its own boundaries because a country cannot have legal machinery to enforce its laws in other sovereign countries. Thus, for most of the laws, the territorial jurisdiction of a law is the international boundary of that country. Countries, however, also make laws that apply to territories outside of their own country. This is called the extra-territorial jurisdiction.
- 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, Preparation, Attempt and Commission of Crime or Accomplishment.
- There are a total 5 types of Punishments: Death, Imprisonment for life, Imprisonment, which is of two descriptions, namely: (1) Rigorous, that is, with hard labour; (2) Simple, Forfeiture of property, Fine and Community Services.
- 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: Human Being, *mens rea* and *actus rea*.
- According to Section 21, any offence under the Bharatiya Nyaya Sanhita, 2023 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law and if not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.
- Section 528 of the BNSS is one of the most important section of Sanhita. It states that nothing in this Sanhita shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Sanhita, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.
- The word "arrest" when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one's personal liberty to go where he pleases. 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. ection 35 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant.
- The general processes to compel appearance are: (1) Summons and (2) Warrants
- Where a warrant remains unexecuted, the Code of Procedure Code, 1973 provides for two remedies: (1) Issuing a proclamation and (2) Attachment and Sale of Property

- Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under the BNSS 2023. This can be compelled to be produced by issuing summons (Sections 94 and 95) or a warrant (Sections 96 to 101).
- 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.
- Section 359 of the BNSS 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.
- According to section 478, when any person other than a person accused of a 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, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. However, 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 bond from such person, discharge him on his executing a bond for his appearance as hereinafter provided.
- In general, there is no limitation of time in filing complaints under the Sanhita but delay may hurdle the investigation. Further, the Limitation Act, 1963 provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVIII has been introduced in the Sanhita prescribing limitation period for taking cognizance of certain offences. (Sections 513 to 519).
- Chapter XVII (Section 303 to 334) of BNS, provides the provisions and law related to the offences against property.
- 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.
- A new sub-offence from Theft has been defined in the BNS namely "Snatching". Theft is snatching if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any movable property.
- 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.
- 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 or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.
- 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.

- 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 definition of criminal misappropriation has not been provided by the provisions. The section directly 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 shall not be less than six months but which may extend to two years and with fine.
- 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.
- Section 318 states 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.
- 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 or another, or representing that he or any other person is a person other than he or such other person really is.
- 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 shall not be less than six months but which may extend to two years, or with fine, or with both.
- According to section 336, 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.
- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes in any manner, 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.
- The Bharatiya Nyaya Sanhita, 2023 (BNS) also provides for general exceptions for a person accused of committing any offence under the Sanhita to plead in his defense. General defences or exceptions are contained in sections 14 to 44 of the BNS (Chapter III). In general exceptions to criminal liability there will be absence of *mens rea* (guilty mind) on the part of the wrong-doer. If there is any general defense of the accused in a criminal case, the burden of proving lies on him under section 108 of the Bhartiya Sakshya Adhiniyam 2023.

GLOSSARY

Mens rea: Mens rea is the mental element necessary to constitute criminal liability.

Actus non facit reum, nisi mens sit rea: The act alone does not amount to guilt; the act must be accompanied by a guilty mind.

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.

Recklessness: Recklessness occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the fundamental elements of a criminal act?
2. Is the Bharatiya Nagarik Suraksha Sanhita a substantive or an adjective law, or both?
3. Distinguish between: (a) Cognizable and Non-cognizable offences (b) Inquiry, Investigation and Trial (c) Bailable and Non-bailable offences (d) F.I.R. and Complaint.
4. What are the various classes of Criminal Courts? Discuss their powers.
5. How can arrest be affected by the police? When can police arrest without warrant? Can a private person cause arrest without warrant?
6. State the cases in which mens rea is not required in criminal law.
7. Write a short note on: (i) Forgery (ii) Defamation.
8. Enumerate the general exceptions for a person accused of committing any offence under the Indian Penal Code to plead his defense.

LIST OF FURTHER READINGS

- Bare Act of the Bharatiya Nyaya Sanhita, 2023
- Bare Act on the Bharatiya Nagarik Suraksha Sanhita, 2023

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/20062/1/a2023-45.pdf
- https://www.indiacode.nic.in/bitstream/123456789/20099/3/A2023-46.pdf

Law relating to Evidence

Lesson 8

KEY CONCEPTS

■ Oath ■ Relevancy of Evidence ■ Admissibility of Evidence ■ Fact in Issue ■ Admissions ■ Confessions ■ Dying Declaration ■ Opinion of third persons

Learning Objectives

To understand:

- Basic concepts under Law of Evidence
- The importance of relevancy of Evidence
- Need and importance of rules relating to admissibility of Evidence
- Facts in issue and related facts
- Admissions and Confessions
- Privileged Communications
- Provisions relating to Oral, Documentary and E-evidence

Lesson Outline

- Introduction
- Judicial Proceedings
- Few Important Terms
- Classification of Relevant Facts
- Fundamental Rules
- Closely Connected Facts
- Admissions and Confessions
- Opinion of Third Persons
- Facts of which evidence cannot be given (Privileged Communications)
- Oral, Documentary and Circumstantial Evidence
- Presumptions
- Estoppel
- Electronic Evidence (e-Evidence)
- Lesson Round Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

Law are not invented. They grow out of circumstances.

– Azarias

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Bharatiya Sakshya Adhiniyam 2023

INTRODUCTION

The "Law of Evidence" may be defined as a system of rules for ascertaining controversial 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 Bharatiya Sakshya Adhiniyam 2023 an Act to consolidate and to provide for general rules and principles of evidence for fair trial.

JUDICIAL PROCEEDINGS

The Bharatiya Sakshya Adhiniyam, 2023 does not define the term "judicial proceedings" but it is inclusively defined under Section 2(1)(m) of the Bharatiya Nagarik Suraksha Sanhita, 2023 as "any proceeding in the course of which evidence is or may be legally taken on oath.

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 2 of the Bharatiya Sakshya Adhiniyam, 2023 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 are which form part of the same transaction, though not in issue, place or at different times and places.

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.

In civil cases, the principle "mere preponderance of probability" is sufficient basis of a decision. In criminal cases, the principle "beyond all reasonable doubt" is required for taking decision.

SCHEME OF THE ADHINIYAM

The Act is divided into four parts			
Part I: PRELIMINARY Chapter I - Preliminary	Part II: RELEVANCY OF FACTS Chapter II: Relevancy of Facts	Part III: ON PROOF Chapter III: FACTS WHICH NEED NOT BE PROVED Chapter IV: OF ORAL EVIDENCE Chapter V: OF DOCUMENTARY EVIDENCE Chapter VI: OF THE EXCLUSION OF ORAL EVIDENCE BY DOCUMENTARY EVIDENCE	Part IV: PRODUCTION AND EFFECT OF EVIDENCE Chapter VII: OF THE BURDEN OF PROOF Chapter VIII: ESTOPPEL Chapter IX: OF WITNESSES Chapter X: OF EXAMINATION OF WITNESSES Chapter XI: OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE Chapter XII: Repeal and Savings

Relevancy of Facts: Sections 3 to 50 of the Adhiniyam deal with relevancy of facts. A fact is also known as Factum Probans or a fact that proves. The question arises what then the term "fact" signifies?

According to section 2(1)(f), "fact" means and includes – (i) any thing, state of things, or relation of things, capable of being perceived by the senses; (ii) any mental condition of which any person is conscious.

Thus facts are classified into physical and psychological facts.

Illustrations.

(i) That there are certain objects arranged in a certain order in a certain place, is a fact.

(ii) That a person heard or saw something, is a fact.

(iii) That a person said certain words, is a fact.

(iv) That a person 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 a specified time conscious of a particular sensation, is a fact;

Changes in BSA: Word "man" is replaced by the word "person" in illustrations and illustration (e)-"That a man has a certain reputation, is a fact" is now not the part of BSA.

Illustrations (i), (ii) and (iii), are the examples of physical facts whereas illustration (iv) are the examples of psychological facts.

Evidence may be given of facts in issue and relevant facts.

According to section 3 of BSA, 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.

Explanation to section 3, however, explains that section 3 shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure.

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, 1908.

FEW IMPORTANT TERMS

To understand the relevancy it is necessary to know the meanings of the few terms. These are as follows:

Relevant Fact

Section 2(1)(k) of BSA provides the definition of "relevant" as: A fact is said to be relevant to another when it is connected with the other in any of the ways referred to in the provisions of this Adhiniyam relating to the relevancy of facts

Section 4 to 14 provides the provisions relating to closely connected facts.

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 Adhiniyam 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 Adhiniyam 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 Bharatiya Sakshya Adhiniyam, 2023, 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 facts not necessarily relevant. The tenth Chapter of the Adhiniyam 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 2(1)(g) of BSA, "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 proceeding, 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: –

(i) That A caused B's death.

(ii) That A intended to cause B's death.

(iii) That A had received grave and sudden provocation from B.

(iv) 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.

CLASSIFICATION OF RELEVANT FACTS

Principles of Sections relating to relevancy of facts are mere rules of logic.

Classification of relevant facts	
Details	Sections
Closely connected facts	Sections 4 to 14
Admissions	Sections 15 to 25
Statements by persons who cannot be called as witnesses	Sections 26 to 27
Statements made under special circumstances	Sections 28 to 32
How much of a statement is to be proved	Section 33
Judgments of Courts when relevant	Sections 34 to 38
Opinions of third persons, when relevant	Sections 39 to 45
Character when relevant	Sections 46 to 50

FUNDAMENTAL RULES

Fundamental Rules of Evidences	
1. No facts other than those having rational probative value should be admitted in evidence.	2. All facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

According to section 2(1)(h) of BSA, Whenever it is provided by this Adhiniyam that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

For example: Section 88: Presumption as to certified copies of foreign judicial records, Section 89: Presumption as to books, maps and charts, Section 90: Presumption as to electronic messages, 92. Presumption as to documents thirty years old, etc.

According to section 2(1)(l) of BSA, whenever it is directed by this Adhiniyam that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

For example: Section 78: Presumption as to genuineness of certified copies, Section 79: Presumption as to documents produced as record of evidence, etc., Section 80: Presumption as to Gazettes, newspapers, and other documents; Presumption as to maps or plans made by authority of Government.

Presumption is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills). Presumption is either of a fact or law. These presumptions which are inference are always rebuttable. Presumption of law is either conclusive or rebuttable.

The Adhiniyam also provides that when one fact is declared by this Adhiniyam to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

CLOSELY CONNECTED FACTS

1. **Relevancy of facts forming part of same transaction (Section 4):** Facts which, though not in issue, are so connected with a fact in issue or a relevant fact as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

   Illustrations.

   (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

   (b) A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and jails are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

   (c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

   (d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

2. **Facts which are occasion, cause or effect of facts in issue or relevant facts (Section 5):** Facts which are the occasion, cause or effect, immediate or otherwise, 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.

   Changes in BSA: Words "or relevant facts" added in heading.

   Illustration: The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

3. **Motive, preparation and previous or subsequent conduct (Section 6)**: Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

   The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

   The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Adhiniyam.

   When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

   Illustrations

   A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

   The question is, whether A owes B ten thousand rupees. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing – "I advise you not to trust A, for he owes B ten thousand rupees", and that A went away without making any answer, are relevant facts.

   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.

4. **Facts necessary to explain or introduce fact in issue or relevant facts (Section 7):** Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or a relevant fact, or which establish the identity of anything, or person whose identity, is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or 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.

Illustrations

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.

A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A – "I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

5. **Things said or done by conspirator in reference to common design (Section 8):** Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the State.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Kolkata for a like object, D persuaded persons to join the conspiracy in Mumbai, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Singapore the money which C had collected at Kolkata, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

6. **When facts not otherwise relevant become relevant (Section 9):** Facts not otherwise relevant are relevant –

   (1) if they are inconsistent with any fact in issue or relevant fact;

   (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustration

The question is, whether A committed a crime at Chennai on a certain day. The fact that, on that day, A was at Ladakh is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

7. **Facts tending to enable Court to determine amount are relevant in suits for damages (Section 10):** In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

8. **Facts relevant when right or custom is in question (Section 11):** Where the question is as to the existence of any right or custom, the following facts are relevant –

   (a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

9. **Facts showing existence of state of mind, or of body or bodily feeling (Section 12):** Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1. – A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2. – But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

Illustration

A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss. The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

10. **Facts bearing on question whether act was accidental or intentional (Section 13):** When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustration

A is accused of fraudulently delivering to B a counterfeit currency. The question is, whether the delivery of the currency was accidental. The facts that, soon before or soon after the delivery to B, A delivered counterfeit currency to C, D and E are relevant, as showing that the delivery to B was not accidental.

11. **Existence of course of business when relevant (Section 14):** When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

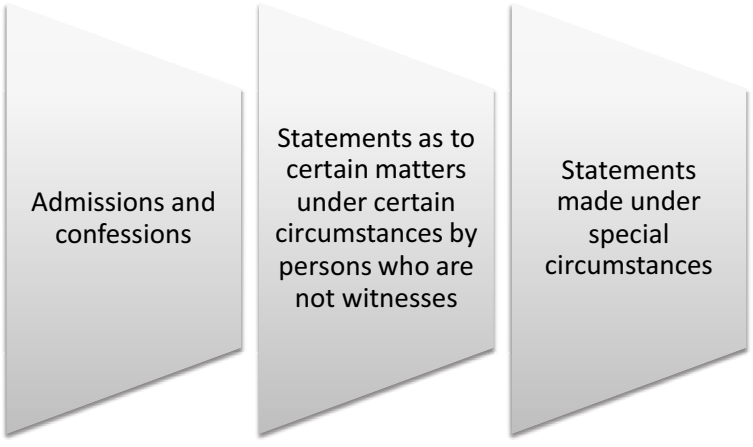
Illustration

(a) The question is, whether a particular letter was dispatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Return Letter Office, are relevant.

ADMISSIONS AND CONFESSIONS

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 15 to 25 lay down the exceptions to the general rule known as "admissions" and "confessions".

Admissions

An admission is defined in Section 15 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 16 to 18. 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 16 to 18 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 16) or by a "reference" (Section 18).

An admission is the best evidence against the party making the same unless it is untrue and made under the circumstances which does not make it binding on him.

An admission by the Government is merely relevant and non-conclusive, unless the party to whom they are made has acted upon and thus altered his detriment.

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 15 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."

Admission means conceding something against the person making the admission. That is why it is stated as a general rule (the exceptions are in Section 17), that admissions must be self-harming; and because a person is unlikely to make a statement which is self-harming unless it is true evidence of such admissions as received in Court.

These Sections deal only with admissions oral and written. Admissions by conduct are not covered by these sections. The relevancy of such admissions by conduct depends upon Section 6 and its explanations.

Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the record produced is in question. (Section 20)

Confessions

Sections 22 to 24 deal with confessions. However, the Adhiniyam 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. Proviso to section 23 and section 24 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	(i) 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; or
Police Officer	(ii) to a Police Officer; or
In custody of police officer without the presence of magistrate	(iii) to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.

Changes made by BSA:

In section 22 [24 of IEA] - The word "coercion" has been added in 22. Section 28 IEA and Section 29 IEA are given as provisos to Section 22 of the BSA. Heading is dropped as sections are included as provisos.

In section 23(2) [26 of IEA] - Heading is dropped as the section is included as a subsection. Word "whilst" is replaced by "while" and words "such person" are replaced by "him".

In section 24 [30 of IEA] - A new explanation II is added, mentioning that "A trial of more persons than one held in the absence of the accused who has absconded or who fails to comply with a proclamation issued under Section 84 of the Bharatiya Nagarik Suraksha Sanhita, 2023, shall be deemed to be a joint trial for the purpose of this section."

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 24 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 24.

The Privy Council in *Pakala Narayanaswami v. Emperor, (1929) PC 47*, observed that:

No statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. All confessions are admissions but not *vice versa*.

A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, is not of itself a confession. For example, an admission that the accused was the owner of and was in recent possession of the knife or revolver which caused a death with

no explanation of any other man's possession of the knife or revolver. A confession cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime.

According to Section 22(1), confession caused by inducement, threat, coercion or promise is irrelevant. To attract the prohibition contained in Section 22 of BSA the following six facts must be established:

(i) that the statement in question is a confession;

(ii) that such confession has been made by an accused person;

(iii) that it has been made to a person in authority;

(iv) that the confession has been obtained by reason of any inducement, threat, coercion or promise proceeded from a person in authority;

(v) such inducement, threat, coercion or promise, must have reference to the charge against the accused person;

(vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

To exclude the confession it is not always necessary to prove that it was the result of inducement, threat, coercion or promise. It is sufficient if a legitimate doubt is created in the mind of the Court or it appears to the Court that the confession was not voluntary. It is however for the accused to create this doubt and not for the prosecution to prove that it was voluntarily made. A confession if voluntary and truthfully made is an efficacious proof of guilt.

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 24 in special circumstances.

Confessions are classified as:

(a) judicial, and

(b) extra-judicial

Judicial confessions are those made before a Court or recorded by a Magistrate under *Section 183 of BNSS 2023* 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 evidences. 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.

In *Ram Khilari v. State of Rajasthan, AIR 1999 SC 1002*, the Supreme Court held that where an extra-judicial confession was made before a witness who was a close relative of the accused and the testimony of said witness was reliable and truthful, the conviction on the basis of extra judicial confession is proper.

In another case, the Supreme Court has further held that the law does not require that the evidence of an extra

judicial confession should be corroborated in all cases. When such confession was proved by an independent witness who was a responsible officer and one who bore no animus against the accused, there is hardly any justification to disbelieve it. Also, where the Court finds that the confession made by the accused to his friend was unambiguous and unmistakably conveyed that the accused was the perpetrator of the crime and the testimony of the friend was truthful, reliable and trustworthy, a conviction based on such extra-judicial confession is proper and no corroboration is necessary. Much importance could not be given to minor discrepancies and technical errors (*Vinayak Shivajirao Pol* v. *State of Maharashtra,* 1998 (1) Scale 159).

Illustrations

1. A undertakes to collect rents for B. B sues A for not collecting rent due from C to B. A denies that rent was due from C to B. A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.
2. The question is, whether a horse sold by A to B is sound. A says to B – "Go and ask C, C knows all about it". C's statement is an admission.
3. The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.
4. A, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under clause (b) of section 26.
5. A is accused of a crime committed by him at Kolkata. He produces a letter written by himself and dated at Chennai on that day, and bearing the Chennai post-mark of that day. The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under clause (b) of section 26.
6. A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.
7. A is accused of fraudulently having in his possession counterfeit currency which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the currency as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine. A may prove these facts.
8. A and B are jointly tried for the murder of C. It is proved that A said – "B and I murdered C". The Court may consider the effect of this confession as against B.
9. A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said – "A and I murdered C". This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

(ii) Statements by persons who cannot be called as witnesses

Statements (written or verbal) of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases, namely:

1. **Statements relating to cause of death:** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
2. **Statement relating to Course of Business:** When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.
3. **Statement against interest:** When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.
4. **Statement relating to the opinion as to existence of Public Right, Custom or matter of Public or General Interest:** when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.
5. **Statement relating to the existence of any relationship:** When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.
6. **Statement relating to the existence of any relationship with deceased:** When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.
7. **Statement in any deed, will or other document relating to right or custom:** When the statement is contained in any deed, will or other document which relates to any such transaction as is specified in clause (*a*) of section 11 *i.e*. any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.
8. **Statement relating to expression feelings or Impression:** when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was raped. The question is whether she was raped by B; or the question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth. An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Nagpur on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Nagpur, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Mumbai harbour on a given day. A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in Chennai, to whom the cargo was consigned, stating that the ship sailed on a given day from Mumbai port, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders is a relevant fact.

(f) The question is, whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship. A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased business person in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married. An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(iii) Statements made under special circumstances:

The following statements become relevant on account of their having been made under special circumstances:

(a) Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

(b) An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record, is kept, is itself a relevant fact.

(c) Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

(d) When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Central Act or State Act or in a Central Government or State Government notification appearing in the respective Official Gazette or in any printed paper or in electronic or digital form purporting to be such Gazette, is a relevant fact.

(e) When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published including in electronic or digital form under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book including in electronic or digital form purporting to be a report of such rulings, is relevant.

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. (Section 33)

OPINION OF THIRD PERSONS

Generally opinion of third persons is irrelevant. However, in the below mentioned cases, opinion of third person may be treated as relevant:

1. **Opinions of experts (Section 39):** When the Court has to form an opinion upon a point of foreign law or of science or art, or any other field, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or any other field, or in questions as to identity of handwriting or finger impressions are relevant facts and such persons are called experts.

   Illustration: 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. The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

   Further, 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.

2. **Facts bearing upon opinions of experts (Section 40):** acts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

   Illustration: The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

3. **Opinion as to handwriting and signature, when relevant (Section 41):** When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

   A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

4. **Opinion as to existence of general custom or right, when relevant (Section 42): W**hen the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

   The expression "general custom or right" includes customs or rights common to any considerable class of persons.

5. **Opinion as to usages, tenets, etc., when relevant (Section 43):** When the Court has to form an opinion as to –

   (*i*) the usages and tenets of any body of men or family;

   (ii) the constitution and governance of any religious or charitable foundation; or

   (*iii*) the meaning of words or terms used in particular districts or by particular classes of people,

   the opinions of persons having special means of knowledge thereon, are relevant facts.

6. **Opinion on relationship, when relevant (Section 44):** When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

   However, such opinion shall not be sufficient to prove a marriage in proceedings under the Divorce Act, 1869, or in prosecution under sections 82 and 84 of the Bharatiya Nyaya Sanhita, 2023.

7. **Grounds of opinion, when relevant (Section 45):** Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

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 are mainly covered under Sections 127 to 134 of the BSA, where evidence is prohibited under those Sections. They are also referred to as 'privileged communications'.

Types of privileged communications	
(i) Evidence of a Judge or Magistrate in regard to certain matters (Section 127)	(iv) Official communications (Section 130)
(ii) Communications during marriage; (Section 128)	(v) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime (Section 131)
(iii) Evidence as to Affairs of State; (Section 129)	(vi) Professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 132(1) &(2) and 134).

Changes in Section 132(1) &(2) BSA [126 of IEA]: The words "barrister, attorney, pleader or vakil" are replaced by "advocate". Word "employment" is replaced by "service".

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.

Evidence of Judges and Magistrates

Under Section 127 of BSA, 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.

Communications during marriage

Under Section 128 of BSA, 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 129 of the BSA applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 129, 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.

Professional communications

Section 132 of BSA deal with the professional communications between an advocate and a client, which are protected from disclosure. A client cannot be compelled and an advocate 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 these sections neither an advocate nor his interpreter, clerk or employees can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such advocate 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 employment.

Further, under section 134, no one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Changes in Section 132 of BSA [126 of IEA]: The words “barrister, attorney, pleader or vakil” are replaced by “advocate”. Word “servant” is replaced by “employee”.

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

Oral Evidences

All facts, except the contents of documents may be proved by oral evidence (Section 54). The contents of documents may be proved either by primary or by secondary evidence (Section 55).

Thus, the two broad rules regarding oral evidence are:

(i) All facts except the contents of documents may be proved by oral evidence;

(ii) 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 125)

Direct Evidence

In Section 55 of the BSA, 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 55 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.

However, the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

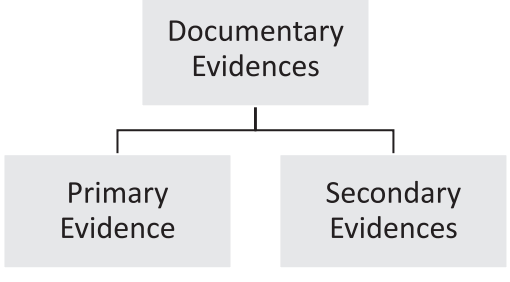
Further, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Documentary Evidences

According to section 2(1)(*d*) "document" means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records.

And according to section 56, the contents of documents may be proved either by primary or by secondary evidence.

So, the documentary evidences can further be classified in two ways i.e. Primary or Secondary.



Primary evidence

"*Primary evidence*" means the document itself produced for the inspection of the Court (Section 57). 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 58 defines the kind of secondary evidence permitted by the Sanhita. According to Section 58, "secondary evidence" means and includes:

(i) certified copies given under the provisions after section 58;

(*ii*) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(*iii*) copies made from or compared with the original;

(iv) counterparts of documents as against the parties who did not execute them;

(*v*) oral accounts of the contents of a document given by some person who has himself seen it;

(vi) oral admissions;

(*vii*) written admissions;

(*viii*) evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents.

Illustrations

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Further, section 60 provides the Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases, namely:

(*a*) when the original is shown or appears to be in the possession or power –

(i) of the person against whom the document is sought to be proved; or

(ii) of any person out of reach of, or not subject to, the process of the Court; or

(*iii*) of any person legally bound to produce it,

and when, after the notice mentioned in section 64 such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(*f*) when the original is a document of which a certified copy is permitted by this Adhiniyam, or by any other law in force in India to be given in evidence;

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

Explanation. – For the purposes of –

(*i*) clauses (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible;

(*ii*) clause (*b*), the written admission is admissible;

(*iii*) clause (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible;

(*iv*) clause (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such document.

Section 62 provides that the contents of electronic records may be proved in accordance with the provisions of Section 63.

Section 63 is non-obstante clause which provides that any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

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 55 of the BSA, 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 55. 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.

PRESUMPTIONS

The Sanhita 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		
(i) Presumptions of law, It is a rule of law that a particular inference shall be drawn by a court from particular circumstances.	(ii) Presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.	(iii) 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 Sanhita. Section 2(1)(b), (h) and (l) 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

When we see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

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 121). 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.

Sections 122 and 123 are also other important sections relating to Estoppel of tenant and of licensee of person in possession and Estoppel of acceptor of bill of exchange, bailee or licensee.

Principle of Estoppel

Estoppel is based on the maxim *'allegans contratia 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.

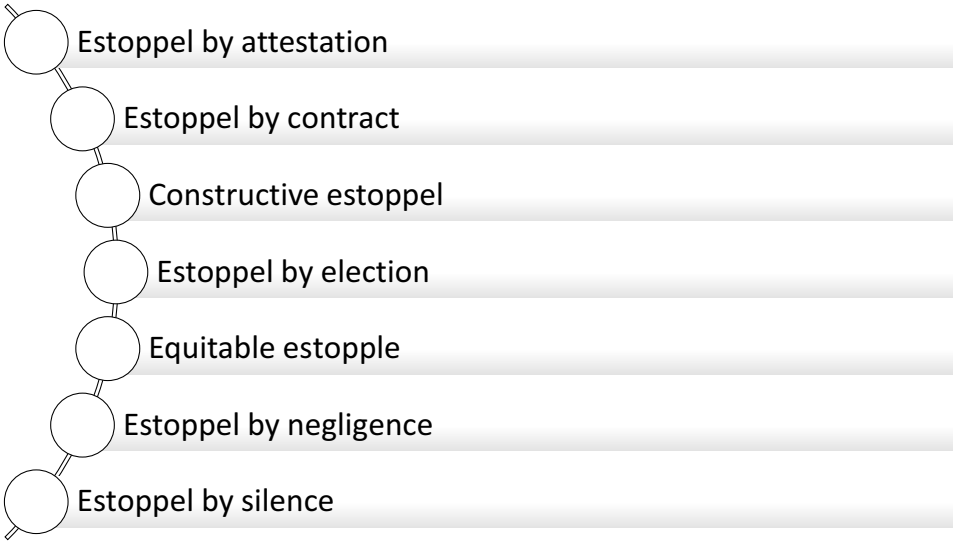
The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not 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*).

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. 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.

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 pursuing 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



ELECTRONIC EVIDENCE (E-EVIDENCE)

The contents of electronic records may be proved in accordance with the provisions of section 63 of BSA.

Admissibility of electronic records

According to section 63, notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

As per section 63(2), the conditions in respect of a computer output are as follows:

(a) the computer output containing the information was produced by the computer or communication device during the period over which the computer or Communication device was used regularly to create, store or process information for the purposes of any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer or Communication device in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer or communication device was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer or Communication device in the ordinary course of the said activities.

Treatment of activity regularly carried on over a period by means of one or more computers or communication

Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in section 63(2)(a) was regularly performed by means of one or more computers or communication device, whether –

(a) in standalone mode; or

(b) on a computer system; or

(c) on a computer network; or

(*d*) on a computer resource enabling information creation or providing information processing and storage; or

(e) through an intermediary,

all the computers or communication devices used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer or communication device; and references in this section to a computer or communication device shall be construed accordingly.

Submission of certificate along with the electronic record

In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:

(*a*) identifying the electronic record containing the statement and describing the manner in which it was produced;

(*b*) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (*a*) to (*e*) of sub-section (*3*);

(*c*) dealing with any of the matters to which the conditions mentioned in sub-section (*2*) relate,

and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

Further, as per section 66 of BSA, except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record, the fact that such electronic signature is the electronic signature of the subscriber must be proved.

LESSON ROUND-UP

- 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 word evidence in the Sanhita 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 the Sanhita 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.
- 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; (ii) Statements as to certain matters under certain circumstances by persons who are not witnesses; and (iii) Statements made under special circumstances.
- All facts which are neither admitted nor are subject to judicial notice must be proved. The Sanhita divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.
- 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. There are three categories of presumptions:(i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances; (ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved; (iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.
- 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.
- According to section 63, notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible.

GLOSSARY

Judicial Proceedings: According to Section 2(1)(m) of the BNSS as "a proceeding in the course of which evidence is or may be legally taken on oath".

Documentary Evidence: All documents including electronic records produced for the inspection of the Court are called documentary evidence.

Fact 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.

Res gestae: Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.

Confessions: The confession is an admission, which is evidence only against its maker and against another person who is being jointly tried with him for an offence. A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence.

Judicial Confessions: Judicial confessions are those made before a Court or recorded by a Magistrate under the BNSS after following the prescribed procedure.

Extra Judicial Confessions: Extra-judicial confessions are those which are made either to the police or to any person other than Judges and Magistrates as such.

Privileged Communication: There are some facts of which evidence cannot be given under Bharatiya Sakshya Adhiniyam, 2023 though they are relevant. They are referred to as 'privileged communications'

Primary Evidence: Primary evidence means the document itself produced for the inspection of the Court.

Estoppel : Estoppel is based on the maxim 'allegans contratia non est audiendus' i.e. a person alleging contrary facts should not be heard.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What is oral, documentary and circumstantial evidence?
2. Differentiate between Primary Evidence and Secondary Evidence.
3. Explain in Brief Principal of Estoppel.
4. Write a short note on Admissions and Confession.
5. State the cases in which opinion of expert is relevant.
6. Write a short note on admissibility of electronic evidence.

LIST OF FURTHER READINGS

- Bare Act of Bharatiya Sakshya Adhiniyam, 2023
- "Relevancy, Proof and Evaluation of Evidence in Criminal Cases" authored by Mr. Justice U.L. Bhat
- Vepa P. Sarathi, Law of Evidence, 6th Edition.

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.mha.gov.in/sites/default/files/250882_english_01042024.pdf

Law relating to Specific Relief

Lesson 9

KEY CONCEPTS

■ Specific Relief ■ Obligation ■ Settlement ■ Injunction

Learning Objectives

To understand:

- What is a specific relief?
- Various kinds of equitable reliefs
- Specific Performance of contracts
- Unenforceable Contracts
- Decrees and Preventive Reliefs
- Public Private Partnerships
- Public Utilities Infrastructure Developments
- Specific Performance of Contract

Lesson Outline

- Introduction
- Specific Relief and Defense
- Specific Performance of Contracts and Defense
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The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Specific Relief Act, 1963

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. It does not purport to lay down the law relating to specific relief in all its ramifications (AIR 1972 SC 1826).

There are other kinds of specific remedy provided for by other enactments e.g. the 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:

(i) Recovering possession of property (Sections 5-8);

(ii) Specific performance of contracts (Sections 9-25);

(iii) Rectification of Instruments (Section 26);

(iv) Rescission of contracts (Sections 27-30);

(v) Cancellation of Instruments (Section 31-33);

(vi) Declaratory decrees (Sections 34-35); and

(vii) Injunctions (Sections 36-42).

SPECIFIC RELIEF AND DEFENSE

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

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. Section 5 and 6 provide alternative remedies which are mutually exclusive.

Recovery of specific movable property

Section 7 and 8 provide for recovery of specific movable properties.

As per Section 7, a person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Explanation 1.–A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.–A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Example

"X" pledges his bike to "Y" for 1 lakh rupees. "Y" unlawfully sold the bike to "Z" before the lapse of loan period. "X" sues Z for possession of his bike, without paying the loan amount even after expiring the time fixed for repayment of loan.

According to section 7, a person entitled to the possession may recover the property by filling a proper suit. Since, in the given situation "X" has not repaid the loan, he is not entitled for the possession.

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:–

(a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;

(b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) 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.

Example

The possession of a family heirloom is with a person 'X', who is not a member of that family.

'X' is bound to return it to the family since the damage caused by its loss would be extremely difficult to ascertain.

SPECIFIC PERFORMANCE OF CONTRACTS AND DEFENSE

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.

CASE LAW

Katta Sujatha Reddy and Ors. vs. Siddamsetty Infra Projects Pvt. Ltd. and Ors. (25.08.2022 - SC) 2022 SCC OnLine SC 1079

Supreme Court decided, whether the amendment made to Section 10 of the Specific Relief Act in 2018 is prospective or retrospective in nature. Court held that such amendment of 2018 was prospective in nature. It was stated that

"*Having come to the conclusion that the 2018 amendment was not a mere procedural enactment, rather it had substantive principles built into its working, this Court cannot hold that such amendments would apply retrospectively. We do not have any hesitation in holding that the 2018 amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force. It is clear that the 2018 Amendment Act is prospective and cannot be applied to the present set of facts. Under the earlier law, grant of specific performance was discretionary. However, it was mandated that such discretion ought to be used in a principled manner without leaving scope for any arbitrary application.*"

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 of 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.

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:–

(a) 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;

(b) 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;

(c) 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;

(d) 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:–

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable.

Example

A, enters into a contract with B, an owner of Mall to give him space in exchange for sales of good and provide him necessary appliances. Can specific performance be sought without defining the consideration?

Here, the specific performance cannot be sought since the goods and appliances are not defined, neither is amount and nature of accommodation is defined.

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 thereunder;

(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.

UNENFORCEABLE 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.

Example

'A' enters into a contract with 'B' to sell a piece of land with trees having ornamental values as to the market value of the house.

'A' without 'B's' consent removed the trees, thereby violating the terms of the contract. A cannot enforce specific performance.

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 contact;

(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–

(a) either party thereto;

(b) 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;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*ca*) 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.

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(c) 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.

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.

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 sub-section (1) unless he has got the contract performed through a third party or by his own agency.

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.

Section 20 shall not prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

CASE LAW

Raman (Dead) by L.Rs. vs. R. Natarajan (13.09.2022 - SC) : AIR2022SC4343

In this case, Supreme Court held that *a Court cannot grant the relief of specific performance against a person compelling the other person to enter into an agreement with a third party and seek specific relief against such a third party.*

"In any case, the High Court ought to have seen that a Court cannot grant the relief of specific performance against a person compelling him to enter into an agreement with a third party and seek specific relief against such a third party. In other words, the specific performance of the agreement by the Appellants herein, depended upon (i) the Appellants entering into an agreement with a third party; and (ii) Appellants being in a position to compel such third party to perform her obligations under such agreement."

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; or

(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.

Enforcement of awards and directions to execute settlements

Section 25 provides that the provisions of Chapter II shall apply to awards to which the Arbitration and Conciliation Act, 1996 does not apply and to directions in a will or codicil to execute particular settlement.

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–

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) 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; or

(c) 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.

The term 'instrument' has been defined under Section 2(14) of the Indian Stamp Act, 1899. According to the definition, 'instrument' includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded:

Example

'A', entered into a contract with 'B' . The subject matter of the contract is Employing B on certain conditions. The contract contains mistakes as to rights of the "B" leading to exclusion few rights conferred upon him.

'B' file a suit to get the contract rectified.

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 –

(a) where the plaintiff has expressly or impliedly ratified the contract; or

(b) 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; or

(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(d) 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.

Example

'A' the owner of a field sells it to 'B', there is a right of way from the field that only 'A' has knowledge of but he conceals it from 'B'.

'B' is entitled to have that contract rescinded as concealment of facts may be covered under misrepresentation and therefore voidable under Indian Contract Act.

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 unit 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 be require.

CANCELLATION OF INSTRUMENTS

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.

Example

'A' the owner of a ship, fraudulently represent the ship as fit and ready to sail, induces 'B', an insurer to insure the ship.

'B' can seek a cancellation of the instrument (insurance policy).

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.

CASE LAW

Jagdish Prasad Patel (Dead) thr. L.Rs. and Ors. vs. Shivnath and Ors. (09.04.2019 - SC): (2019) 6SCC 82

Supreme Court in this case held that in the suit for declaration for title and possession, the Plaintiffs-Respondents could succeed only on the strength of their own title and not on the weakness of the case of the Defendants-Appellants. They stated

"the burden is on the Plaintiffs-Respondents to establish their title to the suit properties to show that they are entitled for a decree for declaration. The Plaintiffs-Respondents have neither produced the title document i.e. patta-lease which the Plaintiffs-Respondents are relying upon nor proved their right by adducing any other evidence. As noted above, the revenue entries relied on by them are also held to be not genuine. In any event, revenue entries for few Khataunis are not proof of title; but are mere statements for revenue purpose. They cannot confer any right or title on the party relying on them for proving their title."

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

(1) 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.

(2) 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.

Example

'X' contracts with 'A' that he will paint a house belonging to A in 1 month and during that time he will not paint any other premises. 'A' is not entitled to decree for specific performance of this contract. But he is entitled to an injunction restraining 'X' from painting any other premises.

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. The only exception to this rule is found in Section 42.

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 threactens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:–

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Example

'C' a trustee for 'A' is about to make an important sale of trust property. 'A' is of the view that 'C' is selling the property at rate i.e. 25% of the market value of that property.

'A' may sue for an injunction to restraint the sale, even though monetary compensation would have afforded him adequate relief.

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 –

(a) 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;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not sub- ordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(*ha*) 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.

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court;

(j) 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.

THE SCHEDULE

[sections 20A and 41 (ha)]

Category of projects and Infrastructure Sub-Sectors

Sl. No.	*Category*	*Infrastructure Sub-Sectors*
1	**Transport**	(a) Road and bridges (b) Ports (including Capital Dredging) (c) Shipyards (including a floating or land-based facility with the essential features of waterfront, turning basin, berthing and docking facility, slipways or ship lifts, and which is self-sufficient for carrying on shipbuilding/repair/breaking activities) (d) Inland Waterways (e) Airports (f) Railway Track, tunnels, viaducts, bridges, terminal infrastructure including stations and adjoining commercial infrastructure (g) Urban Public Transport (except rolling stock in case of urban road transport)
2	**Energy**	(a) Electricity Generation (b) Electricity Transmission (c) Electricity Distribution (d) Oil pipelines (e) Oil/Gas/Liquefied Natural Gas (LNG) storage facility (including strategic storage of crude oil) (f) Gas pipelines (including city gas distribution network)

3	**Water and Sanitation**	(a) Solid Waste Management (b) Water supply pipelines (c) Water treatment plants (d) Sewage collection, treatment and disposal system (e) Irrigation (dams, channels, embankments, etc.) (f)Storm Water Drainage System (g) Slurry pipelines
4	**Communication**	(a) Telecommunication (Fixed network including optic fibre/wire/cable networks which provide broadband/internet) (b) Telecommunication towers (c) Telecommunications and Telecom Services
5	**Social and Commercial Infrastructure**	(a) Education Institutions (capital stock) (b) Sports infrastructure (including provision of Sports Stadia and Infrastructure for Academies for Training/ Research in Sports and Sports-relating activities) (c) Hospitals (capital stock including Medical Colleges, Para Medical Training Institutes and Diagnostic Centres) (d) Tourism infrastructure viz.(i) three-star or higher category classified hotels located outside cities with population of more than one million; (ii) ropeways and cable cars (e) Common infrastructure for industrial parks and other parks with industrial activity such as food parks, textile parks, Special Economic Zones, tourism facilities and agriculture markets (f) Post-harvest storage infrastructure for agriculture and horticulture produce including cold storage (g) Terminal markets (h) Soil-testing laboratories (i) Cold chain(including cold room facility for farm level pre-cooling, for preservation or storage of agriculture and allied produce, marine products and meat) (j) Affordable Housing (including a housing project using at least 50% of the Floor Area Ratio (FAR)/ Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 square meters *Explanation*.– For the purposes of this sub-clause, the term "carpet area" shall have the same meaning as assigned to it in clause (k) of section 2 of the Real Estate (Regulation and Development) Act, 2016.

CASE LAW

Munishamappa v. M. Rama Reddy & Ors decided by Supreme Court on 02.11.2023

In this case, the appeal decided the correctness of the judgment, passed by High Court in which the Second Appeal preferred by the defendant-respondent was allowed, and the suit for specific performance of contract filed by the appellant was dismissed.

An important question in this case decided by the Hon'ble Supreme Court was relating to distinguishment between Sale Deed and Agreement to Sell.

In the Judgement, the Apex Court has stated that the Agreement to Sell is not a conveyance; it does not transfer ownership rights or confers any title.

LESSON ROUND-UP

- The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief. It contains provisions, *inter alia*, specific performance of contracts, contracts not specifically enforceable, parties who may obtain and against whom specific performance may be obtained, etc.
- The tremendous economic development since the enactment of the Act have brought in enormous commercial activities in India including foreign direct investments, public private partnerships, public utilities infrastructure developments, etc.; which have prompted extensive reforms in the related laws to facilitate enforcement of contracts, settlement of disputes in speedy manner.
- It has been felt that the Specific Relief Act is not in tune with the rapid economic growth happening in our country and the expansion of infrastructure activities that are needed for the overall development of the country, Parliament enacted Specific Relief (Amendment) Act, 2018 and came into effect from01 October, 2018.
- Section 14 lays down the contracts which cannot be specifically enforced, namely: (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and (d) a contract which is in its nature determinable.
- 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.
- 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.

- Injunction shall not 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.
- 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 Specific Relief Act in respect of contracts relating to infrastructure projects.
- A suit filed shall be disposed of by the court within a period of twelve months from the date of service of summons to the defendant. The 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.

GLOSSARY

Specific Relief: The expression 'specific relief' means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.

Obligation: It includes every duty enforceable by law

Rescission: It 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.

Instrument: It includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

Declaratory Decree: It is a decree whereby any right as to any property or the legal character of a person is judicially ascertained.

Injunction: It 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

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Explain whether specific performance of a part of contract is allowed.
2. State the exception to a specific performance.
3. Who may sue for Specific Performance?
4. Discuss recovery of possession of property under the Specific Relief Act, 1963.
5. State the persons against whom Specific Performance available.
6. What is an injunction? Explain the kinds of injunctions.
7. Enumerate the conditions under which injunction cannot be granted.
8. Write a note on rescission of contracts.

LIST OF FURTHER READINGS
• Bare Act Specific Relief Act, 1963 • The Indian Contract & Specific Relief Acts (Set of 2 Volumes) (2017) Pollock and Sir Dinshaw Fardunji Mulla • Specific Relief Act by R K Bangia

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)
• https://www.indiacode.nic.in/handle/123456789/1583?sam_handle=123456789/1362

Law relating to Limitation

Lesson 10

KEY CONCEPTS

■ Bar of Limitation ■ Computation of period ■ Legal disability ■ Judicial process ■ Time barred ■ Pauper

Learning Objectives

To understand:

- Computation of period of Limitation
- Bar on institution of suits created by Limitation Act
- Extension and continuous running of time under Limitation Law
- Acquisition of property after lapse of time
- Period prescribed for various suits for filling under Limitation law

Lesson Outline

- Introduction
- Computation of the Period of Limitation
- Bar of Limitation
- Extension of time in certain cases
- Continuous running of time
- Computation of period of limitation
- Effect of acknowledgement on the period of limitation
- Effect of Payment on account of debtor interest on legacy
- Computation of time mentioned in the instrument
- Acquisition of ownership by possession
- Limitation and writs under the constitution
- The Schedule
- Classification of period of limitation
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Limitation Act, 1963

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.

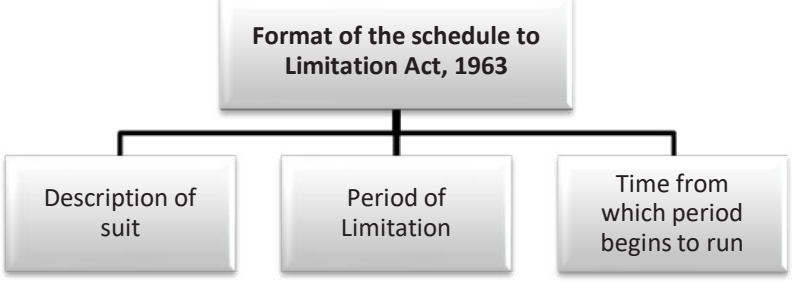
CASE LAW

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process, in *Bombay Dying & Mfg. Co. Ltd. v. State of Bombay, AIR 1958 SC 328*. 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.



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 atime barred suit is not a nullity.

CASE LAW

Noharlal Verma vs. District Cooperative Central Bank Limited, Jagdalpur, (SC), 2008

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.

Limitation period under IBC

S.M. Ghogbhai vs. Schedulers Logistics India Pvt. Ltd. (23.05.2022 - NCLAT) :2022 SCC OnLine NCLAT 216

In this case, the Appeal was filed against the Order dated 16th November, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court-III by which the Application C.P. No. 3857/I & B/2019 filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 was rejected as barred by time. Tribunal dismissed the appeal stating -

"We are satisfied that for the limitation for filing Section 9 application it is Article 137 of the Limitation Act, 1963 which is attracted. Under Article 137, time from which period begins to run is "when the right to apply accrues" the right to apply accrues when invoices issued by the Appellant to the Corporate Debtor were not paid. Invoices on the basis of which payment is claimed are more than three years earlier from the date of filing of Section 9 Application which is the basis for rejection of the Application of the Appellant by the Adjudicating Authority."

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. Section 5 provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, 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.

The Section is not applicable to applications made under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 and also to suits. The Court has no power to admit a time barred suit even if there is a sufficient cause for the delay. It applies only to appeals or applications as specified therein. The reason for non-applicability of the Section to suits is that, the period of limitation allowed in most of the suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months. For the applicability of Section 5, the "prescribed period" should be over. The prescribed period means any period prescribed by any law for the time being in force.

The party applying for condonation of delay should satisfy the Court for not making an appeal or application within the prescribed period for sufficient cause. The term sufficient cause has not been defined in the Limitation Act. It depends on the circumstances of each case.

However, it must be a cause which is beyond the control of the party.

CASE LAW

In *Ramlal v. Rewa Coal Fields Ltd., AIR 1962 SC 361,* 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.

What is sufficient cause and what is not may be explained by the following observations:

1. Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause under Section 5;
2. In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be *bona fide;*
3. Wrong advice given by advocate can give rise to sufficient cause in certain cases;
4. Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;
5. Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
6. Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.
7. Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay (*Collector and Authorised Chief Settlement Commissioner v. Darshan Singh and others, AIR 1999 Raj. 84*).
8. Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause [*Mahendra Yadav v. Ratna Devi & others, AIR 2006 (NOC) 339 Pat*].

The *quasi-judicial* tribunals, labour courts or executive authorities have no power to extend the period under this Section.

The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of 'sufficient cause' delightfully undefined thereby leaving to the court a well-intended discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.

R B Ramlingam v. R B Bhvansewari (2009) 2 SCC 689

G. Ramegowda, Major, Etc. v. Special Land Acquisition Officer , Bangalore, AIR, 1988, SC 897

The Supreme Court held that the expression 'sufficient cause' in Section 5 of the Limitation Act, 1963 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay.

Example

The limitation period of the suit was 3 years. On the last day, X was hospitalized and could not file the suit. He recovered within next 2 days. Can he be allowed to file a suit under section 5 after showing sufficient cause?

No, section 5 is applicable for applications and appeals.

CASE LAWS

B.K. Educational Services Private Limited v. Parag Gupta and Associates (2019) 11 SCC 633

In this case, the question raised by the Appellants was whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Insolvency and Bankruptcy Code, 2016 on and from its commencement on 01.12.2016 till 06.06.2018. The Supreme Court held that Limitation Act, 1963 is applicable to proceedings under Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 retrospectively since its inception. It was stated –

"that, relying upon the Report of the Insolvency Law Committee of March, 2018, that the object of the Amendment Act which introduced Section 238A into the Code was to clarify the law and, thus, Section 238A must be held to be retrospective.

...It is thus clear that since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred Under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application"

Pathapati Subba Reddy (Died) by L.Rs. & Ors v. The Special Deputy Collector (LA) by Supreme Court on 08.04.2024

Merits of the case are not required to be considered in condoning the delay. A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time

This case can be referred to understand the law relating to condonation of delay under the Limitation Act, 1963.

The present Special Leave Petition was filed challenging the judgment and order whereby the High Court has dismissed the application of the petitioners for condoning the delay of 5659 days in filing the proposed appeal.

The moot question before the Hon'ble Supreme court was whether in the facts and circumstances of the case, the High Court was justified in refusing to condone the delay in filing the proposed appeal and to dismiss it as barred by limitation.

The Supreme Court has laid down that on a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision.

Moreover, the High Court, in the facts of this case, has not found it fit to exercise its discretionary jurisdiction of condoning the delay. There is no occasion for us to interfere with the discretion so exercised by the High Court for the reasons recorded. First, the claimants were negligent in pursuing the reference and then in filing the proposed appeal. Secondly, most of the claimants have accepted the decision of the reference court. Thirdly, in the event the petitioners have not been substituted and made party to the reference before its decision, they could have applied for procedural review which they never did. Thus, there is apparently no due diligence on their part in pursuing the matter. Accordingly, in our opinion, High Court is justified in refusing to condone the delay in filing the appeal.

Ajay Dabra vs. Pyare Ram and Ors, 2023 SCC OnLine SC 92, decided by Supreme Court on 31.01.2023

In this case the impugned order of High Court of Himachal Pradesh dismissed the delay condonation applications filed Under Section 5 of the Limitation Act, 1963, declining to condone a delay of 254 days, because the reasons assigned for the condonation were not sufficient reasons for condonation of the delay. This was not found to be a sufficient reason for the condonation of delay as the Appellant was an affluent businessman and a hotelier.

The Supreme Court has said that we do not have a case at hand where the Appellant is not capable of purchasing the court fee. He did pay the court fee ultimately, though belatedly. But then, under the facts and circumstances of the case, the reasons assigned for the delay in filing the appeal cannot be a valid reason for condonation of the delay, since the Appellant could have filed the appeal deficient in court fee under the provisions of law, referred above. Therefore, we find that the High Court was right in dismissing Section 5 application of the Appellant as insufficient funds could not have been a sufficient ground for condonation of delay, under the facts and circumstance of the case. It would have been entirely a different matter had the Appellant filed an appeal in terms of Section 149 Code of Civil Procedure and thereafter removed the defects by paying deficit court fees. This has evidently not been done.

Persons under legal disability

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements Section 6, Section 8 controls these sections, which serves as an exception to Sections 6 and 7. 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 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.

Both Sections 6 and 7 go together. Section 7 is an extension of Section 6, where the point of time at which the existence of disability is to be recognised "*the time from which the period of limitation is to be reckoned*".

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.

To apply Section 7, disability must exist when the right to apply accrued, i.e., at the time from which period of limitation is to be reckoned.

In other words, Section 8 provides that in those cases where the application of Section 6 or 7 of the Act results in an extension of the period prescribed by Schedule, that extension is not to be more than three years after the cessation of the disability.

Example

The limitation period for filling a suit is 12 years. When the limitation period commenced X was minor of age 10 years

He will not get 12 years after cessation of minority. He will get only 3 years due to bar of section 8 of the Limitation Act.

Example

Disabilities are being a minor or insane, or an idiot.

Section 7 deals with the situation where there is joint entitlement of filling a suit or application. It give rise to two situation:

1. When Discharge may be given by any other person without concurrence: In this situation, time will run against them all.
2. When discharge cannot be given by any other person without concurrence: In this situation, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased

CONTINUOUS RUNNING OF TIME

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 shallbe 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.

The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise as the starting point of limitation for that particular application will be deemed not to have been commenced.

Thus, time runs when the cause of action accrues. True test to determine when a cause of action has accrued is to ascertain the time, when plaintiff could have maintained his action to a successful result first if there is an infringement of a right at a particular time, the whole cause of action will be said to have arisen then and there.

Section 9 contemplates only cases where the cause of action continues to exist. Section 10 excludes suits against trustees and their representatives from the purview of the Act. In order to invoke the application of Section 10 the property must be vested in a trustee or trustees for a specific-purpose.

COMPUTATION OF PERIOD OF LIMITATION

Exclusion of certain days or exclusion of time in legal proceedings

While computing Period of Limitation certain day/days are to be excluded.

Part III of the Act containing Sections 12 to 24 deals with computation of period of limitation and Section 12 prescribes the time which shall be excluded in computing the time of limitation in legal proceedings.

(i) ***Computation of period of limitation for a suit, appeal or application:*** According to Section 12(1), the day which is to be excluded in computing period of limitation is the day from which the period of limitation is to be reckoned. In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.

(ii) ***Computation of period of limitation for an appeal or an application for leave to appeal or for revision orfor review of a judgement***: The day on which the judgement complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded [Section 12(2)].

(iii) ***Computation of period for an application made for leave to appeal from a decree or order:*** The time requisitefor obtaining a copy of the judgement shall also be excluded [Section 12(3)].

(iv) ***Computation of Limitation period for an application to set aside an award:*** The time required for obtainingа copy of the award shall be excluded [Section 12(4)].

Thus, the time required for getting copies of certain decisions, mentioned under Section 12 is also to be excluded in computing the period of limitation as per Sub-sections (2), (3) and (4).

CASE LAW

The term "time requisite for obtaining a copy" means the time which is reasonably required for obtaining such a copy, On the explanation to Section 12, the Supreme Court in the case of *Udayan China Bhai v. R.C. Bali, AIR 1977 SC 2319,* held that by reading Section 12(2) with explanation it is not possible to accept the submission that in computing the time requisite for obtaining copy of a decree by an application made after preparation of the decree, the time that elapsed between the pronouncement of the judgement and the signing of the decree should be excluded.

However, the time taken by the Court to prepare the decree or order before an application for a copy is made shall not be excluded in computing the time for obtaining a copy of a decree or an order. (Explanation to Section 12)

Exclusion of time during which leave to sue or appeal as a pauper is applied for (Section 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:

(a) that the plaintiff or the applicant was prosecuting another civil proceedings against the defendant with due diligence in the above said court;

(b) that the previous suit or application related to the same matter in issue;

(c) that the plaintiff or the applicant prosecuted in good-faith in that court; and

(d) that the court was unable to entertain a suit or application on account of defect of jurisdiction or other like cause.

CASE LAW

02.04.2024	Purni Devi & Anr. V. Babu Ram & Anr.	Supreme Court

In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the defendant should be excluded

Facts

The genesis of the case at hand dates back to 01.06.1984, wherein the predecessors in interest of the Appellant ("Plaintiff") filed a suit for possession against the Respondents ("Defendants"). On 10.12.1986, this suit was decreed by learned Munsiff, First Class Hiranagar, in favour of the Plaintiff, and the Defendants were directed to deliver vacant and peaceful possession of the property to the Plaintiff. This decree was challenged by the Respondents before the learned District Judge, Kathua, in First Appeal, which came to be dismissed on 09.02.1990. Thereafter, the Respondents preferred a Second Appeal before the High Court of Jammu and Kashmir which came to be dismissed *vide* Order dated 09.11.2000. No further appeal was preferred. Therefore, the decree of the learned Munsiff Court attained finality on 09.11.2000.

The present *lis* arises from the application for execution filed by the predecessor in interest of the Plaintiff, before the learned Tehsildar (Settlement), Hiranagar on 18.12.2000. This application came to be rejected on 29.01.2005, whereby the learned Tehsildar observed that the Plaintiff had not applied before the Court with appropriate jurisdiction.

The Plaintiff thereafter, on 03.10.2005 preferred a fresh application for execution before the Court of Munsiff, Hiranagar. This application resulted in the order dated 28.11.2007, whereby, the learned Munsiff Court dismissed the application as being barred by limitation, which has come to be confirmed vide the impugned order.

Issue

Whether the time spent in wrong forum be excluded from the Period of Limitation?

Decision

The principles pertaining to applicability of Section 14, were extensively discussed and summarised by Supreme Court in Consolidated Engg. Enterprises case, wherein while holding the exclusion of time period under Section 14 of the Limitation Act to a petition under Section 34 of the Arbitration Act it was observed:-

"Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue; and

(5) Both the proceedings are in a court."

This Court in Consolidated Engg. Enterprises (Supra) further expounded that the provisions of this Section, must be interpreted and applied in a manner that furthers the cause of justice, rather than aborts the proceedings at hand and the time taken diligently pursuing a remedy, in a wrong Court, should be excluded.

In the present case, it is not in dispute that:-

(i) Both the proceedings are civil in nature and have been prosecuted by the Plaintiff or the predecessor in interest.

(ii) The failure of the execution proceedings was due to a defect of jurisdiction.

(iii) Both the proceedings pertain to execution of the decree dated 10.12.1986, which attains finality on 09.11.2000.

(iv) Both the proceedings are in a court.

More recently, in Laxmi Srinivasa R and P Boiled Rice Mill v. State of Andhra Pradesh and Anr.6 (2-Judge Bench), Supreme Court followed the dictum in Consolidated Engg. Enterprises (Supra) and M.P. Steel (Supra) to exclude the time period undertaken by the Plaintiff therein in pursuing remedy under Writ Jurisdiction, in the absence of challenge to the bona fides of the Plaintiff, in view of Section 14.

The Hon'ble Supreme Court has laid down that we do not find the reasoning given by the learned High Court in paragraph 9 while rejecting the plea for exclusion of time to be sustainable. On a perusal of the record, it is apparent that the Plaintiff has pursued the matter bonafidely and diligently and in good faith before what it believed to be the appropriate forum and, therefore, such time period is bound to be excluded when computing limitation before the Court having competent jurisdiction. All conditions stipulated for invocation of Section 14 of the Limitation Act are fulfilled.

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)].

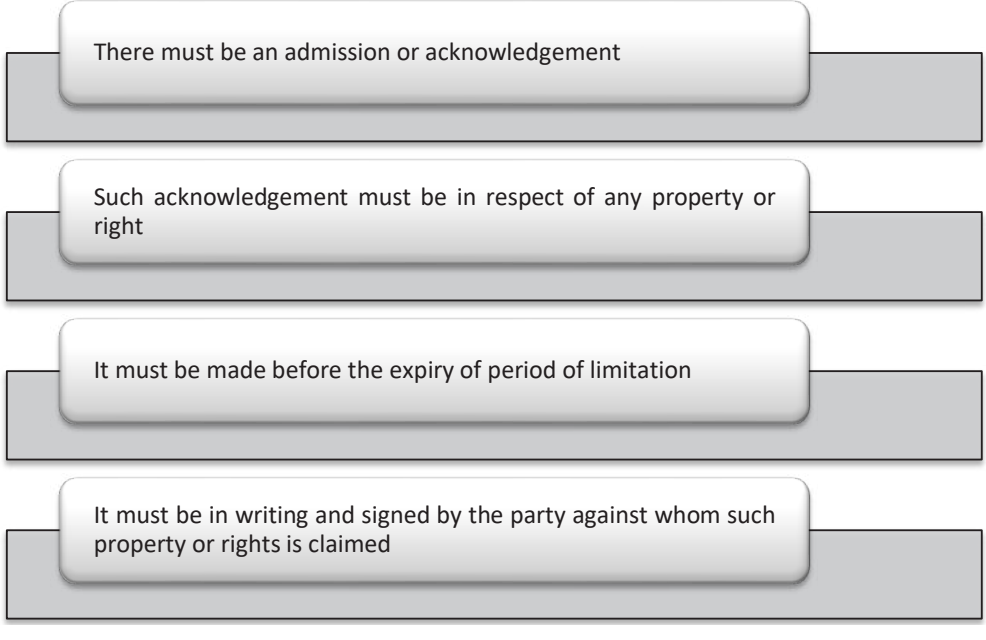
However, the above rule does not apply to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office. [Section 16(3)].

(g) 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. These rules are subject to certain exceptions as provided in proviso to section 17(1). When a judgment-debtor by fraud or force prevented the execution of a decree or order within the period of limitation, the court may extend the period for execution of the decree or order on the application of Judgement Creditor. Such application shall be made within one year from the date of the 'discovery of the fraud' or the 'cessation of force'. (Section 17).

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION

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:



If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

CASE LAW

Laxmi Pat Surana vs. Union Bank of India and Ors. (26.03.2021 - SC) : AIR 2021 SC 1707

This case has discussed, that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower. The Supreme Court stated that-

> *"Suffice it to conclude that there is no substance even in the second ground urged by the Appellant regarding the maintainability of the application filed by the Respondent-financial creditor Under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT - that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application Under Section 7 of the Code filed on 13.02.2019 is within limitation."*

Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal and Ors. (15.04.2021 - SC) : AIR 2021 SC 5249

The supreme court addressed the issue as to whether an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability Under Section 18 of the Limitation Act. The Supreme Court held that several judgments of this Court have indicated that an entry made in the books of accounts, including the balance sheet, may amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act but subject to further examination. It stated-

> *"that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation Under Section 18 of the Limitation Act"*

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY

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.

CASE LAW

Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors. (07.08.2019 - SC): 2019 SCC OnLine SC 975

In this case, the question was whether a person claiming the title by virtue of adverse possession can maintain a suit Under Article 65 of Limitation Act, 1963 for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the Defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a Defendant whose title has been extinguished by virtue of the Plaintiff remaining in the adverse possession or in case of dispossession by some other person? Court held that there is no bar under Limitation Act, 1963 to file a suit. It stated that -

"In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the Plaintiff as well as a shield by the Defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession....

We hold that plea of acquisition of title by adverse possession can be taken by Plaintiff Under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a Plaintiff."

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 provideda 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.

The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2)of the Constitution. It is against the State action that Fundamental Rights are claimed. *(Tilokchand Motichand v. H.P. Munshi, AIR 1970 SC 898).*

The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory period of limitation *(State of M.P. v. Bhai Lal Bhai, AIR 1964 SC 1006).* Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation,the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction.

If the right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right to be enforced under Article 32 of the Constitution. In other case where the remedy only, not the right, is extinguished by limitation the Court will refuse to entertain stale claims on the ground of public policy *(Tilokchand Motichand v. H.P. Munshi, AIR 1970 SC 898).*

ANNEXURE

THE SCHEDULE

(Periods of Limitation)

[Sections 2(j) and 3]

S. No.	*Description of suit*	*Period of limitation*	*Time from which period begin storun*
	First Division - SUITS		
	PART I – SUITS RELATING TO ACCOUNTS		
1.	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last-time admitted or proved is entered in the account, such year to be computed as in the account.
2.	Against a factor for an account.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
3.	By a principal against his agent for movable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
4.	Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
5.	For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.
	PART II — SUITS RELATING TO CONTRACTS		
6.	For a seaman's wages.	Three years	The end of the voyage during which the wages are earned.
7.	For wages in the case of any other person.	Three years	When the wages accrue due.
8.	For the price of food or drink sold by the keeper of a hotel, tavern or lodging- house.	Three years	When the food or drink is delivered.
9.	For the price of lodging.	Three years	When the price becomes payable.
10.	Against a carrier for compensation for losing or injuring goods.	Three years	When the loss of injury occurs.
11.	Against a carrier for compensation for non-delivery of, or delay in delivering goods.	Three years	When the goods sought to be delivered.
12.	For the hire of animals, vehicles, boats or household furniture.	Three years	When the hire becomes payable.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
13.	For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
14.	For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of delivery of the goods.
15.	For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.
16.	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.
17.	For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale.
18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
19.	For money payable for money lent.	Three years	When the loan is made.
20.	Like suit when the lender has given a cheque for the money.	Three years	When the cheque is paid.
21.	For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
22.	For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable.	Three years	When the demand is made.
23.	For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
24.	For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years	When the money is received.
25.	For money payable for interest upon money due form the defendant to the plaintiff.	Three years	When the interest becomes due.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
26.	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
28.	On a single bond, where a day is specified for payment.	Three years	The day so specified.
29.	On a single bond, where no such day is specified.	Three years	The date of executing the bond.
30.	On a bond subject to a condition.	Three years	When the condition is broken.
31.	On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due.
32.	On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years	When the bill is presented.
33.	On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place.
34.	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
35.	On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years	The date of the bill or note.
36.	On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
37.	On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.
38.	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.
39.	On a dishonoured foreign bill where protest has been made and notice given.	Three years	When the notice is given.
40.	By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	Three years	The date of the refusal to accept.
41.	By the acceptor of an accommodation – bill against the drawer.	Three years	When the acceptor pays the amount of the bill.
42.	By a surety against the principal debtor.	Three years	When the surety pays the creditor.
43.	By a surely against a co-surety.	Three years	When the surety pays anything in excess of his own share.
44.	(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased or where the claim on the policy is denied, either partly or wholly, the date of such denial.
	(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
45.	By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.
46.	Under the Indian Succession Act, 1925, Section 360 or Section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years	The date of the payment or distribution.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
47.	For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.
48.	For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-shares.	Three years	The date of the payment in excess of the plaintiff's own share.
49.	By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.
50.	By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years	The date of the payment.
51.	For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
52.	For arrears of rent.	Three years	When the arrears become due.
53.	By a vendor of immovable property for personal payment of unpaid purchase-money.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
54.	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.
55.	For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
PART III — SUITS RELATING TO DECLARATIONS			
56.	To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
57.	To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years	When the alleged adoption becomes known to the plaintiff.
58.	To obtain any other declaration.	Three years	When the right to sue first accrues.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
	PART IV — SUITS RELATING TO DECREES AND INSTRUMENTS		
59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
60.	To set aside a transfer of property made by the guardian of a ward —		
	(a) by the ward who has attained majority;	Three years	When the ward attains majority.
	(b) by the ward's legal representative —		
	(i) When the ward dies within three years from the date of attaining majority;	Three years	When the ward attains majority.
	(ii) when the ward dies before attaining majority.	Three years	When the ward dies.
	PART V — SUITS RELATING TO IMMOVABLE PROPERTY		
61.	By a mortgagor —		
	(a) to redeem or recover the possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues.
	(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
	(c) to recover surplus collection received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.
62.	To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.
63.	By a mortgagee:		
	(a) for foreclosure;	Thirty years	When the money secured by the mortgagee becomes due.
	(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
64.	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.
65.	For possession of immovable property or any interest herein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.
	Explanation — For the purposes of this article –		
	(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;		
	(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgement debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgement debtor who was out of possession.		
66.	For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
67.	By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.
	PART VI — SUITS RELATING TO MOVABLE PROPERTY		
68.	For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
69.	For other specific movable property.	Three years	When the property is wrongfully taken.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
70.	To recover movable property deposited or pawned from a depository or pawnee.	Three years	The date of refusal after demand.
71.	To recover movable property deposited or pawned, and afterwards bought from the depository or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.
PART VII — SUITS RELATING TO TORT			
72.	For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place.
73.	For compensation for false imprisonment.	One year	When the imprisonment ends.
74.	For compensation for a malicious prosecution.	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated.
75.	For compensation for libel.	One year	When the libel is published.
76.	For compensation for slander.	One year	When the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results.
77.	For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year	When the loss occurs.
78.	For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
79.	For compensation for an illegal, irregular or excessive distress.	One year	The date of the distress.
80.	For compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
81.	By executors, administrators or representatives' under the Legal Representatives' Suits Act, 1855.	One year	The date of the death of the person wronged.
82.	By executors' administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
83.	Under the Legal Representatives' Suits Act, 1855, against an executor, an administrator or any other representative.	Two years	When the wrong complained of is done.
84.	Against one who having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion first becomes known to the person injured thereby.
85.	For compensation for obstructing a way or a water-course.	Three years	The date of the obstruction.
86.	For compensation for diverting a water-course.	Three years	The date of the diversion.
87.	For compensation for trespass upon immovable property.	Three years	The date of the trespass.
88.	For compensation for infringing copyright or any other exclusive privilege.	Three years	The date of the infringement.
89.	To restrain waste.	Three years	When the waste begins.
90.	For compensation for injury caused by an injunction wrongfully obtained.	Three years	When the injunction ceases.
91.	For compensation —		
	(a) for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion;	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
	(b) for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
PART VIII — SUITS RELATING TO TRUSTS AND TRUST PROPERTY			
92.	To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93.	To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
94.	To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95.	A set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
96.	By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later.
PART IX — SUITS RELATING TO MISCELLANEOUS MATTERS			
97.	To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property when the instrument of sale is registered.
98.	By a person against whom (an order referred to in Rule 63 or Rule 103) of Order XXI of the Code of Civil Procedure, 1908 or an order under Section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order.	One year	The date of the final order.
99.	To set aside a sale by a Civil or Revenue Court or a sale for arrears of Government revenue or for any demand recoverable as such arrears.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
100.	To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order or an officer of Government in his official capacity.	One year	The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be.
101.	Upon a judgement including a foreign judgement, or a recognisance.	Three years	The date of the judgement or recognisance.
102.	For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity and has knowledge of the conveyance.
103.	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The date of the trustee's death or if the loss has not then resulted, the date of the loss.
104.	To establish a periodically recurring right.	Three years	When the plaintiff is first refused the enjoyment of the right.
105.	By a Hindu for arrears of maintenance.	Three years	When the arrears are payable.
106.	For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an interstate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.	Twelve years	When the legacy or share becomes payable or deliverable.
107.	For possession of a hereditary office. *Explanation* — A hereditary office is possessed when the properties thereof are usually received or if there are no properties when the duties thereof are usually performed.	Twelve years	When the defendant takes possession of the office adversely to the plaintiff.
108.	Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re- marriage.	Twelve years	The date of the alienation.
109.	By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
110.	By a person excluded from a joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.
111.	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.
112.	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu & Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
	PART X — SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD		
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.
	Second Division — Appeals		
114.	Appeal from an order of Acquittal —		
	(a) under Sub-section (1) or Sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898;	Ninety days	The date of the order appealed from.
	(b) under Sub-section (3) of Section 417 of that Code.	Thirty days	The date of the grant of special leave.
115.	Under the Code of Criminal Procedure, 1898.		
	(a) from a sentence of death passed by a Court of Session or by a High Court in exercise of its Original Criminal Jurisdiction;	Thirty days	The date of the sentence.
	(b) from any other sentence or any order not being an order of acquittal –		
	(i) to the High Court;	Sixty days	The date of the sentence or order.
	(ii) to any other Court.	Thirty days	The date of the sentence or order.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
116.	Under the Code of Civil Procedure, 1908 –		
	(a) to a High Court from any decree or order;	Ninety days	The date of the decree or order.
	(b) to any other Court from any decree or order.	Thirty days	The date of the decree or order.
117.	From a decree or order of any High Court to the same Court.	Thirty days	The date of the decree or order.
	Third Division — Applications		
118.	For leave to appear and defend a suit under summary procedure.	Ten days	When the summons is served.
119.	Under the Arbitration Act, 1940.		
	(a)for the filing in Court of an award.	Thirty days	The date of service of the notice of the making of the award.
	(b)for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of service of the notice of the filing of the award.
120.	Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.
121.	Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatement.
122.	To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.	Thirty days	The date of dismissal.
123.	To set aside a decree passed ex parte or to re-hear an appeal decreed or heard *ex parte*. Explanation: For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908, shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
124.	For a review of judgement by a Court other than the Supreme Court.	Thirty days	The date of the decree or order.
125.	To record an adjustment or satisfaction of a decree.	Thirty days	When the payment or adjustment is made.
126.	For the payment of the amount of a decree by instalments.	Thirty days	The date of the decree.
127.	To set aside a sale in execution of a decree, including any such application by a judgement-debtor.	Sixty days	The date of the sale.
128.	For possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree.	Thirty days	The date of the dispossession.
129.	For possession after removing resistance or obstruction to delivery of possession of immovable property decree or sold in execution of a decree.	Thirty days	The date of resistance or obstruction.
130.	For leave to appeal as a Pauper —		
	(a) to the High Court;	Sixty days	The date of decree appealed from.
	(b) to any other Court.	Thirty days	The date of decree appealed from.
131.	To any Court for the exercise of its powers of revision under the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973.	Ninety days	The date of the decree or order or sentence sought to be revised.
132.	To the High Court for a certificate of fitness to appeal to the Supreme Court under Clause (1) of Article 132, Article 133 or sub-clause (c) of clause (1) of Article 134 of the Constitution or under any other law for the time being in force.	Sixty days	The date of the decree, order or sentence.

S. No.	Description of suit	Period of limitation	Time from which period begin storun
133.	To the Supreme Court for special leave to appeal—		
	(a) in a case involving death sentence;	Sixty days	The date of the judgement, final order or sentence.
	(b) in a case where leave to appeal was refused by the High Court;	Sixty days	The date of the order of refusal.
	(c) in any other case.	Ninety days	The date of the judgement or order.
134.	For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.
135.	For the enforcement of a decree granting a mandatory injunction.	Three years	The date of the decree or where a date is fixed for performance, such date.
136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.
137.	Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

CASE LAW

A. Valliammai vs. K.P. Murali and Others decided by Supreme Court on 11th September, 2023

In this case the Supreme Court has referred to the provisions of Article 54 of Part II of the Schedule to the Limitation Act, 1963 which stipulates the limitation period for filing a suit for specific performance as three years from the date fixed for performance, and in alternative when no date is fixed, three years from the date when the plaintiff has notice that performance has been refused.

The Supreme Court referred to the case earlier decided in *Pachanan Dhara and Others v. Monmatha Nath Maity (2006) 5 SCC 340.* The Supreme Court in referred case had held that for determining applicability of the first or the second part, the court will have to see whether any time was fixed for performance of the agreement to sell and if so fixed, whether the suit was filed beyond the prescribed period, unless a case for extension of time or performance was pleaded or established. However, when no time is fixed for performance, the court will have to determine the date on which the plaintiff had notice of refusal on part of the defendant to perform the contract.

CLASSIFICATION OF PERIOD OF LIMITATION

Depending upon the duration, period of limitation for different purposes may be classified as follows:

Period of 30 years: The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits:

1. Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
2. Suits by mortgagee for foreclosure;
3. Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

Period of 12 years: A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.

Period of 3 years: A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

Period varying between 1 to 3 years: The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.

Period in days varying between 90 to 10 days: The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons. For appeals against a sentence of death passed by a court of session or a High Court in the exercise ofits original jurisdiction the limitation period is 30 days. For appeal against any sentence other than a sentence of death or any other not being an order of acquittal, the period of 60 days for the appeal to High Court and 30 days for appeal to any other Court is prescribed. Period of leave to appeal as a pauper from the date of the decree is 60 days when application for leave to appeal is made to the High Court and 30 days to any other Court.

LESSON ROUND-UP

- The essential purpose of a limitation period is to place a time limit on the period within which a party can commence legal proceedings.
- Limitation periods are imposed by statute, primarily the Limitation Act, 1963. The Limitation Act provides different limitation periods for different types of suits.
- If a limitation period has expired for a particular claim, the claim will be “statute-barred”. This means that it will no longer be possible for the claimant to effect recovery for that claim against the alleged wrongdoer.
- 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.
- 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.
- Limitation is dealt with in entry 13, List III of the Constitution of India. The Statute of Limitation is not unconstitutional since it applies to right of action in future.

GLOSSARY

Doctrine of sufficient cause: The extension of prescribed period in certain cases on sufficient cause being shown for the delay.

Harmonious construction: Interpretation of two or more provisions in a way that effect may be given to all/ both.

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Explain Doctrine of Sufficient Cause.
2. "Period of Limitation once starts cannot be stopped". Comment.
3. In which kind of suits maximum period of 30 years prescribed under the Limitation Act, 1963?
4. Write a short note on:-
   (i) Effect of Payment on Account of Debt or of Interest on Legacy
   (ii) Acquisition of Ownership by Possession
5. What are the sufficient causes for extension of time period under Limitation Act, 1963?

LIST OF FURTHER READINGS

- Bare Act of Limitation Act, 1963
- V.G. Ramachandran : Law of Limitation; Eastern Book Company, Lucknow
- M.R. Mallick, B.B. Mitra The Limitation Act, 1963 (22nd ed., 2011)
- K. Shanmukham, Sanjiva Row's The Limitation Act (9th ed., 2000)
- Law of Limitation; Eastern Book Company, Lucknow, V.G. Ramachandran
- Articles of Professionals.

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/1565/1/a1963-36.pdf

Law relating to Arbitration, Mediation and Conciliation

Lesson 11

KEY CONCEPTS

■ Alternate Disputes Resolution (ADR) ■ Arbitration ■ Conciliation ■ Mediation ■ Arbitral Proceedings ■ International Commercial ■ Arbitral Institution ■ Arbitral Award ■ Conciliation Agreement ■ Mediation Agreement ■ Interim Measures ■ Grounds for Challenge ■ Challenge Procedure ■ Fast Track Procedure ■ Settlement ■ Termination of Proceedings ■ Enforcement ■ Appealable Orders ■ Arbitration Council of India (ACI) ■ Foreign Arbitral Award

Learning Objectives

To understand:

- Alternate Dispute Resolutions (ADR)
- Types of Arbitration, Mediation and Conciliation
- The process involved in Alternate Dispute Resolutions
- The role of courts in ADR proceedings
- Challenge/Enforceability of Arbitral Awards or Mediation/Conciliation Agreements
- Law relating to International Arbitration
- Provisions of corrections and interpretation of the Arbitral Awards
- Development of Law relating to Mediation

Lesson Outline

- Introduction
- Important definitions
- Number of arbitrators
- Powers of central government to amend fourth schedule
- Challenge procedure
- Failure or impossibility to act as an arbitrator
- Termination of mandate and substitution of arbitrator
- Competence of arbitral tribunal to rule on its jurisdiction
- Interim measures ordered by arbitral tribunal
- Equal treatment of parties

- Place of arbitration
- Commencement of arbitral proceedings
- Language
- Statements of claim and defence
- Hearings and written proceedings
- Default of a party
- Expert appointed by arbitral tribunal
- Court assistance in taking evidence
- Rules applicable to substance of dispute
- Decision making by panel of arbitrators
- Essential of awards
- Time limit for arbitral award
- Fast track procedure
- Settlement
- Form and contents of arbitral award
- Regime for costs
- Correction and interpretation of award; additional award
- Finality of arbitral awards and enforcement
- Appealable orders
- Arbitration Council of India (ACI)
- Enforcement of certain foreign arbitral awards
- Conciliation
- Commencement of conciliation proceedings
- Termination of conciliation proceedings
- Role of conciliator in other proceedings
- Development of mediation law
- Mediation rules made by high courts
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996
- Alternate Dispute Resolution Rules
- The Mediation Act, 2023

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

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.

With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Further, the promotion of the institutional arbitration in India by strengthening Indian arbitral institutions has been identified critical to the dispute resolution through arbitration. Though arbitral institutions have been working in India, they have not been preferred by parties, who have leaned in favour of ad hoc arbitration or arbitral institutions located abroad. Therefore, in order to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape and also to prepare a road map for making India a robust centre for institutional arbitration both domestic and international, the Central Government constituted a High Level Committee under the Chairmanship of Justice B. N. Srikrishna, Former Judge of the Supreme Court of India. The High Level Committee submitted its Report on 30th July, 2017.

With a view to strengthen institutional arbitration in the country, the said Committee, inter alia, recommended for the establishment of an independent body for grading of arbitral institutions and accreditation of arbitrators, etc. The Committee has also recommended certain amendments to the said Act to minimise the need to approach the Courts for appointment of arbitrators. After examination of the said recommendations with a view to make India a hub of institutional arbitration for both domestic and international arbitration, it was decided to amend the Arbitration and Conciliation Act, 1996. Accordingly, the Arbitration and conciliation (Amendment) Act, 2019 passed by the Parliament.

A recent amendment has been made in section 36 of Arbitration and Conciliation Act, 1996 in 2021. The amendment provides that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption,

it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Further an Explanation has also been added which provides that for the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

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.

Cases that do not fall under purview of arbitration

Most civil rights disputes with damages as the remedy are reffered to arbitration. However Section 2(3) of the Act provides that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

IMPORTANT DEFINITIONS

Arbitration

Section 2(1) (a) of the Act, defines the term "arbitration" as to mean any arbitration whether or not administered by a permanent arbitral institution.

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.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.

The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference there under shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Arbitral Institution

"Arbitral Institution" means an arbitral institution designated by the Supreme Court or a High Court under this Act. [Section 2(1) (ca)]

Arbitral Tribunal

"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)].

Court

Court means,

(i) in the case of an arbitration other than international commercial arbitration, 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;

(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. [Section 2(1)(e)].

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 for in India and 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. [Section 2(1)(f)]

Legal Representative

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting. [Section 2(1)(g)]

Party

Party means a party to an arbitration agreement. [Section 2(1)(h)]

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.

- An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- An arbitration agreement shall be in writing.
- An arbitration agreement is in writing if it is contained in,
  - a document signed by the parties;
  - an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
  - 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.
- 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.

Specimen ADR Clause

It is hereby agreed by and between the parties that if any controversy, dispute or difference shall arise concerning construction, meaning, violation, termination, validity or nullity including without limitation the scope of any Clause or any part thereof, or of the respective rights or liabilities herein contained, the Parties shall make an attempt first to resolve the same by discussion or mediation. However, if the Parties hereto fail to resolve the controversy, dispute or difference amicably within 7 (seven) days of commencement of discussions, conciliation or mediation, then any Party shall upon expiry of such period of 15 (fifteen) days be entitled to refer such controversy, dispute or difference to be resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modifications on re-enactment thereof as in force. The language to be used in the mediation and in the arbitration shall be English. In any arbitration commenced pursuant to this clause, the sole arbitrator shall be appointed by the mutual consent of the parties as per the provisions of the Arbitration and Conciliation Act, 1996. The seat, or legal place, of arbitration shall be New Delhi, India. The cost of the Arbitration proceedings shall be shared equally by both the parties.

CASE LAWS

NBCC (India) Limited versus Zillion Infra Projects Pvt. Ltd.,* 2024 INSC 218 *decided by Supreme Court on 19.03.2024

Reference in one contract to the terms and conditions of the other contract would not ipso facto make the arbitration clause applicable unless there is a specific mention/reference thereto

Facts of the Case/Background

The appellant, NBCC (India) Limited is a Government of India undertaking, engaged in construction of power plants and other infrastructure projects. The respondent, M/s Zillion Infraprojects Pvt. Ltd. is engaged in the construction and infrastructure sector. The appellant issued an Invitation to tender majorly for Construction of the Weir. The Respondent submitted the bid and appellant awarded the contract for Construction of the Weir to the respondent. A dispute arose and the respondent issued a notice invoking arbitration and further seeking consent for the appointment of a former Judge of a High Court, as Sole Arbitrator. The appellant did not respond so the respondent filed an application at the High Court under Section 11(6) of the Arbitration Act. The High Court confirmed the proposed appointment of the former Judge of the Delhi High Court, as the Sole Arbitrator. Aggrieved by the orders, the appellant filed the appeals before Hon'ble Supreme Court.

Key Issue/Allegation

Learned Senior Counsel *inter alia* submitted before the Supreme Court that a mere reference to the terms and conditions without there being an incorporation in the L.O.I. would not make the *lis* between the parties amenable to the arbitration proceedings. Relying on the judgment of Supreme Court in the case of M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited, he submitted that unless the L.O.I. specifically provides for incorporation of the arbitration clause, a reference to the arbitration proceedings would not be permitted in view of the provisions of sub-section (5) of Section 7 of the Arbitration Act.

Decision

The Hon'ble Supreme Court held that:

"when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not ipso facto be applicable to the second contract unless there is a specific mention/reference thereto.

We are of the considered view that the present case is not a case of 'incorporation' but a case of 'reference'. As such, a general reference would not have the effect of incorporating the arbitration clause. In any case, Clause 7.0 of the L.O.I., which is also a part of the agreement, makes it amply clear that the redressal of the dispute between the NBCC and the respondent has to be only through civil courts having jurisdiction of Delhi alone."

POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

Section 8(1) provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

Further sub-section (2) states that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

It may be noted that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

Sub-section (3) states that notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

Example

A party to the arbitration agreement applies to the judicial authority to refer for arbitration. The application is filed before first statement on the substance of the dispute. There was a decree of High Court providing the guidelines restricting the limitation period to 15 Days from the date of receiving information regarding the suit for referring the dispute. The applicant parties applies it with a copy of agreement which is neither original nor certified copy.

Can judicial authority refer the parties to arbitration?

Solution:

Judicial authority shall notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration, and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

INTERIM MEASURES BY COURT

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 authorising 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, sub-section (2) states that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (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 sub-section (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.

NUMBER OF ARBITRATORS

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Example: A & B intends to commence arbitration proceedings. They should try to appoint odd number of arbitrators, i.e., 1, 3, 5 , 7 and so on.

Appointment of Arbitrators

Nationality of Arbitrator	• According to Section 11(1) of the Act, a person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
Procedure for appointment of	• Section 11(2) provides that subject to Section11 (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
General Procedure for appointment of Arbitrators	• Section 11(3) states that failing any agreement referred to in Section 11(2) above, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.
Designation of Arbitral Institution	• According to Section 11(3A) of the Act, the Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of the Act.
Failure to appoint Arbitrator under section 11(3)	• Section 11(4) provides that if the appointment procedure in section 11(3) applies; and • a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or • the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
Failure to agree on the arbitrator under section 11(2)	• According to Section 11(5) of the Act, failing any agreement referred to in Section 11(2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in Section 11(4) as provided above.

Failure to follow the procedure, agreement and function	• Section 11(6) states that where, under an appointment procedure agreed upon by the parties,- 1. a party fails to act as required under that procedure; or 2. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or 3. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
Disclosure from Arbitrator	• The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of section 12(1), and have due regard to: 1. any qualifications required for the arbitrator by the agreement of the parties; and 2. the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."
Appointment of an arbitrator in International Commercial Arbitration	• Section 11(9) provides that in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
Discretion of the Court	• Section 11 (11) states that where more than one request has been made under Section 11(4), Section 11(5) and Section 11(6), to the Chief Justices of different High Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.
Reference to courts	• Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) of section 11 arise in an international commercial arbitration, the reference shall be construed as a reference to the "Supreme Court" and in other cases reference shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in section 2 (1)(e) is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

Limitation period for appointment	• Section 11(13) provides that an application for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
Fees and Manner of payment	• Section 11(14) states that For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule. • it was clarified that section 11(4) shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

Example

A & B intends to commence arbitration proceedings. A is willing to appoint X as their arbitrator while B wants Y to arbitrate their matter. Both A and B, failed to appoint arbitrator within 30 days. Both A and B has an option to approach the Court for such appointment of arbitrator.

CASE LAWS

Cox & Kings Ltd. V. SAP India Pvt. Ltd. & Anr, 2024 INSC 670, decided by Supreme Court on 09.09.2024

Jurisdiction of the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 is limited to examining whether an arbitration agreement exists between the parties. Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement.

This case can be referred to *inter alia* understand the issues relating to the scope of powers of the referral court and scope of enquiry at the referral stage.

The Apex Court said that having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the application of the petitioner for the appointment of an arbitrator deserves to be allowed.

On the scope of powers of the referral court at the stage of Section 11(6), it was observed by the Supreme Court in *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.* reported in 2023 INSC 976 as follows:

"26. Taking cognizance of the legislative change, this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , noted that post 2015 Amendment, the jurisdiction of the Court under Section 11(6) of the 1996 Act is limited to examining whether an arbitration agreement exists between the parties — "nothing more, nothing less."

In a recent decision in *SBI General Insurance Co. Ltd. v. Krish Spinning reported in 2024 INSC 532*, it was observed by us that the arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts.

Further, on the scope of enquiry at the referral stage for the determination of whether a non-signatory can be impleaded as a party in the arbitration proceedings, it was observed by the Constitution Bench in Cox and Kings, 2023 INSC 1051 as follows:

"158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [*Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570*] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.

Also, the Apex Court has laid down that Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner.

Ajay Madhusudan Patel & Ors. V. Jyotrindra S. Patel & Ors., 2024 INSC 710, decided by Supreme Court on 20.09.2024

Facts of the Case/Background

This petition has been filed under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") seeking appointment of a Sole Arbitrator under an Agreement entered into between the petitioner AMP Group and respondent JRS Group.

Key Issue/Allegations

Whether the SRG Group, being a non-signatory to the FAA, should also be referred to arbitration along with the AMP and JRS Groups?

Decision

The Hon'ble Apex Court in Cox and Kings held that the definition of "parties" under Section 2(1)(h) read with Section 7 of the Act, 1996 includes both the signatory as well as non-signatory parties. Persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may also intend to be bound by the terms of the agreement. Further, the requirement of a written agreement under Section 7 of the Act, 1996 does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. Therefore, the issue as to who is a "party" to an arbitration agreement is primarily an issue of consent. Actions or conduct could be an indicator of the consent of a party to be bound by the arbitration agreement. This aspect is also evident from a reading of Section 7(4)(b) which emphasises on the manifestation of the consent of persons or entities through actions of exchanging documents.

It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration

agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement.

Therefore, considering the complexity involved in the determination of the question whether the SRG Group is a veritable party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence that may be adduced by the parties before it and the application of the legal doctrine as elaborated in the decision in Cox and Kings.

POWER OF CENTRAL GOVERNMENT TO AMEND FOURTH SCHEDULE

In terms of Section 11A of the Act, if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule(Model fee) and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

GROUNDS FOR CHALLENGE

Section 12(1) provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1

The grounds stated in the Fifth Schedule of the Act shall guide in determining whether circumstances exist\ which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2

The disclosure shall be made by such person in the form specified in the Sixth Schedule of the Act.

According to Section 12(2), an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him. Section 12(3) states an arbitrator may be challenged only if,

a. circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

b. he does not possess the qualifications agreed to by the parties.

Section 12(4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.

Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Act shall be ineligible to be appointed as an arbitrator.

Section 12(6) states that where an arbitral award is set aside on an application made under section 12(5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

CASE LAWS

Jivan Kumar Lohia v. Durgadutt Lohia AIR 1992 SC 188

In this case, revocation of the authority of the arbitrator was sought by the respondent applicants before the High Court on the ground of bias on the part of the arbitrator. It was stated that

"reasonable apprehension of bias or likelihood of bias in the mind of either party is a ground for termination of the arbitrator."

BCC Developers & Promoters Ltd v. DMRC (dated 28.10.2021 in ARB.P 813/2021)

In this case, it was observed that just because the appointed arbitrators happen to be ex-employees of one of the parties, it shall not make them ineligible for such appointment.

"the plea urged by petitioner seeking appointment of sole Arbitrator and disqualification of panel of proposed/nominated Arbitrators by the respondent being hit by provision of Section12 of the Act, is not maintainable."

CHALLENGE PROCEDURE

Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. 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.

Sub-section (2) provides that failing any agreement referred to in sub-section (1) of Section 13, 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 referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under sub- section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

FAILURE OR IMPOSSIBILITY TO ACT AS AN ARBITRATOR

As per Section 14(1), the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator,

(a) 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; and

(b) 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 under Section 14(2).

According to Section 14(3) if, under section 14 or section 13(3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATOR UNDER SECTION 15

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate,

(a) where he withdraws from office for any reasons; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15].

CASE LAW

Chennai Metro Rail Limited Administrative Building v. M/s Transtonnelstroy Afcons (JV) & Anr. decided by Supreme Court on 19th October, 2023

In this case, Chennai Metro Rail Limited("Chennai Metro"), a joint venture between the Central Government and the Government of Tamil Nadu, had awarded the contract to the respondent ("Afcons").

The tribunal recorded the agreement of parties, that the hearing fee for each arbitrator was fixed at ₹1,00,000/- per session of hearing date. A member of tribunal was substituted. Further, in the 10th Meeting, the tribunal sought to revise the fee payable from ₹ 1,00,000/- to ₹ 2,00,000/. Chennai Metro objected to this revision and Afcons requested the tribunal to keep its direction for modification of fee, in abeyance till the decision of this court.

Later, Afcons informed Chennai Metro that it had paid the revised fee for five hearings but Chennai Metro filed an application before the Madras High Court. In this proceeding under Section 14, the relief sought was a declaration that the mandate of the tribunal was terminated in respect of the disputes referred to them.

All three members of the tribunal filed affidavits, in response to the Section 14 petition acknowledging that Supreme Court's judgment in *ONGC v. AFCONS Gunasa JV2* (hereafter "ONGC") had decided the issue and thus members of the tribunal decided to revert back to the originally agreed fee i.e., ₹ 1,00,000.

Initially, the High Court granted an interim order, staying the proceedings. However, after hearing counsel for the parties, and considering the materials on the record, the court dismissed the application, filed by Chennai Metro through the impugned judgment.

In the present SLP filed before Hon'ble Supreme Court, it was decided that the attempt by Chennai Metro to say that the concept of *de jure* ineligibility because of existence of justifiable doubts about impartiality or independence of the tribunal on unenumerated grounds [or other than those outlined as statutory ineligibility conditions in terms of Sections 12 (5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12(3). In case, this court were in fact make an exception to uphold Chennai Metro's plea, the consequences could well be an explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process....

COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

Section 16 deals with competence of arbitral tribunal to rule on its jurisdiction. According to section 16(1) the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b. a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

As per Section 16(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator, (Sub-section 2).

Section 16(3) provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

The arbitral tribunal may, in either of the cases referred it, in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified. Further, the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

A party aggrieve by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

CASE LAW

Chloro Controls (I) P. Ltd v. Severn Trent Water Purification Inc and Ors 2012(9) N SCALE 595

In this case, court observed on the rule of *kompetenz kompetenz.* Court held

"challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. The negative effect of the kompetenz kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed."

INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL

Section 17(1) provides that a party may, during the arbitral proceedings apply to the arbitral tribunal,

(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 authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any

party, 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 arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Sub-section (2) states that Subject to any orders passed in an appeal under section 37 of the Act, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.

Example

An order of interim injunction under section 17 of the Act is deemed to be an order of the court and enforceable under the Code of Civil Procedure, 1908.

EQUAL TREATMENT OF PARTIES

The parties shall be treated with equality and each party shall be given a full opportunity to present this case.

Determination of Rules of Procedure

Section 19 deals with determination of rules of procedure. It says that:

1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.
2. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
4. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of' any evidence.

PLACE OF ARBITRATION

As per Section 20(1) the parties are free to agree on the place of arbitration and sub-section (2) states that if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

CASE LAWS

Brahmani River Pellets Limited (Appellant) vs. Kamachi Industries Limited (Respondent) decided by Supreme Court on 25.07.2019

Parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction.

Facts of the Case: The appellant entered into an agreement with the respondent for sale of 40,000 WMT (Wet Metric Tonne) of Iron Ore Pellets. Dispute arose between the parties regarding the price and payment terms and the appellant did not deliver the goods to the respondent. The respondent claimed for damages and the appellant denied any liability. Clause 18 of the agreement between the parties contains an arbitration clause. The respondent invoked arbitration clause and the appellant did not agree for the appointment of arbitrator. Hence, the respondent filed petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the Madras High Court.

The appellant contested the petition challenging the jurisdiction of the Madras High Court on the ground that the parties have agreed that Seat of arbitration be Bhubaneswar. The Madras High Court vide impugned order appointed a former judge of the Madras High Court as the sole arbitrator. The appellant preferred the appeal to the Supreme Court.

The Hon'ble supreme court observed that Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 (the Act) defines the "Court" with reference to the term "subject-matter of the suit". As per Section 2(1)(e) of the Act, if the "subject-matter of the suit" is situated within the arbitral jurisdiction of two or more courts, the parties can agree to confine the jurisdiction in one of the competent courts. In para (96) of BALCO, the Supreme Court held that the term "subject matter" in Section 2(1)(e) of the Act is to identify the court having supervisory control over the arbitral proceedings. As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. The Supreme Court observed that when the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act. The impugned order was liable to be set aside.

Judgement:

For details:
https://main.sci.gov.in/supremecourt/2019/9962/9962_2019_7_1501_15263_Judgement_25- Jul-2019. pdf

Uttar Pradesh Ban Nigam, Almora V Bishan Nath Goswami, AIR 1985 all 351, 353

In this case, it was held that no arbitrator can decide or fix the place of seat, venue of arbitration without taking into account the material information such as convenience of parties, their residence, subject matter, their witnesses etc. Tribunal shall take into consideration all the above material information while fixing the place of venue of arbitration. Court stated that

"It was not open to the arbitrator to fix the venue of his choice regardless of the convenience of parties etc. Under Section 13 of Arbitration Act, which contemplates the powers and duties of arbitrator, be cannot violate the principles of natural justice and has to give fair hearing to the parties. There was no condition in the arbitration agreement to empower the arbitrator to fix the venue of arbitration as he thought fit. It must be in consonance with the principles of natural justice also."

Union of India v. Hardy Exploration and Production (India) unreported 2018 (Sup Ct (Ind)

In this case, it was decided that the terms 'place' and 'seat' can be used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. It was stated that

"The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it

is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place."

COMMENCEMENT OF ARBITRAL PROCEEDINGS

According to Section 21 of the Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

LANGUAGE

Section 22(1) provides that the parties are free to agree upon the language or languages to be used in the arbitral proceedings and under sub-section (2) if they fail to reach an agreement, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

Sub-section (3) states that the agreement or determination, unless otherwise specified shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

As per sub-section (4) the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENTS OF CLAIM AND DEFENCE

Section 23(1) provides that within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

Sub-section (2) states that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Sub-section (2A) provides that the respondent, in support of his case, may also submit a counter claim or plead a set -off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Sub-section (3) states that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Section 23 (4) as inserted in the Amendment Act, 2019 states that the statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

HEARINGS AND WRITTEN PROCEEDINGS

Section 24(1) provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

- Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

- Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.

Section 24(2) state that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

Section 24(3) says that all statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

DEFAULT OF A PARTY

Section 25 provides that unless otherwise agreed by the parties, where, without showing sufficient cause,-

a. the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

b. the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the allegation by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited;

c. a party fails to appear an oral hearing or to produce documentary evidence. The arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Failure under the Act	***Consequence***
Claimant fails to communicate his statement of claim	Arbitral tribunal shall terminate the proceedings
Respondent fails to communicate his statement of defence	Arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the allegation by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited
Party fails to appear an oral hearing or to produce documentary evidence	Arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it

EXPERT APPOINTED BY ARBITRAL TRIBUNAL

Sub-section (1) of section 26 provides that subject to agreement between the parties, the arbitral tribunal may,

a. appoint one or more expert to report to it on specific issues to be determined by the arbitral tribunal, and

b. require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection.

Section 26 (2) states that if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Further Section 26 (3) provides that the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

COURT ASSISTANCE IN TAKING EVIDENCE

According to Section 27(1) the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

Under Section 27 (2) the application shall specify,

a. the names and addresses of the parties and the arbitrators,

b. the general nature of the claim and the relief sought,-

c. the evidence to be obtained, in particular,-

   i. the name and addresses of any person to be heard as witness or expert witness and a statement of the subject- matter of the testimony required;

   ii. the description of any document to be produced or property to be inspected.

Section 27 (3) provides that the Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

Under Section 27 (4) the Court may, while making an order, issue the same processes to witnesses as it may issue in suits tried before it.

Section 27 (5) provides that persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

As per Section 27 (6) the expression “Processes” includes summons and commissions for the examination of witnesses and summons to produce documents.

RULES APPLICABLE TO SUBSTANCE OF DISPUTE

Section 28(1) provides that where the place of arbitration is situate in India,

a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

b. in international commercial arbitration,

   i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

   ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

iii. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

As per Section 28(2) the arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* only if the parties have expressly authorised it to do so.

Under Section 28(3) while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

DECISION MAKING BY PANEL OF ARBITRATORS

As per section 29(1) unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

However section 29(2) states that notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

ESSENTIAL OF AWARDS

Arbitral Awards means and includes on interim award.

Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

Essential Features of Arbitral award	
1. Written and stamped	An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing.
2. Signed	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. Reasoned	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. 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. and 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. Dated	The award should be dated i.e. the date of making of the award should be mentioned in the award.
5. Mention of Place	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. Clarity of Value and Interest	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. Cost of Arbitration	The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. Delivery of copies	After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Types of Arbitral Awards

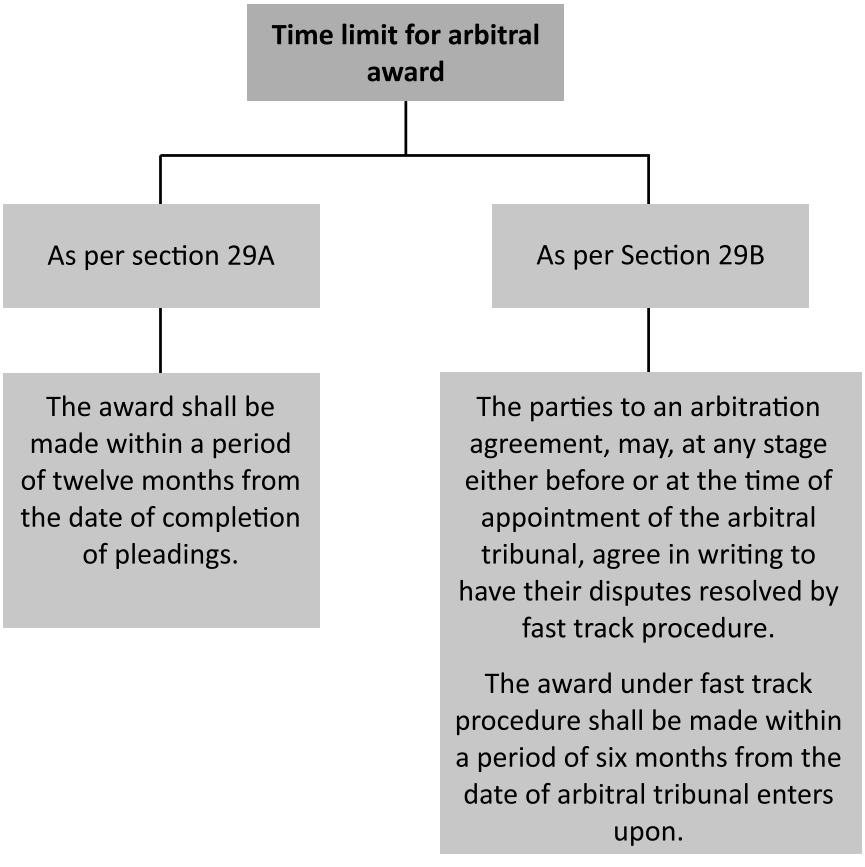
1. **Interim award** – It is an award made by a tribunal during the pendency of the matter. .
2. **Additional award** – Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
3. **Settlement awards** – With the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. An award. If the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. .
4. **Final award** – An award which finally determines all the issues in a dispute.

CASE LAW

Union of India v. Om Vajrakaya Construction Company (dated 20.12.2021) in OMP (COMM) 299/2021

In this case, the High Court of Delhi held unlike the tribunal's ability to award interest, the court's ability to award costs within the meaning of section 31A is unrestricted, and any agreement between the parties that forbids the awarding of costs would be irrelevant unless they do so after a dispute has already arisen.

TIME LIMIT FOR ARBITRAL AWARD



The award shall be made within a period of twelve months from the date of completion of pleadings. The parties may extend this period for making award for a further period not exceeding six months.

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.

The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon. Section 29A(1) provides that the award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under section 23(4).

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose off the matter within a period of twelve months from the date of completion of pleadings under section 23(4).

Section 29A(2) states that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

Under Section 29A(3) the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

Section 29A(4) states that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application.

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

As per Section 29A(5) the extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

Section 29A(6) provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

Section 29A(7) states that in the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

Section 29A(8) provides that it shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

As per Section 29A(9) an application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party (Section 29A).

CASE LAW

Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal Thermal Power Ltd. OMP (MISC) (COMM) 512/2019

It was stated that amended section 29A (1) of Arbitration and Conciliation Act shall have a retrospective effect with respect to the pending arbitration suits as on the date of amendment.

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):

Written pleadings without oral hearing	(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;
Further clarification	(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

Oral hearing on request	(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
Procedural Discretion	(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 sub-section (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.

SETTLEMENT

Section 30(1) provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Under Section 30(2) if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

As per Section 30(3) an arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

Section 30(4) states that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

CASE LAW

State of Jharkhand v. Gitanjali Enterprises Arb. Appeal No. 09 of 2017

It is stated that Section 73 forms part III of the Arbitration and Conciliation Act, 1996 and is only applicable to conciliation proceedings and will not have any effect on Section 30 of the Act.

FORM AND CONTENTS OF ARBITRAL AWARD

As per section 31(1) an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

Section 31(2) states that for the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

Under Section 31 (3) the arbitral award shall state the reasons upon which it is based, unless-

a. the parties have agreed that no reasons are to be given, or

b. the award is an arbitral award on agreed terms under section 30.

Section 31(4) provides that the arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

Section 31(5) says that after the arbitral award is made, a signed copy shall be delivered to each party.

Under Section 31(6) the arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

Under Section 31(7)

a. Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

b. A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation -The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978

As per Section 31(8) the cost of arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.

CASE LAW

R.P. Garg v. The Chief General Manager, Telecom Department & Ors., 2024 INSC 743 decided by Supreme Court on 10.09.2024

Facts of the Case/Background

The Arbitrator denied payment of such interest under a misplaced impression that the contract between the parties prohibited it. The executing Court affirmed the finding of the Arbitrator and rejected the prayer. However, allowing the appeal, the District Court held that the appellant will be entitled to post award interest. By the order impugned before Hon'ble Apex Court, the High Court allowed the revision and set aside the District Court order while holding that the contract between the parties did not permit grant of post award interest.

Key Issue/Allegations

Whether the appellant is entitled to post award interest on the sum awarded by the Arbitrator.

Decision

For the reasons to follow, while allowing the appeal the Apex Court have held that as this is a case arising out of the Arbitration and Conciliation Act, 1996, by operation of Section 31(7)(b), the sum directed to be paid under the Arbitral Award shall carry interest. This is a first principle. A sum directed to be paid by an Arbitral Award must carry interest. In this view of the matter, we have restored the judgment of the District Court granting 18% interest from the date of the award to its realization.

The interest granted by the First Appellate Court only related to post award period, and therefore, for this period, the agreement between the parties has no bearing. Section 31(7)(b) deals with grant of interest for post award period i.e., from the date of the award till its realization. The statutory scheme relating to grant of interest provided in Section 31(7) creates a distinction between interest payable before and after the award. So far as the interest before the passing of the award is concerned, it is regulated by Section 31(7)(a) of the

Act which provides that the grant of interest shall be subject to the agreement between the parties. This is evident from the specific expression at the commencement of the sub-section which says "unless otherwise agreed by the parties".

So far as the entitlement of the post-award interest is concerned, sub-Section (b) of Section 31(7) provides that the sum directed to be paid by the Arbitral Tribunal shall carry interest. The rate of interest can be provided by the Arbitrator and in default the statutory prescription will apply. Clause (b) of Section 31(7) is therefore in contrast with clause (a) and is not subject to party autonomy. In other words, clause (b) does not give the parties the right to "contract out" interest for the post-award period. The expression 'unless the award otherwise directs' in Section 31(7)(b) relates to rate of interest and not entitlement of interest. The only distinction made by Section 31(7)(b) is that the rate of interest granted under the Award is to be given precedence over the statutorily prescribed rate.

REGIME FOR COSTS

Section 31A (1) provides that in relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine,

(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.

Explanation. - For the purpose of this sub-section, "costs" means reasonable costs relating to,

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

Under Section 31A (2) if the Court or arbitral tribunal decides to make an order as to payment of costs,

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

Section 31A (3) provides that in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including,

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

Under Section 31A (4) the Court or arbitral tribunal may make any order under this section including the order that a party shall pay,

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) (f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

Section 31A (5) states that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Termination of 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 recognises 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 mason 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.

CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD

Section 33(1) provides that within 30 days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties

a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Further Section 33 (2) states that if the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

Further Section 33 (3) states that the arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

Section 33 (4) provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Section 33 (5) provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

Under Section 33 (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub- section (5).

Section 33 (7) states that section 31 shall apply to a connection or interpretation of the arbitral award or to an additional arbitral award made under this section.

APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

Section 34 (2) states that an arbitral award may be set aside by the Court only if, –

a. the party making the application establishes on the basis of the record of the arbitral tribunal that, –

   i. a party was under some incapacity, or

   ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

   iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

   iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

   v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

b. the Court finds that,

   i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

   ii. the arbitral award is in conflict with the public policy of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 ; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

As per Section 34(2A) an arbitral award arising out of arbitrations, other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

Section 34 (3) provides that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Under Section 34(4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

As per Section 34(5) an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Under Section 34(6) an application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

CASE LAWS

State of Maharashtra v. Hindustan Construction Co. AIR 2010 SC 1299

It was decided that if any ground not initially raised cannot be raised after the expiry of prescribed period given under section 34.

TPI Ltd. v. Union of India, 2001(3) RAJ 70 (Del)

The Court upheld the constitutionality of Section 34 stating that matter in dispute is not related to judicial review, challenge to arbitral award can be made only on the grounds specified by the legislature and not just on merits.

Oil and Natural Gas Corpn. Ltd v. Saw Pipes Ltd AIR 2003 SC 262

It was decided that 'public policy' should not be interpreted in narrow terms with respect to just the Indian Laws, it should be interpreted in a way that aims at broadening public interest and fairness.

"Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. It must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. If the arbitral tribunal does not dispense justice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."

FINALITY OF ARBITRAL AWARDS AND ENFORCEMENT

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively.

Enforcement

Section 36(1) provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

Further Section 36(2) provides that where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

Section 36(3) states that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

The below proviso has been added by the Arbitration and Conciliation (Amendment) Act, 2021:

Provided further that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation. – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

APPEALABLE ORDERS

Section 37(1) provides that notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely,

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

Further Section 37(2) provides that appeal shall also lie to a court from an order of the arbitral tribunal –

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

Section 37(3) states that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CASE LAWS

Augmont Gold Pvt Ltd. v. One97 Communication Limited (dated 27.09.202021) ARB A. (COMM.) 30/2021

It was held that no appeal shall lie under section 37 of Arbitration and Conciliation Act, 1996 with court if the order of the tribunal has been made under section 17 of the act owing its discretionary and final nature.

Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Co. (dated 13.11.2021) (civil appeal no. 6832/2021)

It was observed that power of High Court while exercising its jurisdiction under section 37 is different from that of First Appellate Court against an order under section 34 Arbitration and Conciliation Act, 1996.

State of Chhattisgarh v. M/s. Sal Udyog Private Ltd. (dated 08.11.2021) Civil Appeal no. 4353 of 2010)

It was held that "patent illegality" serves as a ground available under section of 37 of the Arbitration and Conciliation Act, 1996 and can be raised as a fresh ground under an appeal. A party is not barred from raising a fresh ground of challenge in an appeal.

Deposits

As per Section 38(1) the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.

Further Section 38 (2) states that the deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

Section 38 (3) provides that upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Lien on Arbitral Award and Deposits as to Costs

Section 39(1) provides that subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

Section 39 (2) states that if in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

As per Section 39 (3) an application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal and the arbitral tribunal shall be entitled to appear and he heard on any such application.

Under Section 39 (4) the Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Arbitration Agreement not to be Discharged by Death of Party Thereto

Section 40 (1) provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Section 40 (2) states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

As per Section 40 (3) nothing in this section shall affect the operation or any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of insolvency

As per Section 41(1) where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

Further, Section 41 (2) states that where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

As per Section 41 (3) the expression “receiver” includes an Official Assignee.

Jurisdiction

Section 42 provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Confidentiality of information

Section 42A provides that notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

Protection of action taken in good faith

According to Section 42B of the Act, no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.”

Limitations

Section 43(1) provides that the Limitation Act, 1963, shall apply to arbitrations as it applies to proceedings in court.

Section 43(2) states that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.

As per Section 43 (3) where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

Section 43(4) states that where the Court orders that an arbitral award be set aside, the period between the commencement of the, arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

ARBITRATION COUNCIL OF INDIA (ACI)

Part IA as inserted in the Amendment Act, 2019 deals with Arbitration Council of India. Section 43A of Act contains definitions of terms used in Part IA such as Chairperson, Council and Member.

Establishment and incorporation of Arbitration Council of India

Section 43B empowers the Central Government to establish the Arbitration Council of India to perform the duties and discharge the functions under the Arbitration Conciliation Act, 1996.

The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract, and shall, by the said name, sue or be sued. The head office of the Council shall be at Delhi. The Council may, with the prior approval of the Central Government, establish offices at other places in India.

Composition of Council

According to Section 43C of the Act, the Council shall consist of the following Members, namely:–

(a) A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India – Chairperson;

(b) An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government – Member;

(c) An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson – Member;

(d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary – Member, ex officio;

(e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary – Member, ex officio;

(f) One representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government – Part-time Member; and

(g) Chief Executive Officer – Member-Secretary, ex officio.

The Chairperson and Members of the Council, other than ex officio Members, shall hold office as such, for a term of three years from the date on which they enter upon their office.

Chairperson or Member, other than ex officio Member, shall not hold office after he has attained the age of seventy years in the case of Chairperson and sixty-seven years in the case of Member.

The salaries, allowances and other terms and conditions of the Chairperson and Members as may be prescribed by the Central Government. The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.

Duties and functions of Council

Section 43D provides that it shall be the duty of the Council to take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation or other alternative dispute resolution mechanism and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration.

For the purposes of performing the duties and discharging the functions under this Act, the Council may—

(a) frame policies governing the grading of arbitral institutions;

(b) recognise professional institutes providing accreditation of arbitrators;

(c) review the grading of arbitral institutions and arbitrators;

(d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes;

(e) frame, review and update norms to ensure satisfactory level of arbitration and conciliation;

(f) act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation;

(g) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes;

(h) promote institutional arbitration by strengthening arbitral institutions;

(i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;

(j) establish and maintain depository of arbitral awards made in India;

(k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and

(l) Such other functions as may be decided by the Central Government.

Vacancies, etc., not to invalidate proceedings of Council

Section 43E states that no act or proceeding of the Council shall be invalid merely by reason of—

(a) any vacancy or any defect, in the constitution of the Council;

(b) any defect in the appointment of a person acting as a Member of the Council; or

(c) any irregularity in the procedure of the Council not affecting the merits of the case.

Resignation of Members

According to Section 43F, the Chairperson or the Full-time or Part-time Member may, by notice in writing, under his hand addressed to the Central Government, resign his office. Provided that the Chairperson or the Full-time Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold

office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earlier.

Removal of Member

Section 43G (1) provides that the Central Government may, remove a Member from his office if he –

(a) is an undischarged insolvent; or

(b) has engaged at any time (except Part-time Member), during his term of office, in any paid employment; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

According to Section 43G(2) notwithstanding anything contained in sub-section (1), no Member shall be removed from his office on the grounds specified in clauses (d) and (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

Appointment of experts and constitution of Committees thereof

Section 43H provides that the Council may, appoint such experts and constitute such Committees of experts as it may consider necessary to discharge its functions on such terms and conditions as may be specified by the regulations.

General norms for grading of arbitral institutions

Section 43-I states that the Council shall make grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations.

Norms for accreditation

43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.

General norms applicable to Arbitrator

- the arbitrator shall be a person of general reputation of fairness, integrity and capable to apply objectivity in arriving at settlement of disputes;
- the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;
- the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him;

- the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence;
- the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;
- the arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices in regard thereto;
- the arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes and be able to apply legal principles to a situation under dispute and also to apply judicial decisions on a given matter relating to arbitration; and
- the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

Depository of awards

According to the Section 43K the Council shall maintain an electronic depository of arbitral awards made in India and such other records related thereto in such manner as may be specified by the regulations.

Power to make regulations by Council

Section 43L empowers the Council may, in consultation with the Central Government, make regulations, consistent with the provisions of this Act and the rules made thereunder, for the discharge of its functions and perform its duties under the Act.

Chief Executive Officer

Section 43M states that there shall be a Chief Executive Officer of the Council, who shall be responsible for day-to-day administration of the Council.

The qualifications, appointment and other terms and conditions of the service of the Chief Executive Officer shall be such as may be prescribed by the Central Government.

The Chief Executive Officer shall discharge such functions and perform such duties as may be specified by the regulations.

There shall be a Secretariat to the Council consisting of such number of officers and employees as may be prescribed by the Central Government.

The qualifications, appointment and other terms and conditions of the service of the employees and other officers of the Council shall be such as may be prescribed by the Central Government.'

ENFORCEMENT OF CERTAIN FOREIGN ARBITRAL AWARDS

Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

CHAPTER I - NEW YORK CONVENTION AWARDS

Awards Made under New York Convention or Geneva Convention

Any foreign award, whether made under New York Convention or Geneva Convention, which would be enforceable under the respective provisions of the Act applicable to the award, 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 defence, set off or otherwise in any legal proceedings in India.

Power of Judicial Authority to Refer Parties to Arbitration

Section 45 provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.

When Foreign Award Binding

Section 46 states that any foreign award which would be enforceable under this Chapter shall be 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 defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 47 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produces before the court-

a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b. the original agreement for arbitration or a duly certified thereof; and

c. such evidence as may be necessary to prove that the award is a foreign award.

Further Section 47 (2) states that if the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation

In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for Enforcement of Foreign Awards

Section 48 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use one or more of the following grounds for the purpose of opposing enforcement of a foreign award, namely, –

(i) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which. or under the law of which, that award was made; or

Enforcement of an arbitral award may also be refused if the Court finds that:

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) the enforcement of the award would be contrary to the public policy of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Enforcement of Foreign Awards

As per section 49 where the Court is satisfied that the foreign award is enforceable, the award is executable as a decree of the Court.

Appealable Orders

Section 50(1) provides that "notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the order refusing to-

a. refer the parties to arbitration under section 45;

b. enforce a foreign award under section 48,

to the court authorised by law to hear appeals from such order.

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court is not affected or taken away by virtue of these provisions.

CHAPTER II: GENEVA CONVENTION AWARDS

Power of Judicial Authority to Refer Parties to Arbitration

Section 54 provides that notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908, a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

Foreign Awards when Binding

Section 55 provides that any foreign award which would be enforceable under this Chapter shall be 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 defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 56(1) provides that the party applying for the enforcement of a foreign award shall, at the time of application produce before the Court-

a. the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

b. evidence proving that the award has become final; and

c. such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub- section (1) of section 57 are satisfied.

Further Section 56(2) provides that where any document requiring to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation 1

In this section and all the following sections of this Chapter, "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 over the subject-matter of the award 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.

Explanation 2

In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for Enforcement of Foreign Awards

Sub-section (1) of section 57 provides that in order that a foreign award may be enforceable under the Act, it shall be necessary that,

The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
The subject-matter of the award is capable of settlement by arbitration under the law of India;
The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitral procedure;
The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
The enforcement of the award is not contrary to the public policy or the law of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Further sub-section (2) provides that even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that,

a. the award has been annulled in the country in which it was made;

b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

As per sub-section (3) if the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and of sub-section

(1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Enforcement of Foreign Awards

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Appealable Orders

Sub-section (1) of section 59 provides that an appeal shall lie from the order refusing,

a. to refer the parties to arbitration under section 54; and

b. to enforce a foreign award under section 57, to the court authorised by law to hear appeals from such order.

Further, sub-section (2) provides that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CONCILIATION

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. 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 behaviour 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.

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. The Act gives a formal recognition to conciliation in India. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

Application and Scope

Section 61(1) provides that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part III of the Arbitration and Conciliation Act, 1996 shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

As per Section 61 (2), Part III of the Arbitration and Conciliation Act, 1996 shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Sub-section (1) of section 62 provides that 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.

Sub-section (2) states that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

Further sub-section (3) states that if the other party rejects the invitation, there will be no conciliation proceedings.

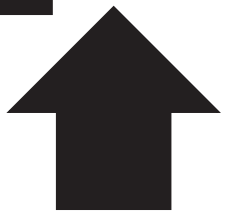
Sub-section (4) provides that if the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he

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



There shall be one conciliator unless the parties agree that there shallbe two or three conciliators



Where there is more than one conciliator, they ought, as a generalrule, to act jointly

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Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Appointment of Conciliators

Sub-section (1) of section 64 provides that subject to sub-section (2),

a. in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

b. in conciliation proceedings with two conciliators, each party may appoint one conciliator;

c. in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Further sub-section (2) provides that parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,-

a. a party may respect such an institution or person to recommend the names of suitable individuals to act as conciliator, or

b. the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person: Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of Statements to Conciliator

Sub-section (1) of section 65 provides that the conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

Further sub-section (2) provides that the conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

Sub-section (3) states that at any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation

In this section and all the following sections of this Part, the term conciliator" applies to a sole conciliator, two or, three conciliators, as the case may be.

Conciliator not Bound by Certain Enactments

Section 66 provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Role of Conciliator

Sub-section (1) of section 67 provides that the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Further Sub-section (2) provides that 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.

As per sub-section (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.

Sub-section (4) states that 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 therefor.

Administrative Assistance

Section 68 provides that in order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Communication between Conciliator and Parties

Sub-section (1) of section 69 provides that the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Further sub-section (2) states that unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of Information

Section 70 provides that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of Parties with Conciliator

Section 71 provides that the parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by Parties for Settlement of Dispute

Section 72 provides that each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

Sub-section (1) of section 73 provides that when it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Further sub-section (2) provides that if the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

Sub-section (3) states that when the parties sign the settlement agreement, it shall be, final and binding on the parties and persons claiming under them respectively.

As per sub-section (4) the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and Effect of Settlement Agreement

Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

Confidentiality

Section 75 provides that notwithstanding anything contained in any other law for the time bring in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

The conciliation proceedings shall be terminated,

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) 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.

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.

Resort to Arbitral or Judicial Proceedings

Section 77 provides that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject- matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Costs

Sub-section (1) of section 78 states that upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

Further, sub-section (2) states that for the purpose of sub-section (1), "costs" means reasonable costs relating to,

a. the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;

b. any expert advice requested by the conciliator with the consent of the parties;

c. any assistance provided pursuant to clause (b) of sub- section (2) of section 64 and section 68;

d. any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

As per sub-section (3) the costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Deposits

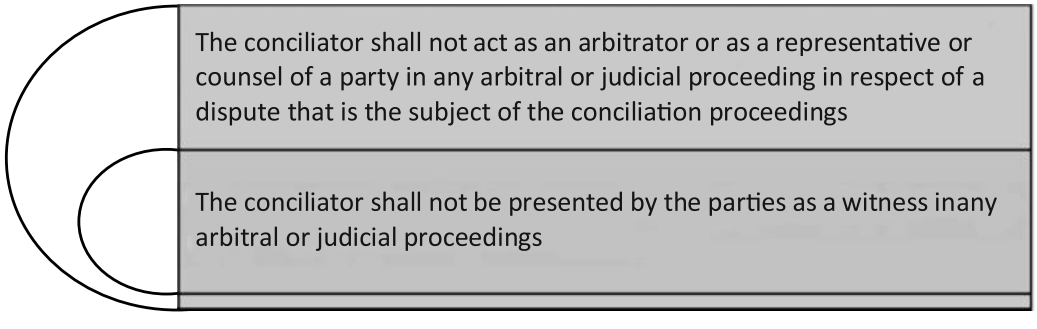
Sub-section (1) of section 79 states that the conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

Further, sub-section (2) states that during the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

As per sub-section (3) if the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

Sub-sections (4) provide that upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS



Admissibility of Evidence in other Proceedings

Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,

a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

b. admissions made by the other party in the course, of the conciliation proceedings;

c. proposals made by the conciliator;

d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

~~Power of High Court to Make Rules~~

~~Section 82 provides that the High Court may make rules consistent with this Act as to all proceedings before the Court under this Act.~~

Removal of Difficulties

Sub-section (1) of section 83 provides that if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

Further sub-section (2) provides that every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Power to make Rules

Sub-section (1) of section 84 provides that the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

Further sub-section (2) provides that every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made 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 rule or both Houses agree that the rule should not be made, the rule 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 rule.

MEDIATION

The adversarial method of dispute resolution is one in which the opposing claims of parties are presented to a neutral third party for resolution. As opposed to the adversarial mode of dispute resolution, non-adversarial Alternate Dispute Resolution mechanisms like mediation are informal, friendly to people, and simpler. They also enable the parties to communicate with each another about the issues driving their conflict, identify their shared interests, and concentrate on coming to a resolution on their own. Such non-adversarial conflict settlement techniques aid in the parties' time and financial savings.

Definition and Meaning

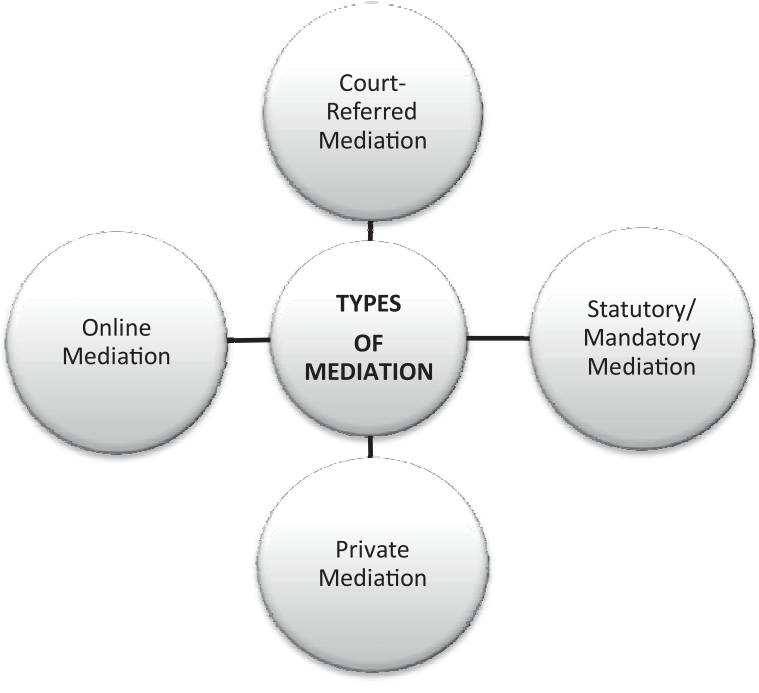
According to the Civil Procedure ADR and Mediation Rules, 2003 - *"Mediation" means the process by which a mediator appointed by the parties or by the Court, as the case may be, mediates the disputes between them by applying the provisions of the Mediation Rules contained in Part-II, and in particular by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is their own responsibility for making decisions which affect them.*

According to Section 4 of Mediation Bill, 2021 - *Mediation shall be a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby party or parties, request a third person referred to as mediator or mediation service provider to assist them in their attempt to reach an amicable settlement of a dispute.*

Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process.

Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties. Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

Types of Mediation



1. **Court- Referred Mediation** - It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908. The courts have mediation centres where cases are referred, and following a preliminary investigation, the cases are assigned to skilled and qualified mediators from the Mediation Centres' Panel of Mediators.

   Court Annexed Mediation - In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator.

2. **Statutory/Mandatory Mediation** - Some disputes, like those involving labour and family laws, are required by law to go through the mediation procedure. Mandatory mediation simply refers to the act of attempting mediation rather than requiring parties to resolve their problems through mediation.

3. **Private Mediation** - In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

4. **Online Mediation** - Online mediation including pre-litigation mediation may be conducted at any stage of mediation under this Act, with the written consent of the parties including by the use of electronic form or computer networks.

Merits of Mediation

Mediation is :

- Quick and responsive.
- Economical.
- There is no extra cost.
- Harmonious settlement.
- Creating solutions and remedies.
- Confidential and informal.
- Parties controlling the proceedings.

Mediation Act, 2023

Mediation Act, 2023 has received the assent of the Hon'ble President of India on the 14th September, 2023. The object of this law *inter alia* is to promote and facilitate mediation, resolution of disputes, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process. The provisions of this law will come into force on such date(s) as the Central Government will notify. The following sections of the Mediation Act, 2013 has come into force w.e.f. 9th October, 2023.

These sections are as follows:

Section 1: Short title, extent and commencement

This Act may be called the Mediation Act, 2023. It shall extend to the whole of India. It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Section 3: Definitions

The important definitions provided in section 3 *inter alia* is as under:

(a) "commercial dispute" means a dispute defined in clause (c) of sub-section (1) of section 2 of the Commercial Courts Act, 2015;

(b) "community mediator" means a mediator for the purposes of conduct of community mediation under Chapter X;

(c) "Council" means the Mediation Council of India established under section 31;

(e) "court-annexed mediation" means mediation including pre-litigation mediation conducted at the mediation centres established by any court or tribunal;

(f) "institutional mediation" means mediation conducted under the aegis of a mediation service provider;

(g) "international mediation" means mediation undertaken under this Act and relates to a commercial dispute arising out of a legal relationship, contractual or otherwise, under any law for the time being in force in India, and where at least one of the parties, is-

(i) an individual who is a national of, or habitually resides in, any country other than India; or

(ii) a body corporate including a Limited Liability Partnership of any nature, with its place of business outside India; or

(iii) an association or body of individuals whose place of business is outside India; or

(iv) the Government of a foreign country;

(h) "mediation" includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute;

(i) "mediator" means a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council. Explanation.—Where more than one mediator is appointed for a mediation, reference to a mediator under this Act shall be a reference to all the mediators;

(j) "mediation agreement" means a mediation agreement referred to in sub-section (1) of section 4;

(k) "mediation communication" means communication made, whether in electronic form or otherwise, through—

(i) anything said or done;

(ii) any document; or

(iii) any information provided,

for the purposes of, or in relation to, or in the course of mediation, and includes a mediation agreement or a mediated settlement agreement;

(l) "mediation institute" means a body or organisation that provides training, continuous education and certification of mediators and carries out such other functions under this Act;

(m) "mediation service provider" means a mediation service provider referred to in sub-section (1) of section 40;

(n) "mediated settlement agreement" means mediated settlement agreement referred to in sub-section (1) of section 19;

(q) "online mediation" means online mediation referred to in section 30;

(u) "pre-litigation mediation" means a process of undertaking mediation, as provided under section 5, for settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature in respect thereof, before a court or notified tribunal under sub-section (2) of section 5;

(y) "specified" means specified by regulations made by the Council under this Act.

Section 31 to Section 38 relating to Mediation Council of India

The Central Government shall, by notification, establish for the purposes of this Act, a Council to be known as the Mediation Council of India to perform the duties and discharge the functions under this Act. The composition of Council shall be in accordance with provisions provided under section 32 of the Mediation Act, 2023. Other provisions inter alia relates to Vacancies, etc., not to invalidate proceedings of Council, Resignation, Removal, Appointment of experts and constitution of Committees, Secretariat and Chief Executive Officer of Council and Duties and functions of Council.

Section 45 to 47 relating to Mediation Fund, Accounts and Audits & Power of Central Government to issue directions

Section 45 provides for creation of "Mediation Fund" and prescribes the amounts that may be credited to this fund.

Further, the accounts of the Council are to be audited by the Comptroller and Auditor-General of India and any expenditure incurred by him in connection with such audit shall be payable by the Council to the Comptroller and Auditor-General of India.

In exercise of its powers or the performance of its functions under this Act, the Council shall be bound by directions on questions of policy as the Central Government may give in writing to it and the decision of the Central Government whether a question is one of policy or not shall be final.

Section 50 to 54 relating to certain Protection, power of making rules, regulations and power of removal of difficulties

Section 50 provides that no suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of such Government, or the Member or Officer or employee of the Council or a mediator, mediation institutes, mediation service providers, which is done or is intended to be done in good faith under Mediation Act, 2023 or the rules or regulations made thereunder. This provision can aid and promote the effective implementation of this Law.

The power of making the rules has been given to the Central Government and the regulations can be made by the Mediation Council. Notification, Rules and Regulation made under this law is to be laid 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, rule or regulation or both Houses agree that the notification, rule or regulation should not be issued or made, the notification, rule or regulation 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, rule or regulation.

If case of any difficulty, the Central Government may make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty. However, no such order shall be made under this section after the expiry of a period of five years from the date of commencement of this Act.

Section 56 and 57 dealing with effect of this law on pending proceedings and transitory provisions

This Act does not apply to, or in relation to, any mediation or conciliation commenced before the coming into force of this Act. The rules in force governing the conduct of court-annexed mediation shall continue to apply until regulations are made under section 15(1). However, the rules shall continue to apply in all court-annexed mediation pending as on the date of coming into force of the regulations.

Mediation under Various Laws

There are various laws that provides for mediation as dispute redressal mechanism. An inclusive list of laws along with the related provisions covering the subject matter is provided below:

1. The Companies Act, 2013
2. Industrial Disputes Act, 1947
3. Code of Civil Procedure, 1908
4. Legal Services Authority Act, 1987 read with Section 89 of CPC
5. Micro, Small and Medium Enterprises (MSME) Development Act, 2006
6. Hindu Marriage Act, 1955 and Special Marriage Act, 1954
7. Real Estate (Regulation and Development) Act, 2016
8. Commercial Courts Act, 2015 and the Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018
9. The Consumer Protection Act, 2019

CASE LAWS

Salem Advocate Bar Association v. Union of India (UOI) (25.10.2002 - SC) : (2005) 6 SCC 344

In this case, writ petitions were filed seeking to challenge Amendments made to the Code of Civil Procedure (CPC) by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002 especially Section 89 of CPC. Supreme Court emphasised on the need to promote the alternative dispute mechanisms. It stated that -

it is quite obvious that the reason why Section 89 has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delay and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refer to different acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd. and Ors. (26.07.2010 - SC) : [2010 (8) SCC 24]

In this case, question arose to whether the section 89 of Civil Procedure Code empowers the court to refer the parties to a suit to arbitration without the consent of both parties and scope of the said section. Court held that

"If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution."

Arbitration v. Mediation

Since both options looks appealing to resolve business disputes, there is a need to distinguish between the two:

1. Mediation is when a neutral third party aims to assist the parties in arriving at a mutually agreeable solution whereas arbitration is like litigation which is outside the court and which results in an award like an order.
2. Mediation is more collaborative; arbitration is more adversarial.
3. The process of mediation is more informal than that of arbitration.
4. The outcome in mediation is controlled by the parties whereas in arbitration it is controlled by the arbitrator.
5. In mediation, the dispute may or may not be resolved whereas in arbitration it is always settled in either party's favour.

MEDIATION RULES MADE BY HIGHER COURTS

Supreme Court Manual

Supreme Court has made a Mediating Training Manual with regards to the benefits and/or suitability of ADR methods of dispute resolution. It aims at facilitating and help guiding mediation in growing not as an alternative dispute resolution mechanism, but as another effective mode of disputes resolution. It is a uniform Training Manual applicable throughout India, which can be used by the Trainers, Mediators, Referral judges, Litigants etc. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999 which introduced amendment in section 89 thereto.

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely,

(i) Introduction and Opening Statement;

(ii) Joint Session;

(iii) Separate Session; and

(iv) Closing.

These functional stages are used in an informal and flexible manner so that the mediation process gains momentum.

This manual provides for the practical aspects involved in mediation including the procedure of mediation, stages of mediation, the code of conduct to be followed by all the parties including mediator involved, training of mediators, how to communicate – kinds of communication, barriers to it etc, the art of negotiation and bargaining, the role of referral judges, lawyers, parties among other aspects of it.

Mediation rules made by High Court

High Courts in India has come up with their own ADR Rules. For instance, Alternative Disputes Resolution Rules, 2003 and Mediation Rules are formulated by Chandigarh High Court for effective disposal of suits via ADR methods. Part I of these rules talks about Alternative Disputes Resolution Rules with special emphasis at Arbitration.

According to these rules, Arbitration as a means the process by which an arbitrator appointed by the parties or by the Court, to adjudicate the disputes between them and passes an award by applying the provisions of the Arbitration and Conciliation Act, 1996.

Further, Conciliation means the process by which a conciliator who is appointed by the parties or by the Court, as the case may be, conciliates the disputes between them in exercise of his powers under Sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement.

And, Mediation means the process by which a mediator appointed by the parties or by the court, as the case may be, mediates the disputes between them by applying the provisions of the Mediation Rules contained in Part II.

And also 'Judicial Settlement' means a final settlement by way of compromise before a Lok Adalat or before a suitable institution or person, which shall be deemed to be a settlement before a Lok Adalat within the meaning of the Legal Services Authorities Act, 1987.

Rule 5 talks provides the rules relating to procedure for reference by the Court to the different modes of settlement be it through arbitration, mediation, conciliation or judicial settlement. According to rule 4 High Courts shall take steps to have training courses to facilitate smooth understanding ADR Mechanism.

Part II, lays emphasis on mediation and conciliation and has been named as "Mediation Rules".

Rule 2 and 3 talks about appointment and panel of mediators or conciliators. Whereas, Rule 4 enumerates the qualification of such mediator or conciliator, which are as under:

a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Courts;

(iii) Retired District and Sessions judges / Additional District and Sessions Judges and retired Civil Judges.

Legal practitioners with at least five years standing at the Bar in the Supreme Court/High Court/ District Court.

b) Experts or other professionals with at least fifteen years standing or retired senior bureaucrats or retired senior executives.

c) Institutions which are themselves experts in mediation and have been recognized as such by the High Court.

Rule 5, talks about the disqualification of such mediator or conciliator. These are as under:

a) any person who has been adjudged insolvent;

b) any person against whom criminal charges involving moral turpitude have been framed by a criminal court and are pending ; or

c) any person who has been convicted by a criminal court for any offence involving moral turpitude;

d) any person against whom disciplinary proceedings have been initiated by the competent authority or who has been punished in such proceedings;

e) such other categories of persons as may be notified by the High Court.

These rules also states Procedure of mediation as given in Rule 10. The mediator/conciliator shall attempt to facilitate voluntary resolution of the dispute by the parties and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them. However, he shall not impose terms of settlement on the parties as mentioned in Rule 15.

These rules also inter alia covers Time limit for completion of mediation (Rule 17), Confidentiality disclosure and inadmissibility of information (Rule 19), Communication between mediator/conciliator and the Court (Rule 22), Settlement Agreement (Rule 24) among other important provisions.

The rules facilitate the courts for effecting the resolution of disputes through Alternate Dispute Resolution method.

Alternative Dispute Resolution (ADR)

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.

There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities. 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. 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.

Areas in which ADR Works

Almost all disputes including commercial, civil, labour 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.

LESSON ROUND-UP

- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration.
- The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts. Part one deals with Arbitration; Part two deals with enforcement of certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.
- The present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.
- The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- 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. 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 behaviour 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.
- The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- 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. 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 behaviour 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.
- The Alternative Dispute Resolution (ADR) processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial. 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.

- Supreme Court has made a Mediating Training Manual with regards to the benefits and/or suitability of ADR methods of dispute resolution. It aims at facilitating and help guiding mediation in growing not as an alternative dispute resolution mechanism, but as another effective mode of disputes resolution.
- High Courts in India has come up with their own ADR Rules.

GLOSSARY

Arbitration: Arbitration means any arbitration whether or not administered by permanent arbitral institution.

Arbitral Tribunal: Arbitral tribunal means a sole arbitrator or a panel of arbitrators.

Arbitration agreement: Arbitration agreement means 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. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

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.

Legal Representative: Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.

Conciliation: 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.

Mediation: Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the grounds to challenge the appointment of an Arbitrator under the Arbitration and Conciliation Act, 1996? Discuss.
2. What do you understand by an arbitration agreement?
3. What are the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996?
4. What are the provisions relating to settlement of the dispute under the Arbitration and Conciliation Act, 1996?
5. Part I of the Arbitration and Conciliation Act, 1996 applicable only to all the arbitrations which take place within the territory of India. Comment.

LIST OF FURTHER READINGS

- Bare Act of Arbitration and Conciliation Act, 1996
- Bare Act of Mediation Act, 2023
- Alternative Disputes Resolution Rules, 2003
- P.C. Markanda, LAW RELATING TO ARBITRATION AND CONCILIATION, pp.1-8, (8th Edn. 2013) LexisNexis
- Mediation and Conciliation Rules of Delhi High Court
- Mediation Training Manual of India of Supreme Court

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf
- https://www.indiacode.nic.in/bitstream/123456789/19637/1/A2023-32.pdf
- https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf

Indian Stamp Law

Lesson 12

KEY CONCEPTS

■ Duly Stamped ■ Chargeable ■ Remission ■ Compounding ■ Valuation ■ Apportionment ■ Instruments not duly Stamped ■ Adhesive Stamps ■ Impressed Stamps ■ Time of Stamping Instruments ■ Adjudications as to Stamps ■ Impounding ■ Unstamped Receipts ■ Reference and Revisions

Learning Objectives

To understand:

- Levy of Stamp Duty on instruments
- Extent of the liability of Stamp Duty
- The provisions of stamp duties on various instruments
- Person liable to pay duty
- Mode of Stamping and time
- Consequence of instruments not duly stamped
- Concept and process of e-stamping

Lesson Outline

- Introduction
- Key Definitions
- Principles of levy of Stamp Duty
- Instruments chargeable with Duty
- Extent of liability of Instruments to Duty
- Instruments coming within several descriptions
- Bonds, Debentures, etc. Issued under the Local Authorities Loan Act
- Securities dealt in Depository not liable to Stamp Duty
- Corporatisation and Demutualisation schemes and related instruments not Liable to Duty
- Reduction, Remission and Compounding of Duties
- Valuation for Duty

- Apportionment
- Persons liable to pay Duty
- Mode of Stamping
- Time of stamping Instruments
- Instruments not duly stamped
- Admission of Instruments (where not to be questioned)
- Admission of improperly stamped Instruments
- Dealing with Instruments impounded
- Collector's power to refund penalty paid
- Instruments unduly stamped by accident
- Endorsement of Instrument on which Duty has been paid
- Prosecution for Offences against Stamp Law
- Recovery and Refunds
- Allowance and Refund
- Reference and Revision
- Prosecution
- Criminal Offences
- Schedule
- Concept of E-stamping
- Practical aspects with regard to the calculation and payment of Stamp Duty
- Adjudication as to Stamps
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain and specified instruments.

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Indian Stamp Act, 1899

INTRODUCTION

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. The Act is divided into eight Chapters and there is a schedule which contains the rates of stamp duties on various instruments .

Union List	The State Legislature	Amendments, entry 44
• Union List, Entry 91 gives power to the Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. The power to reduce or remit duties on these instruments is vested in the Union Government as per Section 9 of the Act.	• State List, entry 63 confers on the States power to prescribe the rates of stamp duties on other instruments. As per "Principles" for levy of duty' fall in tire Concurrent List, entry 44.	• The amendments to the Central Act effected by the States are in the shape of amendment of sections of the Central Act, adding new sections, adding separate schedules, modifying in schedules, etc. Some States, for their convenience, have passed separate legislation to cover the matters coming under State's domain. As a result, the rates of stamp duties in different States on other instruments category differ from State to State for the same instrument.

Question: Which government can make law relating to stamp duty payments?

(A) Central

(B) State

(C) Both A and B

(D) Neither A nor B

KEY DEFINITIONS

Section 2 of the Act contains definitions of various terms used in the Act. Some important definitions are discussed below:

Allotment List(Section 2(1)]

"allotment list" means a list containing details of allotment of the securities intimated by the issuer to the depository under sub-section (2) of section 8 of the Depositories Act, 1996.

Banker- [Section 2(1A)]

"Banker" includes a bank and any person acting as a banker.

[Section 3 of the Negotiable Instruments Act defines a "banker" includes any person acting as a banker and any post office savings bank].

Bill of Lading- [Section 2(4)]

"Bill of Lading" includes a 'through bill lading' but does not include a mate's receipt.

A bill of lading is a receipt by the master of a ship for goods delivered to him for delivery to *certain person* or his assigns. Three copies are made, each signed by the master. One is kept by the consignor (a person or company that sends goods to someone) of the goods, one by the master of the ship and one is forwarded to *that person*, the consignee (the person or company to whom goods or documents are officially sent or delivered), 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.

Cheque- [Section 2(7)]

"Cheque" means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

It should be noted 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.

Clearance List- [Section 2(7A)]

"Clearance list" means a list of transactions of sale and purchase relating to contracts traded on the stock exchanges submitted to a clearing corporation in accordance with the law for the time being in force in this behalf.

Clearance Corporation- [Section 2(7B)

"Clearing corporation" means an entity established to undertake the activity of clearing and settlement of transactions in securities or other instruments and includes a clearing house of a recognised stock exchange.

Indian Clearing Corporation Ltd. and National Commodity Clearing Ltd. are the examples of clearing corporation in India.

Conveyance- [Section 2(10)]

The term "conveyance" includes a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred *inter vivos*[1] and which is not otherwise specifically provided for by Schedule. It does not include a will.

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.

Debenture-[Section 2(10A)]

Debenture includes–

(i) debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;

1. The expression "inter vivos" means during lifetime.

(ii) bonds in the nature of debenture issued by any incorporated company or body corporate;

(iii) certificate of deposit, commercial usance bill, commercial paper and such other debt instrument of original or initial maturity upto one year as the Reserve Bank of India may specify from time to time;

(iv) securitised debt instruments; and

(v) any other debt instruments specified by the Securities and Exchange Board of India from time to time.

Depository- [Section 2(10B)]

Depository includes–

(a) a depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996; and

(b) any other entity declared by the Central Government, by notification in the Official Gazette, to be a depository for the purposes of Indian Stamp Act, 1899.

National Securities Depositories Ltd (NSDL) and Central Securities Depositories Ltd (CDSL) are Depositories in India.

Duly stamped [Section 2(11)]

According to Section 2(11), "Duly stamped" as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with law for time being in force in India.

- The amount of stamp to be used is governed by provisions and schedule to the Stamp Act.
- The manner of stamping is governed by section 10 to 19 of the Act and also by the rules framed by the Government. Under this head are included particulars as to the description of state ps and the number of stamps to be used.

Example : an instrument which is to be written on paper with an impressed stamp is not duly stamped if it bears only an adhesive stamp of the value and vice- versa.

Executed / Execution [Section 2(12)]

Under Section 2(12), the words "executed" and "execution" (used with reference to instruments), mean "signed" and "signature" respectively "executed" and "execution" used with reference to instruments, mean "signed" and "signature" and includes attribution of electronic record within the meaning of section 11 of the Information Technology Act, 2000.

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)

Impressed stamp [Section 2(13)]

According to Section 2(13), "impressed stamp" includes:

(a) labels affixed and impressed by the proper officer; and

(b) stamps embossed or engraved on stamp paper.

CASE LAW

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 All. 388).

Adhesive stamp- Adhesive stamps are those stamps which can be stuck to a document using any form of adhesive. There are two types of adhesive stamps and they are:

a. **Postal stamps-** Postal stamps have their limited application. Postal stamps are used for post office related transactions.

b. **Non-postal stamps-** Non-postal stamps have wider application compared to postal stamps. Non-postal stamps are revenue stamp, court fee stamp, insurance policy stamp etc.

Example, Share transfer stamps are categorised in Adhesive Stamp whereas a non-judicial stamp paper is an example of Impressed Stamp.

Instrument [Section 2(14)]

Instrument includes –

(a) every document, by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;

(b) a document, electronic or otherwise, created for a transaction in a stock exchange or depository by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded; and

(c) any other document mentioned in Schedule I.

However, it does not include such instruments as may be specified by the Government, by notification in the Official Gazette.

Following instances may be noted:

(i) An unsigned draft document is not an "instrument" (because it does not create or purport to create any right, etc).

(ii) 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.]

(iii) 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).

(iv) 'Instrument' does not include ordinary letters.

Illustration :

Nature of document or instrument	*Stamp duty payable?*
Court order sanctioning amalgamation scheme	Yes
An instrument transferring either movable or immovable property	Yes. It is conveyance

Issue-[Section 2(15A)]

"Issue" means any person making an issue of securities. [Section 2(15A)].

Bill of Exchange[Section 2(2)]

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.

Bill of exchange payable on demand[Section 2(3)]

Under Section 2(3) of the Stamp Act, a "bill of exchange payable on demand" includes:

(a) 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;

(b) an order for the payment of any sum of money weekly, monthly or at any other said period; and

(c) 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 by the Negotiable Instruments Act, 1881.

Bond [Section 2(5)]

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.

But it does not include a debenture.

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 "obliges 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.

Chargeable [Section 2(6)]

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. The word 'Chargeable' herein connotes instruments chargeable under the Indian Stamp Act, 1899 only and not under any other Act.

Lease [Section 2(16)]

"Lease" means a lease of immovable property and includes also:

(a) a patta;

(b) 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;

(c) any instrument by which tolls of any description are let;

(d) any writing on an application for a lease intended to signify that the application is granted.

Question: Which of the following is not included in the definition of Lease as per Indian Stamp Act, 1899?

Options: (A) Patta

(B) Kabuliyat

(C) Licence

(D) any writing on an application for a lease intended to signify that the application is granted

Answer: (C)

Section 105 of the Transfer of Property Act,1882 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 therefor.

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*'.

Market security [Section 2(16A)]

"Marketable Security" means a security capable of being traded in any stock exchange in India.

Market value [Section 2(16B)]

"Market Value", in relation to an instrument through which –

(a) any security is traded in a stock exchange, means the price at which it is so traded;

(b) any security which is transferred through a depository but not traded in the stock exchange, means the price or the consideration mentioned in such instrument;

(c) any security is dealt otherwise than in the stock exchange or depository, means the price or consideration mentioned in such instrument.

Promissory Note [Section 2(22)]

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.

Requisites of a promissory note as per the Negotiable Instruments Act, 1881 are the following:

(a) the document must contain an unconditional undertaking to pay;

(b) the undertaking must be to pay money only;

(c) the money to be paid must be certain;

(d) it must be payable to or to the order of a certain person or to bearer;

(e) the document must be signed by the maker.

Illustrations

An instrument in the form:

- "I do acknowledge myself to be indebted to B in Rupees 10,000 to be paid on demand for value received" is a promissory note.
- "I have received a sum of £20 which I borrowed from you and I have to be accountable for the sum with interest" held not to be a promissory note.
- "On demand I promise to pay to the trustees of W&C or their treasurer for the time being £100" was held a good promissory note.

Receipt [Section 2(23)]

"Receipt" includes any note, memorandum or writing:

(a) whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received; or

(b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt; or

(c) whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged; or

(d) which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person.

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.

Securities [Section 2(23A)]

Securities includes –

(i) securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956;

(ii) a "derivative" as defined in clause (a) of section 45U of the Reserve Bank of India Act, 1934;

(iii) a certificate of deposit, commercial usance bill, commercial paper, repo on corporate bonds and such other debt instrument of original or initial maturity upto one year as the Reserve Bank of India may specify from time to time; and

(iv) any other instrument declared by the Central Government, by notification in the Official Gazette, to be securities for the purposes of this Act.

Settlement [Section 2(24)]

"Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made:

(a) in consideration of marriage;

(b) 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; or

(c) 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.

Marketable Security[Section 2(16A)]

"Marketable security" means a security capable of being traded in any stock exchange in India.

Stamp [Section 2(26)]

Under Section 2(26), "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.

Stock Exchange [Section 2(27)]

According to section (27),"stock exchange" includes –

(i) a recognised stock exchange as defined in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 ; and

(ii) such other platform for trading or reporting a deal in securities, as may be specified by the Central Government, by notification in the Official Gazette, for the purposes of this Act.

[2]PRINCIPLES OF LEVY OF STAMP DUTY

Historical Background

In India, stamp duties were first imposed in Bengal during 1797, by Regulation VI of 1797.It was then intended as an addition to public resources. Subsequently, Stamp Acts XXXVI of 1860, X of 1862, XVIII of 1869 and I of 1879 were passed by the Governor General in Council prior to the present Indian Stamp Act, II of 1899 the stamp law as contained in these Acts, is in most respects modeled upon English Stamp law.

Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty, is a subject included in the Concurrent List of the Seventh Schedule of the Constitution of India (item 44 of the List III – Concurrent List), while duties or fees collected by means of judicial stamps are regulated by State Legislation vide item 3 of List II (State List).

Under Article 246(1) read with entry 91 of the List I (Union List) of the Seventh Schedule to the Constitution of India, parliament has exclusive powers to make laws with respect to any of the matters regarding rates of stamp duty in respect of bills of exchange, Cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

In respect of other documents, the legislature of any State has exclusive power to make laws for the State (vide item 63 of list II-State List). Under Article 268 of the Constitution, stamp duties on documents mentioned in List I (Item 91) are also collected and appropriated by the State within which such duties are leviable.

Article 246 (2) of the Constitution and items 6 and 47 of List III of the Seventh Schedule confer upon the State Legislature/ Parliament the power to make laws for the registration of deeds and documents and for the levy and collection of fees in respect of the registration of such deeds and documents.

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.

INSTRUMENTS CHARGEABLE WITH DUTY

Section 3 of the Act is the charging section. It provides that subject to the provisions of the Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with a duty of the amount indicated in that Schedule as the proper duty therefore, namely:

2. https://cag.gov.in/uploads/media/Stamp-Duty-and-Registration-Manual-20200914191933.pdf

1. Every instrument mentioned in Schedule I of the Act which are executed in India on or after the 1st July, 1899;
2. Every bill of exchange or promissory note drawn or made out of India on or after 1st July, 1899 and accepted or paid or presented for so or negotiated in India; and
3. Every instrument except a bill of exchange or promissory note mentioned in the Schedule, which is executed outside India on or after 1st July, 1899, but it relates to any property or service situated or rendered in India and is received in India.

However, no duty shall be chargeable in respect of:

1. any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.
2. any instrument for the sale, transfer or disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel or any part, interest, share of property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838 or the Indian Registration of Ships Act, 1841 as amended by subsequent Acts.

Thus, Section 3 charges certain instruments to be liable to stamp duty.

Section 2(14) of the Indian Stamp Act, the term "Instrument" includes every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded.

CASE LAWS

The Court has observed as under in *Commissioners of Inland Revenue* v. *G. Angus*, 1889) 23 QBD 579, followed in *re Swadeshi Cotton Mills*, AIR 1932 All 291, *"the first thing to be noticed is that thing which is made liable to duty is an instrument. If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within the section and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if any one carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction".*

In *re Swadeshi Cotton Mills,* AIR 1932 All 291, it was held that if after entry into a contract of sale the parties (in spite of the risk that either party may resile from the contract), refrain from getting an *actual deed of conveyance* prepared, they can successfully evade the payment of higher duty. It is no argument that the Government loses revenue, if such a course is permitted".

On this point Esher M.R., in *Commissioners of Inland Revenue* v. *G. Angus*, (1889) 23 QBD 579, stated that "*goodwill can be sold and conveyed to purchasers without any 'conveyance' being executed and if you treat the document as only an agreement with regard to the goodwill, there will never be any conveyance executed and the property would have been transferred to the purchaser without the Crown getting any advalorem duty upon the transfer. If a vendor can convey the property sold to the purchaser without the execution of any instrument, he can convey it without paying any duty under Section 70. The subject may have the good fortune to escape the stamp duty, if he can get a conveyance of property sold to him without the execution of any instrument..... "The Crown ..... must make out its right to duty and if there be a means of evading the stamp duty, so much the better for those who can evade it".*

Substance and description

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of the instrument. The substance of the transaction contained in the document may not necessarily embody the description given at the head thereof.

It is the substance of the transaction as contained in the instrument and not the form of the instrument, that determines the stamp duty, though the duty is leviable on the instrument and not on the transaction. In determining whether a document comes within the description of a document upon which a stamp is required by the Act, one has to look at the entire document to find out whether it falls within the description. Where a single instrument contains several purposes, the instrument as a whole should be read to find out its dominant purpose. To determine whether a document is sufficiently stamped the Court must look at the document itself, as it stands.

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 –

Only the principal instrument shall be chargeable with the duty prescribed for the conveyance, mortgage or settlement; and → 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).

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.

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.

Illustrations (Section 4 held applicable)

(i) 'A' executed a conveyance of immovable property. On the same deed his nephew (undivided in status) endorsed his consent to the sale, as such consent was considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee (ILR 13 Bom 281).

(ii) Subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor. These declarations were held to be chargeable, together with the sale deed, as having completed the conveyance (*Somaiya Organics Ltd. v. Chief Controlling Revenue Authority, AIR 1972 All 252*).

(iii) Brother A executed in favour of brother B a gift of all his property. By another deed, brother B made provision for the living expenses of brother A and hypothecating in favour of brother A a part of the property included in the above mentioned gift deed, in order to secure the payment of the living

expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied (*Maharaj Someshar Dutt, ILR 37 All 264*).

(iv) B conveyed the whole of his property to three persons who undertook to provide for him and to perform his obsequies. By another document, the three donees agreed to provide for B. This was mentioned in the deed executed by A also. It was held that the two documents had to be construed as part of the same act; the first was liable to duty as a conveyance while the second was liable to a duty of Rupee 1 only (*Dadoba v. Krishna, ILR 7 Bom. 34*).

(v) 'A' company executed, first a deed of trust and mortgage stating that the company was to issue notes for raising loans secured by the sale deed. It was held as under:

(1) The deed was principal or primary security (and not a collateral security). It was chargeable as mortgage under Article 14.

(2) The notes issued subsequently were debentures and not principal instruments (*Madras Refinery Ltd. v. Chief Controlling Revenue Authority, Madras, AIR 1977 SC 500).*

(vi) The Rangoon Gymkhana executed a duly stamped trust deed, mortgaging its assets as security for the repayment of the debenture stock issued by it. In addition, it had issued certificates of debenture stock to the subscribers, but these did not contain any promise to repay any need, but merely stated the amount standing in each shock holder's name. It was held that the certificates were not debentures, but were instruments employed to complete the mortgage [Rangoon Gymkhana In re, AIR 1927 Rang. 37 (Section 4 applied)].

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).

Example : If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments.

The Section deals with multifarious instruments. The expression "distinct matter" means distinct transactions [*Ram Swarup* v. *Joti*, (1933) Allahabad Law Journal 427; *Board of Revenue, Madras* v. *Narasimhan*, AIR 1961 Mad 504].

Section 5 applies even where the two (or more) matters are of the same description.

Illustrations as to "distinct matters"

(i) An agreement for service and a lease.

(ii) A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be chargeable. The two are "distinct matters" [*Chinmoyee Basu v. Sankare Prasad Singh, AIR 1955 Cal. 561 (cf. AIR 1936 Lah. 449)*].

(iii) An agreement containing two covenants making certain properties chargeable in the first instance and creating a charge over certain properties if the first mentioned properties are found insufficient does not fall within Section 5 (*Tek Ram v. Maqbul Shah, AIR 1928 Lah. 370*).

(iv) A grant of annuity by several persons requires only one stamp (because there is only one transaction).

(v) A lease to joint tenants requires only one stamp.

(vi) A conveyance by several persons jointly relating to their separate interest in certain shares in an incorporated company requires only one stamp.

(vii) A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.

(viii) Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.

(ix) The position is the same where a person is an executive or administrator and signs an instrument containing a disposition by him in his personal capacity and also a disposition as executor. The two capacities are different (*Member, Board of Revenue v. Archur Paul Benthall, AIR 1956 SC 35*).

Principal and ancillary

The test is – "What is the leading object? Which is principal and which is ancillary?

If an instrument taken with reference to its primary object is exempted then stamp duty cannot be charged merely because matter ancillary to it is included and that matter is chargeable to stamp duty.

Examples:

An agreement for sale of goods, which also contains an arbitration clause. The latter clause is incidental to the former agreement.

Where a deed of dissolution of partnership contains a clause charging the partnership assets for payment of certain amounts to outgoing parties, the instrument is chargeable separately for the charge and the partnership. The former is not ancillary to the later.

Where a document contains a transfer of mortgage and *an agreement* to make a loan, the mortgage and the loan are distinct matters and separately chargeable.

If in a lease there is also an agreement to pay a certain sum on account of the balance of previous year, the document is chargeable (i) as a lease and (ii) also as a bond.

A lease reserving *separately* rent for house and rent for furniture is chargeable separately for each of the items.

Where, at an auction, a purchaser purchases several lots and there is only one instrument in respect of all of them the separate purchases are, nevertheless, separate and distinct matters and so, the stamp duty must be determined separately.

Thus, the test usually adopted is the test of "leading object". If there is only one leading object, Section 5 will not apply. But if there are several distinct contracts, each is taxable.

INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE- I- 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.

Example

1. Where a deed (i) contains a stipulation binding the executant to deliver his sugarcane crop to the obligee under the deed and (ii) also provides that the sugarcane crop is hypothecated as security for payment of money advanced by the obligee, the deed fulfills the dual character of the mortgage and a bond and is therefore chargeable to the highest of the duties by virtue of section 6.
2. Similarly, where an attested instrument, containing an undertaking to pay money, evidences also a pledge of immovable property as security for the money due, the higher of the stamp duty payable on its character as a bond and on its character as a pledge, was held leviable. An instrument which can be treated both as a dissolution of partnership and as an instrument of partition has to be charged to the duty prescribed for partition deed, which is the higher of the two.

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;

(iii) 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.

Explanation 1 – For the purposes of this section, the expressions "beneficial ownership", "depository" and "issuer" shall have the meanings respectively assigned to them in clauses (a), (c) and (f) of Sub-section (1) of Section 2 of the Depositories Act, 1996.

Explanation 2 – For the purposes of this section, the expression "securities" shall have the meaning assigned to it in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

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; or

(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.

Explanation – For the purposes of this Section –

(a) the expressions "corporatisation", "demutualisation" and "scheme" shall have the meanings respectively assigned to them in clauses (aa), (ab) and (ga) of Section 2 of the Securities Contracts (Regulation) Act, 1956;

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

Notwithstanding 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 I.

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; and

(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.

CASE LAWS

The object of this section is that, upon every purchase *ad valorem* duty has to be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject matter of the sale (*Collector of Ahmedabad v. Deepak Textile Industries*, AIR 1966 Guj. 227).

What Section 24 means is that where property is sold subject to the payment by the purchaser, discharging a debt charged on the property, then the purchaser is really paying a consideration which includes the amount of that debt also (*Somayya Organics Ltd.* v. *Board of Revenue*, AIR 1986 SC 403).

Proviso to Section 24 operates for the benefit of assignee of the mortgage.

When the mortgaged property is sold to the mortgagee along with other properties, the stamp duty already paid is to be deducted from the duty payable on the deed of sale. In order to entitle the mortgagee to a deduction of the duties payable the entire property mortgaged should be transferred and not merely a portion of it (*In re Mirabai, in re Laxman and Ganpat*, ILR 29 Bom. 203).

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; and

(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.

Example

By a document, 'A' binds himself and his posterity on the security of some immovable property for the annual payment to a temple of Rs. 2,200/-. It is a mortgage deed, chargeable with duty calculated on 20 years' payment.

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.

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.

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.

CASE LAW

"Value of any property" would mean that real value of the property in the open market at the time the document was executed and not at the time when the executant acquired it. Where there is no value set forth in the instruments, there would be contravention of Section 27, but the omission does not render the document inadmissible or liable to be impounded and taxed in the manner provided in Section 35 (*Vinayak* v. *Hasan Ali*, AIR 1961 MP 6).

The Collector cannot proceed to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value so ascertained by the Collector. The Act does not provide for any powers to the revenue authority to make an independent enquiry into the value of the property conveyed for determining the duty chargeable. (In *Re. Muhammad Muzaffar Ali* AIR 1922 All 82)

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 under-valuation 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.[3]

3. In some States, local amendments have given such powers to the collector.

APPORTIONMENT- SECTION 28

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.

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.

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.

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.

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/-.

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; and

(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.

Mr. A has taken a policy of fire insurance and Life Insurance. Who is liable to pay the duty?

In case of fire insurance, the insurance company is liable to pay stamp duty.

In case of Life Insurance, Mr. A is liable to pay stamp duty

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; or

(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:

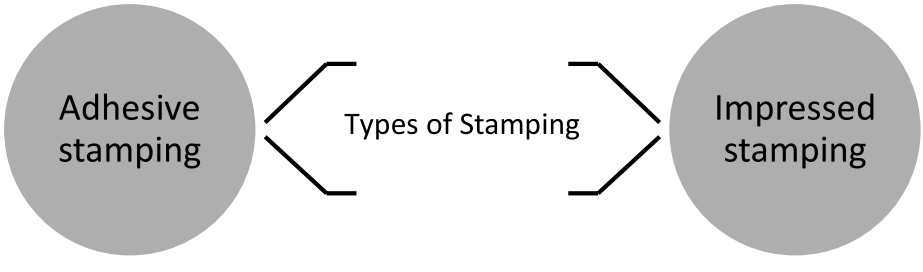
(i) in the case of each kind of instrument, the description of stamps which may be used;

(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.

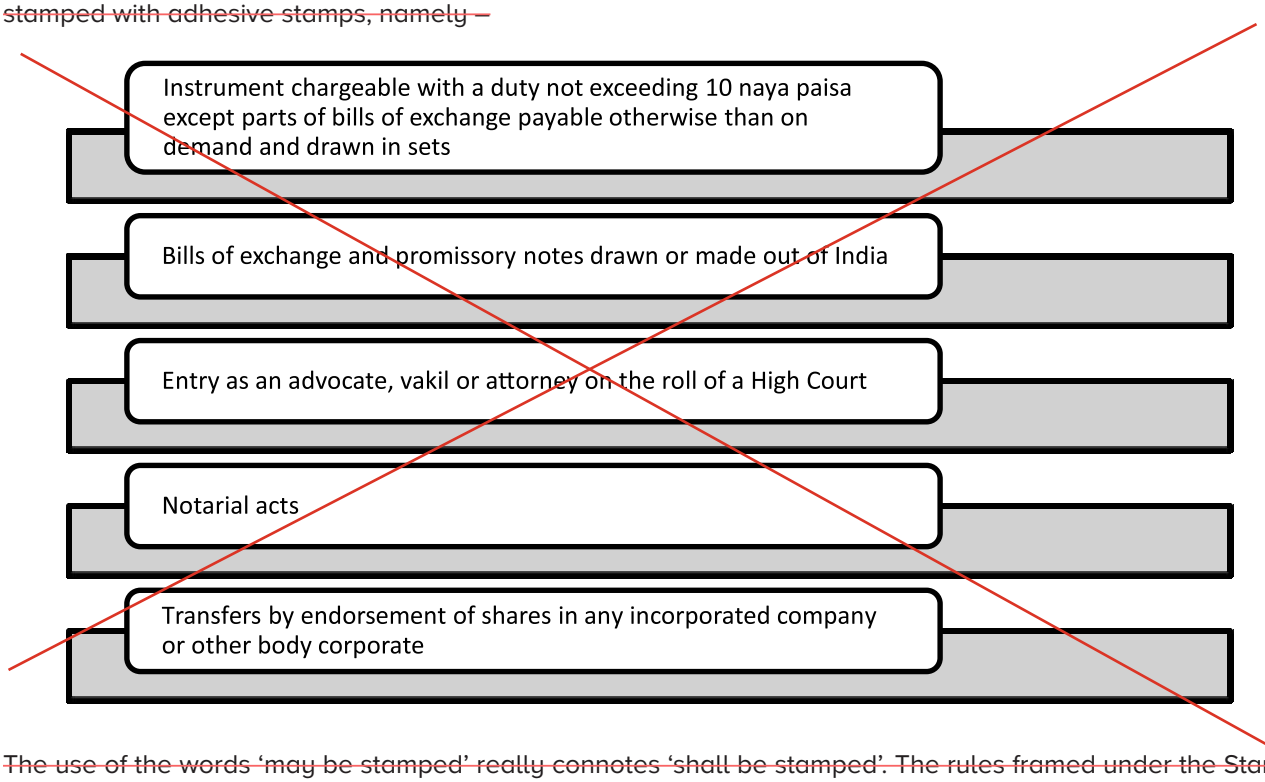
Types of stamping

There are two types of stamping, namely:



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.

Question: Adhesive Stamp means every instrument written upon paper stamped with an impressed stamp.

Options: True or False

Answer: False

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 writing or in any other effectual manner.	-	Section 12(3)
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

CASE LAWS

In *Mahadeo Koeri v. Sheoraj Ram Teli,* ILR 41 All 169; AIR 1919 All 196, it was held that a stamp may be treated as having been effectively cancelled by merely drawing a line across it.

But, in *Hafiz Allah Baksh* v. *Dost Mohammed*, AIR 1935 Lah. 716, it was held that if it is possible to use a stamp a second time, inspite of a line being drawn across it, there is no effectual cancellation. Again, the question whether an adhesive stamp has been cancelled in an effectual manner has to be determined with reference to the facts and circumstances of each case.

In *Melaram* v. *Brij Lal*, AIR 1920 Lah. 374, it was held that a very effective method of cancellation is the drawing of diagonal lines right across the stamps with ends extending on to the paper of the document. A cross marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in *Kolai Sai* v. *Balai Hajam*, AIR 1925 Rang. 209. Accordingly, where the adhesive stamps on promissory note were cancelled by drawing lines on them in different directions and stretching beyond the edge of the stamp on the paper on which the promissory note was written, it was held that the stamp had been effectually cancelled.

Where one of the four stamps used on an instrument had a single line drawn across the face of the stamp, the second had two parallel lines, the third three parallel lines and the fourth two lines crossing each other, it was held that the stamps must be regarded as having been cancelled in manner so that they could not be used again (*In re Tata Iron Steel Company,* AIR 1928 Bom. 80). Putting two lines crossing each other is effective (AIR 1961 Raj. 43).

However, putting a date across the stamp by a third party on a date subsequent to the date on which the bill had been drawn, was held to be not proper cancellation in *Daya Ram v. Chandu Lal*, AIR 1925 Bom. 520 *Cf. Rohini v. Fernandes*, AIR 1956 Bom. 421, 423. Similarly, crossing by drawing lines and signing on the adjacent stamp was held to be not a cancellation of the first stamp in *U. Kyaw v. Hari Dutt*, AIR 1934 Rang. 364. Cross is a good way of cancellation. AIR 1976 Cal. 99.

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 – 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.

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.

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'.

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.

Note: Section 15 of the Act deems every instrument written in contravention of Section 13 or Section 14 to be unstamped and to be inadmissible in evidence as not being duly stamped.

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.

Example: Where a promissory note is executed by 'A' and 'B' and a stamp is afterwards affixed and cancelled by 'A' by again signing it, the stamping has taken place subsequent to the execution and hence, the provisions of Section 17 are not complied with (*Rohini v. Fernandes, AIR 1956 Bom 421*). A receipt stamped subsequent to its execution, but before being produced in the Court is not stamped in time and accordingly, not admissible in evidence.

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.

CASE LAW ON SECTION 18

The object of Section 18 is to facilitate the stamping of the documents within a period of three months, in as much as, by the very nature of things, Section 17 relating to instruments executed in India cannot be complied with. Section 18 is intended to mitigate the inconvenience and hardship that will entail if the instrument concerned is required to be stamped before or at the time of execution as laid down in Section 17. Instrument executed in India is not within Section 18 (*Nath Bank* v. *Andhar Mamik Tea Co.*, AIR 1960 Cal 779).

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; and

(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.

CASE LAWS

The word 'produced' has to be properly understood. It means produced in response to a summon or produced voluntarily for some judicial purpose, such as, for supporting an evidence. It does not refer to a document which accidentally or incidentally falls into a judge's hand. The Court is not justified in impounding a document which the witness had not been called upon to produce (*Narayandas v. Nathuram, ILR 1943 Nag. 520; AIR 1943 Nag. 97*).

Similarly, a Court before which a copy of a document has been produced cannot compel the party to produce the original document with a view to impounding it, having received information that is not sufficiently stamped. It is open to the party to refuse to obey the order of the Court in this respect (*Uttam Chand v. Permanand, AIR 1942 Lah. 265*).

Where a Magistrate issued a warrant with a view to discovering registers kept by the accused containing documents not stamped in accordance with the provisions of the Stamp Act, and in course of the search, the registers were seized and produced before the Magistrate, it was held that the documents thus produced could be impounded as the word 'comes' is sufficiently wide to include documents produced by the search under a search warrant (*Emperor v. Balu Kuppayyan, ILR 25 Mad. 525*). This case should be confined to its facts.

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

(a) 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; or

(ii) shall be acted upon; or

(iii) registered; or

(iv) authenticated by any such person as aforesaid or by any public officer.

unless such instrument is duly stamped.

(b) 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.

(c) 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.

(d) 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'.

(e) 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.

(f) Where an unstamped instrument is lost, the party relying on it is helpless and no payment of penalty can enable admission of secondary evidence.

(g) 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.

CASE LAW

An insufficiently stamped instrument is not an invalid document and it can be admitted in evidence on payment of penalty. [*K. Narasimha Rao v. Sai Vishnu, AIR 2006 AP 80 also at p.302*]

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED) - SECTION 36

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not (except as provided in Section 61) be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

CASE LAW

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the Court cannot subsequently order the deficiency to be made and levy penalty (*Bhupathi Nath* v. *Basanta Kumar*, AIR 1936 Cal. 556; AIR 1933 Lah. 240).

Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the Court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. (*Javer Chand and ors. v. Pukhraj Surana, AIR 1961 SC 1665*)

However, it should be mentioned that Section 61 makes certain important provisions, details of which will be discussed later.

ADMISSION OF IMPROPERLY STAMPED INSTRUMENTS - SECTION 37

Under Section 37, opportunity is given to a party, of getting a mistake rectified when a stamp of proper amount, but of improper description has been used. Under this section, the State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the stamp is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

DEALING WITH INSTRUMENTS IMPOUNDED

Section 38 deals with instruments impounded under Section 33.

When the person impounding an instrument under Section 33 and receiving the same in evidence (upon payment of penalty under Section 35 or, of duty under Section 37) shall send, to the Collector of Stamps, an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof and shall send such amount to the Collector or to such person as the Collector may appoint in this behalf.

Subsection (2) states that in every other case, the person so impounding an instrument shall send it in original to the Collector.

COLLECTOR'S POWER TO REFUND PENALTY PAID

Section 39 vests the Collector with certain powers to refund penalty recovered by a court on impounding a document not duly stamped when produced before it.

Under Section 38, the court so impounding the instrument and realising the penalty has to forward an

authenticated copy of the instrument and the amount of penalty recovered to the Collector. The Collector, on examining the instrument so received by him may, in his discretion, refund the whole penalty if it had been imposed for contravention of Section 13 or Section 14 of the Act and in any other case any portion of the penalty in excess of Rs. 5/- in cases where a copy of the instrument under Section 38(1) has been sent to him. The Collector can act *suo motu* without any application in this behalf being made by a party affected.

When such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may refund the whole penalty so paid.

Collector's Power to Stamp Instrument Impounded

Section 40 deals with Collector's powers to stamp an instrument which is impounded.

Under Section 40(1), the Collector when impounding any instrument under Section 33, or receiving any instrument under Section 38(2) not being an instrument chargeable with duty not exceeding 10 naya paisa only or a bill of exchange or promissory note, shall adopt the following procedure:

(i) if he is of the opinion that instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be;

(ii) if he is of the opinion that such instrument, is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of Rs. 5/-, if he thinks fit and amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of Rs. 5/-.

The Collector, however, has the discretion to remit the whole penalty leviable under this Section in a case where the instrument has been impounded only because it has been written in contravention of Section 13 or Section 14.

A certificate given in the situation (i) above, shall, for the purposes of the Act be conclusive evidence of the matters stated therein. Sub-section (3) of Section 40 provides that an instrument which has been sent to the Collector under Section 38(2) shall be returned to the impounding officer after the collector has dealt with the same in the manner provided above.

INSTRUMENTS UNDULY STAMPED BY ACCIDENT- SECTION 41

Section 41 deals with cases where a person, of his own motion bring it to the Collector's notice that the instrument is not duly stamped. In such cases, if the Collector is satisfied, that the omission to pay the proper duty was due to accident, mistake or urgent necessity, he may receive the deficit amount and certify by endorsement on the instrument that the proper duty has been levied. In order to avail of the benefit of this section, the instrument must be produced before the Collector within one year from the date of its execution or first execution. Where the instrument is brought to the notice of the Collector, beyond the period of one year, Section 47 has no application and the Collector has to proceed under Section 42 read with Section 33 and 40 of the Act. Where the instrument having been brought to the notice of the Collector within the period of one year, the Collector is in doubt regarding the amount of duty chargeable, he may refer the case to the Chief Controlling Revenue Authority and proceed in accordance with the decision of such authority. However, where no such reference is made by the Collector, the Collector's decision would be final, and the Chief Controlling Revenue Authority cannot interfere with his decision.

ENDORSEMENT OF INSTRUMENT ON WHICH DUTY HAS BEEN PAID UNDER SECTIONS 35, 40 AND 41- SECTION 42

Section 42 deals with cases where duty and penalty, if any, have been levied and realised by the court or any other body or by the Collector. In such cases, the authority collecting the duty and penalty must make an endorsement on the instrument as to the amount paid and the name and the residence of the person paying

the same. Upon such certification, the instrument becomes admissible in evidence and may be registered and acted upon as if it had been duly stamped. The duty and penalty referred to in this Section are those covered by Sections 35, 40 or 41 as the case may be. The proviso to this Section lays down that no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be delivered to the person from whom possession of it came into the hands of the officer impounding it, before the expiration of one month from the date of such impounding or if the Collector has certified that its further detention is necessary and has not cancelled such certificate. Again, nothing contained in Section 42 shall affect the provisions of clause (3) of Section 144 of the Code of Civil Procedure, 1889 [under the present Code the corresponding provision is proviso to Order 13, Rule 9(1)].

PROSECUTION FOR OFFENCES AGAINST STAMP LAW- SECTION 43

Section 43 deals with prosecutions for offences against the Stamp Law. This section provides that a levy of a penalty or payment thereof in respect of an unstamped or insufficiently stamped document (as provided for in Chapter IV) does not necessarily exempt a person from liability for prosecution for such offence. However, the proviso to the section clarifies that no such prosecution shall be instituted in the case of any instrument in respect of which a penalty has been paid, unless it appears to the Collector that the offence was committed with the intention of evading the payment of proper duty. On receipt of copy of the instrument impounded under Section 38, the Collector can initiate criminal proceedings if he sees reasons therefor.

RECOVERY AND REFUNDS

Recovery of Duty or Penalty in certain cases- Section 44

Section 44 deals with the circumstances in which persons paying duty or penalty may recover the same in certain cases. The duty or penalty under this Section refers to the duty or penalty paid/levied under Sections 35, 37, 40 or 41 of the Act. It also includes any duty or penalty under Section 29. The remedy is available to a person who, under the Act, was not bound to bear the expense of providing the proper stamp for such instrument. Such a person shall be entitled to recover, from the person bound to bear such expense, the amount of duty or penalty, if any, paid. For the purpose of such recovery, any certificate granted in respect of such instruments under the Act shall be conclusive evidence of the matters therein certified. Sub-section (3) of Section 44 further provides that the amounts so recoverable may, if the court thinks fit, be included in any order as to cost in any suit or proceedings to which such persons are parties and in which such instrument has been tendered in evidence. If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

Refund of Duty or Penalty in certain cases by Revenue Authority -Section 45

Section 45 deals with power of the Revenue Authority to refund the penalty in excess of duty payable on instrument in certain cases. Section 39 of the Act empowers the Collector to refund a part and in some cases, the whole of the penalty paid under the provisions of Section 35. Section 45 further empowers the Chief Controlling Revenue Authority to order refunds. The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue Authority may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part. Where in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

It is necessary to appreciate the differences between the powers of the Collector under Section 39 and the powers of the Controlling Revenue Authority under Section 45 at this stage. They are:

Powers of the Collector under section 39	***Powers of Controlling Revenue Authority under section 45***
Refund of penalty only.	Refund of Penalties and duties where they have been paid in excess.
Power to refund penalty is restricted only to two cases mentioned in Section 39.	Powers under Section 45 are not subject to any such limitation.
There is no time limit for the Collector to exercise his powers to refund.	Section 45 provides for the time limits.
The power under Section 39 is routine function of the Collector.	The power under Section 45 is to be exercised only when an application is made by a party.
The collector may also use his discretion.	The power under Section 45 is a purely discretionary one and the Chief Controlling Revenue Authority cannot be compelled to exercise his power by any further proceedings.

Non-liability for loss of Instruments sent under Section 38- Section 46

Section 46 provides that where any instrument sent to the Collector under Section 38(2) is lost, destroyed during transmission, the person sending the same, shall not be liable for such loss, destruction or damage.

However, Section 38(2) provides that when any instrument is to be sent, the person from whose possession it came into the hands of the person impounding the same may require a copy thereof to be made at his expense and authenticated by the person impounding such instruments.

Power to Stamp in certain cases- Section 47

Under Section 47 when any bill exchange or promissory note chargeable with a duty not exceeding 10 naya paise is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in the manner provided in the Act, may pay the sum payable upon such bill or note and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid and such bill or note shall, so far as respects the duty, be deemed good and valid. However, nothing contained in this section shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

Recovery of Duties and Penalties- Section 48

Under Section 48, all duties penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person or by any other process used for the recovery of the arrears of land revenue. This section provides for the mode of realisation of duty or penalty or other sums not voluntarily paid.

ALLOWANCE AND REFUND- SECTION 49 TO 55

Allowance for Spoiled Stamps- Section 49

Section 49 deals with different circumstances in which refund would be admissible in respect of impressed stamps not used.

The section applies only to impressed stamps and not adhesive stamps.

Section 49 provides that subject to such rule as may be made by the State Government, as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in Section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:

Clause (a) of the section refers to cases where the stamp paper is spoiled before any document has been written thereon, or is spoiled in the course of writing and before execution:

(a) The stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person;

Clause (b) refers to cases where the document has been written out wholly or in part but not executed.

(b) The stamp on any document which is written out wholly or in part; but which is not signed or executed by any party thereto;

Clause (c) refers to bills of exchange payable otherwise than on demand and promissory notes, when these have not been accepted or made use of.

(c) In the case of bills of exchange payable otherwise than on demand or promissory notes:

(1) The stamp on any such bill of exchange signed by or on behalf of the drawer which has not been accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance provided that the paper on which any such stamp is impressed, does not bear any signature intended as or for the acceptance of any bill of exchange to be afterwards written thereon;

(2) The stamp on any promissory note signed by or in behalf of the maker which has not been made use of in any manner whatever or delivered out of his hands;

(3) The stamp used or intended to be used for any such bill of exchange or promissory note signed by, or on behalf of, the drawer thereof, but which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange may have been presented for acceptance or accepted or endorsed, or being a promissory note may have been delivered to the payee: provided that another completed and duly stamped bill of exchange or promissory note is produced identical in every particular, except in the correction of such omission or error as aforesaid, with the spoiled bill, or note;

Clause (d) deals with refunds after execution.

(d) The stamp used for an instrument executed by any party thereto which–

(1) Has been afterwards found to be absolutely void in law from the beginning;

(2) Has been afterwards found unfit, by reason of any error or mistake therein, for purpose originally intended;

(3) By reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to effect the intended transaction in the form proposed;

(4) For want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended;

(5) By reason of the refusal of any person to act under the same or to advance any money intended to be thereby secured or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;

(6) Becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument between the same parties and bearing a stamp of not less value;

(7) Is deficient in value and the transaction intended to be thereby effected has been effected by some other instrument between the same parties and bearing a stamp of not less value;

(8) is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is executed and duly stamped.

Provided that, in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up to be cancelled.

Time Limits- Section 50

Section 50 prescribes the time limit within which an application for relief in respect of impressed stamps spoiled, can be made; different time limits have been specified for the purpose, namely:

(1) in the cases mentioned in clause (d)(5) of Section 49, within two months of the date of the instrument;

(2) in the case of a stamped paper on which no instrument has been executed by any of the parties thereto, within six months after the stamp has been spoiled;

(3) in the case of a stamped paper in which an instrument has been executed by any of the parties thereto, within six months after the date of the instrument, or if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed:

Provided that –

(a) when the spoiled instrument has been for sufficient reasons sent out of India, the application may be made within six months after it has been received back in India.

(b) when, from unavoidable circumstances, any instrument for which another instrument has been substituted, cannot be given up to be cancelled within the aforesaid period, the application may be made within six months after the date of execution of the substituted instrument.

Unused Forms- Section 51

Section 51 of the Act enables the Chief Controlling Revenue Authority or the Collector if authorised by the Chief Controlling Revenue Authority, for such purpose to allow refunds in cases where refunds of stamps on printed forms used by bankers, incorporated companies/bodies corporate if required. Allowance may be made without limit of time, for stamped papers used for printed forms of instruments any bankers or by any incorporated company or other body corporate, if for any sufficient reasons such forms have ceased to be required by the said banker, company or body corporate: provided that the Chief Controlling Revenue Authority or the Collector, as the case may be, is satisfied that the duty in respect of such stamped papers has been duly paid.

Misused Stamps- Section 52

Section 52 deals with allowance for misused stamps and applies to both impressed and adhesive stamps in the following instances:

(a) When any person has inadvertently used, for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or a stamp of greater value than was necessary, or has inadvertently used any stamp for an instrument not chargeable with any duty; or

(b) When any stamp used for an instrument has been inadvertently rendered useless under Section 15, owing to such instrument having been written in contravention of the provisions of Section 13.

The Collector may, on application made within six months after the date of instrument or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if chargeable with duty, being restamped with the proper duty, cancel and allow as spoiled the stamp so misused or rendered useless.

Allowance for Spoiled or Misused Stamps (how to be made)- Section 53

Under Section 53, in any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof:

(a) other stamps of the same description and value; or

(b) if required and he thinks fit, stamps of any other description to the same amount in value; or

at his discretion, the same value in money, deducting ten naya paisa for each rupee or fraction of a rupee.

Allowance for Stamps not required for use- Section 53

Section 54 of the Act enables a person to obtain refund of the value of stamps purchased by him, if he has no immediate use thereof. Under this section, when any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall repay to such person the value of such stamp or stamps in money, deducting ten naya paise for each rupee or portion of a rupee, upon such person delivering up the same to be cancelled and proving to the Collector's satisfaction:

(a) that such stamp or stamps were purchased by such person with a bona fide intention to use them; and

(b) that he has paid the full price thereof; and

(c) that they were so purchased within the period of six months next preceding the date on which they were so delivered.

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor without any such deduction as aforesaid.

Allowance on renewal of certain Debentures - Section 55

Section 55 is intended to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture. As per this section, when any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture whichever shall be less:

Provided that the original debenture is produced before the Collector and cancelled by him in such manner as the State Government may direct.

A debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes:

(a) the issue of two or more debentures in place of one original debenture, the total amount secured being the same;

(b) the issue of one debenture in place of two or more original debentures, the total amount secured being the same;

(c) the substitution of the name of the holder at the time of renewal for the name of the original holder; and

(d) the alteration of the rate of interest of the date of payment hereof.

REFERENCE AND REVISION- SECTION 56 TO 61

Sections 56 to 61 deal with Reference and Revision. Section 56 provides that the powers exercisable by a Collector under Chapter IV and V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority. Further, if any Collector, acting under Sections 31, 40 or 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority [Section 56(2)].

Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

As per Section 57(1), the Chief Controlling Revenue Authority may state any case referred to it under Section 56(2) or otherwise coming to its notice, and refer such case, with its own opinion thereon to the High Court and the same shall be decided by not less than three Judges of the High Court and the majority decision shall prevail.

According to Section 58, if the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the court may refer the case back to the Revenue Authority for further feed back. The High Court shall decide the questions raised and give its judgment to the Authority who shall dispose of the case as per the judgment.

As per Section 60, any subordinate Court can also refer such case to the High Court like the Revenue Authority but should be through proper channel. In Section 61(1) of the Act it is provided that a Court may take into consideration on its own motion or on application of the Collector, an order of the lower Court admitting the instrument as duly stamped or as not requiring stamp duty or on payment of duty and penalty. According to sub-section 2 of Section 61, if such Court is not in agreement with the stand of the lower Court, it may require that the instrument be produced before it and may even impound the same if necessary. While doing so, the Court shall send a copy of its order to the Collector and to the office/Court from which such instrument has been received. [Section 61(3)]

PROSECUTION

As per Section 61(4), the Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower Court as to the instrument shall be valid except for the purposes of prosecution in this respect.

OFFENCES AND PENALTIES

Sections 62 to 72 deal with penalties for offences. The provisions are as under:

Penalty for executing, etc., instrument not duly stamped

As per Section 62(1), any person

(a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped; or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or

(c) voting or attempting to vote under any proxy not duly stamped shall, for every such offence, shall be punishable with fine which may extend to five hundred rupees.

Provided that, when any penalty has been paid in respect of any instrument under Sections 35, 40 or 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty. In such a case the Collector is to make an enquiry and to give an opportunity to the accused to pay. In such cases the instrument is (i) chargeable with duty, and (ii) there is a dishonest intention not to pay the duty.

Sub-section (2) of Section 62, provides that if a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, its managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.

Penalty for failure to comply with provisions of section 9A

According to section 62A(1), Any person who:

- being required under section 9A(1) to collect duty, fails to collect the same; or
- being required under section 9A(4) to transfer the duty to the State Government within fifteen days of the expiry of the time specified therein, fails to transfer within such time,

shall be punishable with fine which shall not be less than one lakh rupees, but which may extend up to one per cent. of the collection or transfer so defaulted.

According to section 62A(2), Any person who:

- being required under section 9A(5) to submit details of transactions to the Government, fails to submit the same; or
- submits a document or makes a declaration which is false or which such person knows or believes to be false,

shall be punishable with fine of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

Penalty for failure to cancel adhesive stamp

Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees (Section 63). The criminal intention is necessary for an offence under this Section.

Penalty for omission to comply with provisions of section 27

As per Section 64, any person who, with intent to defraud the Government

(a) executes any instrument in which all the facts and circumstances required by Section 27 to be set forth in such instrument are not fully and truly set forth; or

(b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or

(c) does any other Act calculated to deprive the Government of any duty or penalty under this Act;

shall be punishable with fine which may extend to five thousand rupees.

Here also, an intention to evade payment of proper stamp duty or intention to defraud the Government of its stamp revenue is necessary.

Penalty for refusal to give receipt, and for devices to evade duty on receipts.

Any person who (a) being required under Section 30 to give a receipt, refuses or neglects to give the same; or (b) with intent to defraud the Government of any duty, upon a payment of money or delivery of property exceeding twenty rupees in amount or value, gives a receipt for amount or value not exceeding twenty rupees, or separates or divides the money or property paid or delivered shall be punishable with fine which may extend to one hundred rupees (Section 65). To constitute an offence under this section, an intention to defraud the Government is necessary.

Penalty for not making out policy or making one not duly stamped

As per Section 66, any person shall be punishable with fine which may extend to Rs. 200/- if he –

- receives, or takes credit for any premium or consideration for any contract of insurance and does not, within one month after receiving or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance; or
- makes, executes or delivers out any policy which is not duly stamped or pays or allows in account, or agees to pay or to allow in account, any money upon, or in respect of, any such policy.

Penalty for not drawing full number of bills or marine policies purporting to be in set

As per Section 67, if any person drawing or executing a bill of exchange (payable otherwise than on demand) or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees.

Penalty for post-dating bills, and for other devices to defraud the revenue

Any person who, (a) with intent to defraud the Government, of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made; or (b) knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note; or in any manner negotiates the same; (c) with the like intent, practices or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force; shall be punishable with fine which may extend to one thousand rupees. Intention to defraud is an essential ingredient for offence under Section 68.

Penalty for breach of rule relating to sale of stamps and for unauthorised sale

If any person appointed to sell stamps who disobeys any rule made under Section 74, and any person not so appointed who sells or offers for sale any stamp other than a ten naya paise or five naya paise adhesive stamp shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both (section 69). Before instituting criminal proceedings under this section against any person, sanction of the Collector must be obtained. Otherwise, the proceedings will be vitiated. A criminal court having jurisdiction to try offences under Bharatiya Nagarik Suraksha Sanhita can try such offences.

Taking Cognizance

(a) No prosecution in respect of any offence punishable under this Act or any Act hereby repealed, shall be instituted without the sanction of the Collector or such other officer as the State Government generally or the Collector specially, authorises in that behalf.

(b) The Chief Controlling Revenue Authority, or any officer generally or specially authorised by it in this behalf, may stay any such prosecution or compound any such offence.

(c) The amount of any such composition shall be recoverable in the manner provided by Section 48.

A Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act (Section 71).

Every such offence committed in respect of any instrument may be tried in any district or presidency town in which instrument is found as well as in any district or presidency town in which such offence might be tried under the Code of Criminal Procedure for the time being in force (Section 72).

Supplemental Provisions

Chapter VIII, containing Sections 73 to 78 deals with supplemental provisions regarding inspection of relevant registers, books, records, etc; to enter the premises for that purpose, powers of Government to frame rules for the sale and supply of stamps and to make rules generally to carry out the provisions of the Act.

Section 73A of the Act provides for the Power of Central Government to make rules. The rules making powers of Central Government are enumerated below:

1. The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of Part AA of Chapter II which deals with the liability of instruments of transaction in stock exchange and depositories to duty.
2. The manner of collection of stamp-duty on behalf of the State Government by the stock exchange or the clearing corporation authorised by it, from its buyer under clause (a) of sub-section (1) of section 9A.
3. The manner of collection of stamp-duty on behalf of the State Government by the depository from the transferor under clause (b) of sub-section (1) of section 9A
4. The manner of collection of stamp-duty on behalf of the State Government by the depository from the issuer under clause (c) of sub-section (1) of section 9A
5. The manner of transfer of stamp-duty to the State Government under sub-section (4) of section 9A
6. Any other matter which has to be, or may be, provided by rules

Section 73B of the Act provides Power of the Central Government to issue directions and to authorise certain authorities to issue instructions, etc.

1. The Central Government may issue directions relating to such matters and subject to such conditions, as it deems necessary;

2. The Central Government may, in writing, authorise the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 or the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 to issue instructions, circulars or guidelines, for carrying out the provisions of Part AA (liability of instruments of transaction in stock exchange and depositories to duty) of Chapter II and the rules made there under.

Section 77A provides that all stamps in denominations of annas four or multiples thereof shall be deemed to be stamps of the value of 25 naya paise or (as the case may be), multiples thereof and shall accordingly be valid for all the purposes of the Act. From this it can be inferred that whatever the stamp duty is mentioned to be annas in the first Schedule; the instrument concerned has to be treated as leviable with duty of 25 naye paise or in multiples thereof as the case may be.

Rules to be laid before the parliament

Every rule made by the Central Government under Indian Stamp Act, 1899 shall be laid 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. If both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

SCHEDULE

The Schedule to the Stamp Act prescribes the rates of stamp duties on instruments. Articles 13, 27, 37, 47, 49, 53 and 62(a) of the Schedule relate to instruments, the rates of duties on which are prescribed by the Central Legislature and have been subject to legislative amendments by that Legislature (See Entry 91 of List I). The other articles relate to instruments in respect of which the Central Legislature has lost its power to regulate rates of duties (except for Union Territories) since the passing of the Government of India Act, 1935. With respect to these instruments, the rates mentioned are fixed by the State Legislatures (See Entry 63 of List II).

CONCEPT OF E-STAMPING

E-STAMP

E-stamping is a computer based application and a secured electronic way of stamping documents. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. To reduce the instances of counterfeits and errors, government introduced the e-stamping facility in 2013. The Stock Holding Corporation of India Limited (SHCIL) is the Central Record Keeping Agency (CRA).

Through modernisation, there has been an introduction of E-stamp or as known as an electronic stamp. E-Stamping is a computer-based procedure and a secure manner for the state to pay non-judicial stamping duties. The prevailing system of physical stamp paper / franking is being replaced by E-Stamping system. The benefits of e-Stamping are as under :

Benefits of E-stamp

1. E-stamps are less time-consuming;
2. They are very easily accessible;
3. They are cost saving;
4. e-Stamp Certificate generated is tamper proof;

5. e-Stamp Certificate generated has a Unique Identification Number;
6. Easy accessibility;
7. Security;
8. Cost savings and User friendly.

Government of India, Ministry of Finance, Department of Economic Affairs appointed Stock Holding Corporation of India Limited (SHCIL) to act as Central Record Keeping Agency (CRA).

Verification of e-stamping

An e-Stamp can be verified online by clicking on verify e-Stamp certificate and entering the required details i.e

1. State
2. Certificate Number (UIN)
3. Stamp Duty Type (Description of Document)
4. Certificate Issue Date
5. 6 character alphanumeric string

UIN is a Unique system generated number mentioned on the e-Stamp Certificate. Anybody, having the Unique Identification Number, can check the authenticity of the Certificate through www.shcilestamp.com.

Authorised Collection Center (ACC)

ACC means Authorised Collection Center (ACC). Its an agent appointed by SHCIL. ACC is the intermediary between the CRA and Stamp Duty payer. Schedule Banks and Post Offices can become ACCs by completing the registration process.

Mode of Payment of Stamp Duty

The stamp duty may be paid through the following modes:

1. Cash
2. Cheque
3. Demand Draft
4. Pay Order
5. RTGS
6. NEFT
7. Account to Account transfer.

PRACTICAL ASPECTS WITH REGARD TO THE CALCULATION AND PAYMENT OF STAMP DUTY

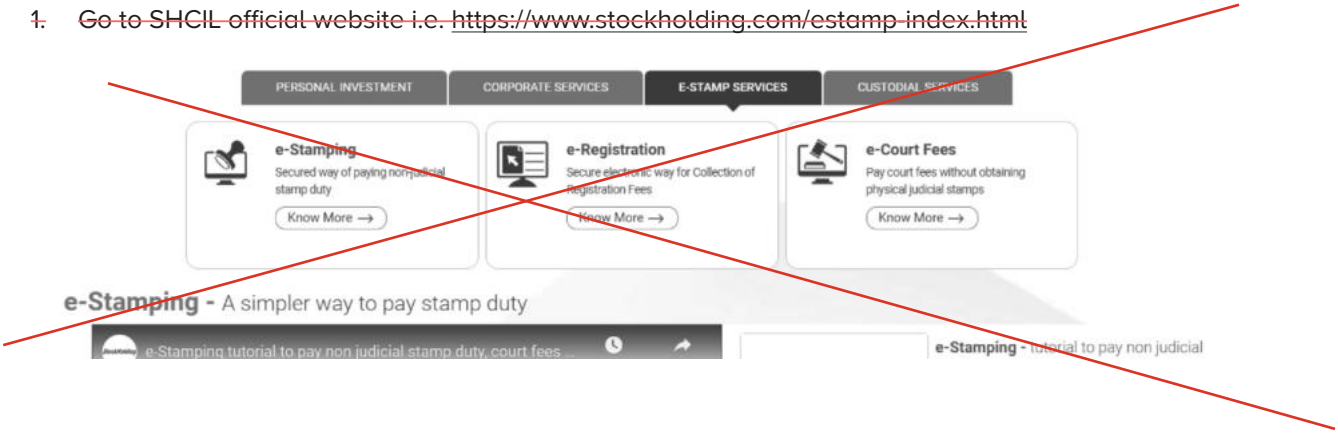
Through this example, we will understand the process of making the payment related to the issue of shares in the state of NCT of Delhi.

As we know that the Stock Holding Corporation of India Limited is an Indian custodian and depository participant, based in Mumbai, Maharashtra. SHCIL was established in 1986 as a public limited company and is a subsidiary of IFCI. It is also responsible for e-stamping system around India.

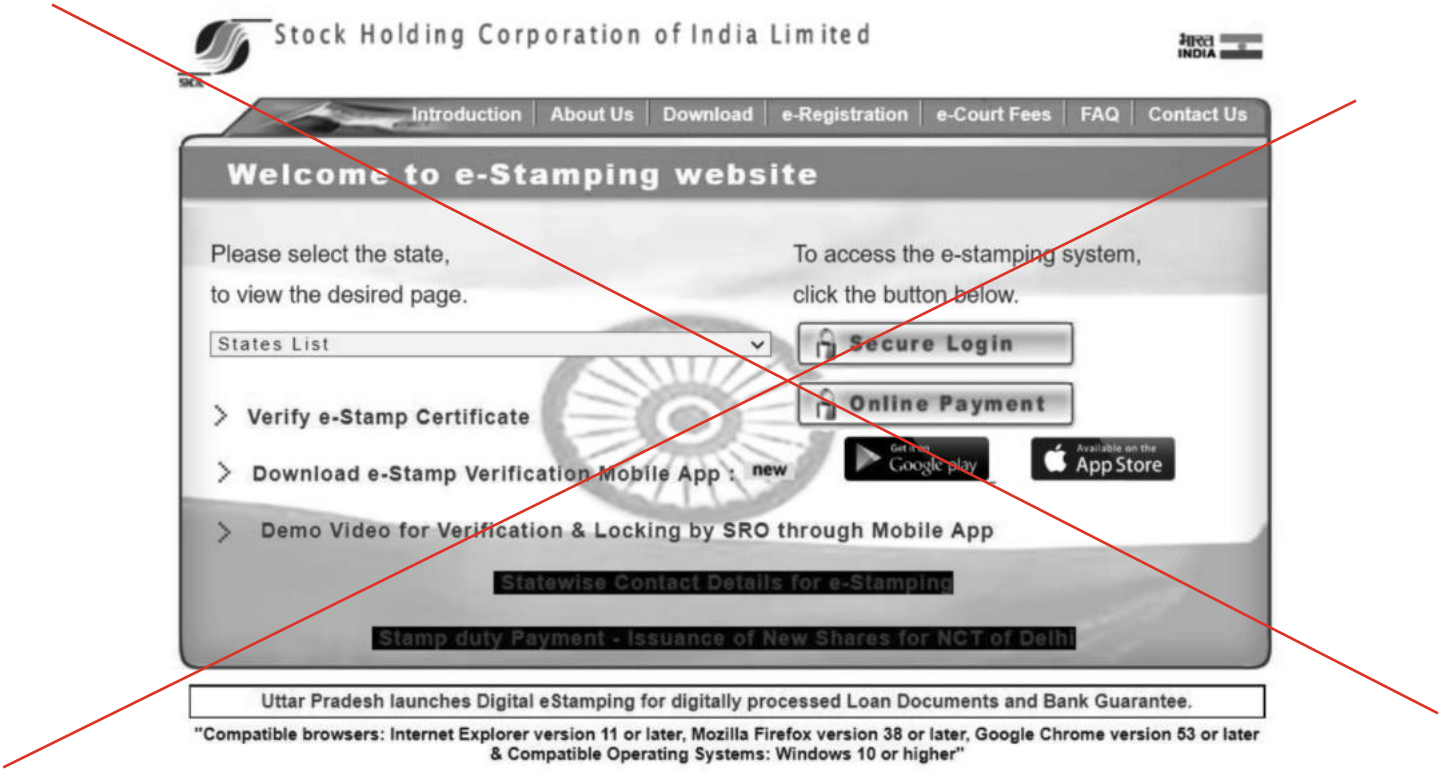
Example On 01.06.2022, XYZ Limited issued 1,00,000 equity shares of INR 10 each to its existing shareholders by way of Right Issue. The Company has filed the eForm PAS-3 for allotment of shares. Now, in compliance to the Indian Stamp Act, the Company is required to pay the stamp duty @ 0.005% on the consideration i.e. INR 10,00,000. (1,00,000 equity shares * 10 face value). The amount of Stamp duty will be INR 50/- only.

HOW TO PAY

1. Go to SHCIL official website i.e. https://www.stockholding.com/estamp-index.html

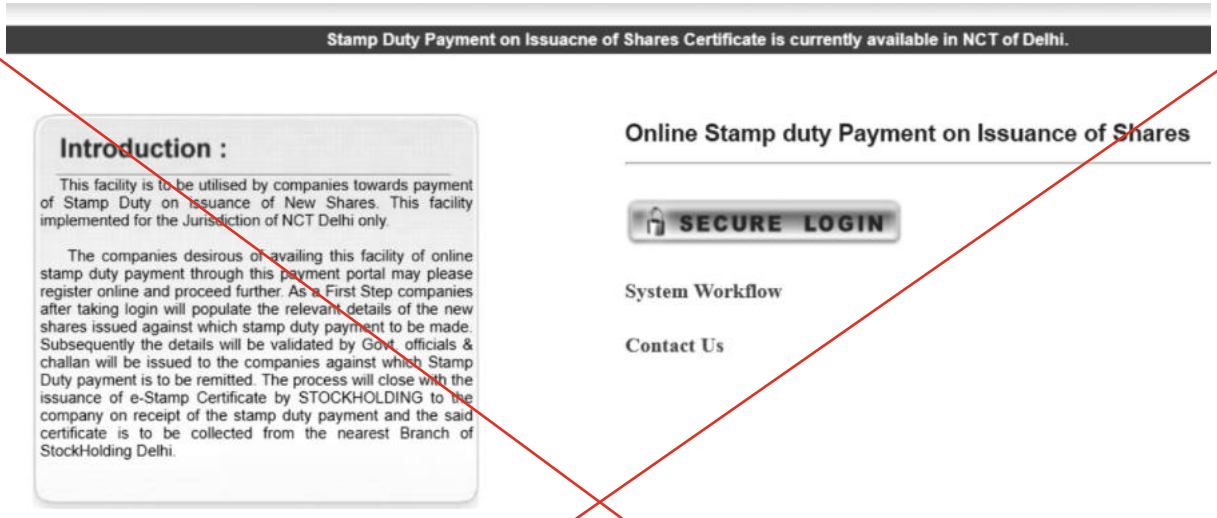


2. Click on e-Stamping
3. A separate web page will be opened

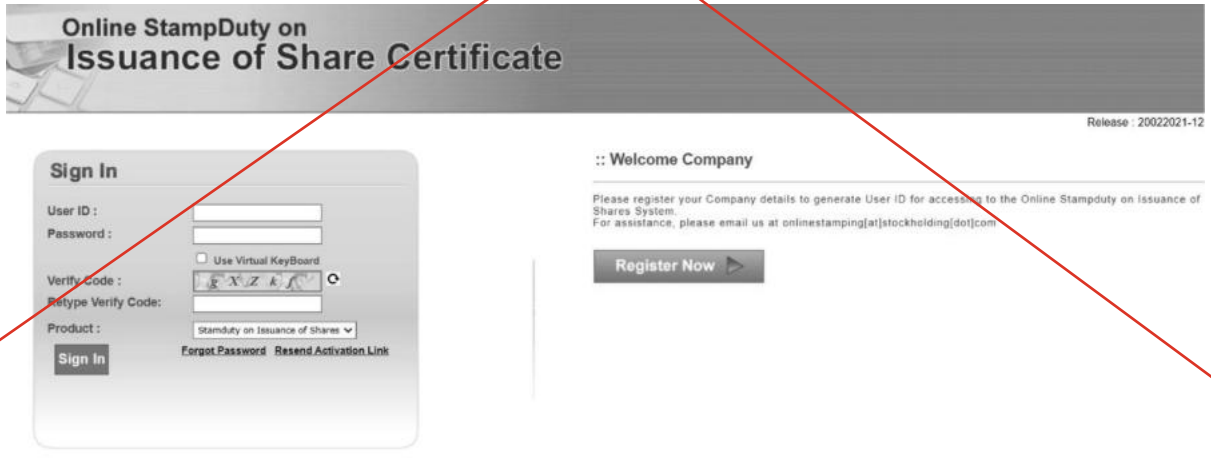


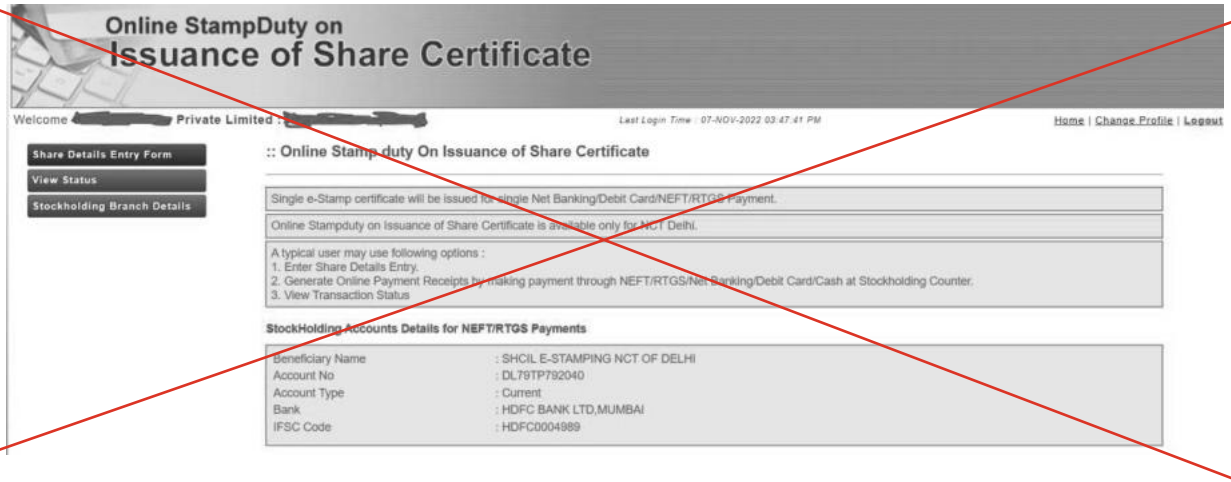
4. Click on **Stamp duty Payment - Issuance of New Shares for NCT of Delhi**

5. After clicking, a separate web page will be opened like this



6. After that, click on register now





7. After signing in, the above page shall be displayed.

8. Click on Share Details Entry Form.

9. Fill the form and attach the files attachments in PDF.
10. After filling the form and attaching all the files, Click on Submit button.
11. Your form will be submitted.

Notes:

1. You will not be demanded for payment unless the form got approved from SDM office.
2. Once the form is approved, you need to make the payment electronically and generate the challan.
3. Print the challan after payment and visit to either SDM office, Sham Nath Marg, Delhi or any nearest office of SHCIL.
4. They will issue a Stamp paper equivalent to the amount of stamp duty.
5. Submit the stamp paper to the SDM office, Sham Nath Marg, Delhi.
6. The SDM office will provide you the certificate of payment of stamp duty.

The certificate issued by the department will be under the seal of the SDM. Nowadays, the certificate is issue electronically.

ADJUDICATION AS TO STAMPS – SECTION 31 - 32

Chapter III, consisting of Sections 31 and 32, deals with adjudication by the Collector, as to the proper stamp that an instrument has to bear. The provisions of this Chapter are intended to assist any party who is in doubt as to the proper stamp to be affixed on an instrument but is nevertheless anxious to stamp the instrument. When the document or any draft of the document is produced to the Collector he shall determine the proper stamp duty on payment of a nominal fee. The relevant provisions of the Act and matters in regard to the performance of this function by the Collector are discussed below.

Adjudication as to proper Stamp – Section 31

Under Section 31(1) when

(i) an instrument, (whether executed or not and whether previously stamped or not), is brought to the Collector, and

(ii) the person bringing it applies to have the opinion of that officer as to the duty if any, with which it is chargeable, and

(iii) pays a fee (not exceeding Rs. 5 and not less than 50 naya paise as the Collector may direct),

the Collector shall determine the duty if any with which in his judgment, the instrument is chargeable.

Under Section 31 (2), the Collector may require to be furnished with an abstract of the instrument and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of duty with which it is chargeable, are fully and truly set-forth therein, and may refuse to proceed upon accordingly.

However, no evidence furnished pursuant to this section shall be used against any person in any civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable. Every person by whom such evidence is furnished shall, on payment of the full duty, be relieved from any penalty which he may have incurred under the Act by reason of the omission to state truly in such instrument any of the facts or circumstances.

The duty of the Collector under Section 31 is only to determine the stamp duty payable upon the instrument. He is not authorised to impound the instrument or to impose any penalty if he comes to the conclusion that the

instrument is not sufficiently stamped. Where a person has obtained the opinion of the Collector on any draft instrument, and thereafter does not want to proceed any further to execute the instrument, no consequences will follow and, after determination of the duty, the Collector becomes functus officio. But where the party wants to proceed with effectuating the instrument or using it for the purposes of evidence, he has to pay the duty determined by the Collector and obtain from the Collector under Section 32, an endorsement that the full duty with which the instrument is chargeable has been paid. Normally, the determination by the Collector of the duty payable on an instrument under Section 31 is final.

Certificate by Collector – Section 32

Section 32 deals with certificate by the Collector of Stamps as well as the time limit within which such a certificate can be given by the Collector of Stamps.

Sub-section (1) of the section provides that when an instrument is brought to the Collector with an application for having an opinion as to the proper duty chargeable thereon, and

- the Collector is of the opinion that the instrument is already fully stamped or
- the duty determined by the Collector under Section 31 or such a sum as (with the duty already paid in respect of the instrument), is equal to the duty so determined, has been paid,

the Collector shall certify by endorsement on such instrument, that the full duty (stating the amount) with which it is chargeable has been paid.

When the Collector is of opinion that any such instrument brought to him is not chargeable with duty, he shall certify in the same manner that such instrument is not so chargeable.

Under Section 32(3), any instrument upon which an endorsement has been made by the Collector shall be deemed to be duly stamped or not chargeable with duty as the case may be, and if chargeable with duty, shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally duly stamped.

The proviso to Section 32(3) categorically provides that the Collector shall not make any endorsement on any instrument under Section 32, where –

(a) any instrument is executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;

(b) any instrument is executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or

(c) any instrument chargeable with a duty not exceeding 10 naya paise or any bill of exchange or promissory note, is brought to him after the drawing or execution thereof, on paper not duly stamped.

In effect, the proviso to Section 32(3) lays down the time limit within which the Collector of Stamps can make any endorsement on any instrument brought to him, for his opinion as to the duty chargeable thereon.

CASE LAW

Life Insurance Corporation of India v. The State of Rajasthan and Ors., 2024 INSC 358, Supreme Court on 30.04.2024

The issue for consideration in this case was whether the state of Rajasthan has the power and jurisdiction to levy and collect stamp duty on policies of insurance issued within the state.

The Hon'ble Supreme Court rejected the contention of the Life Insurance Corporation, the appellant, regarding the lack of legislative competence of the state and have also affirmed the power to levy and collect stamp duty under the Rajasthan Stamp Law Adaptation) Act, 1952 and the rules made thereunder. While dismissing the appeal, the Apex court however set aside certain findings of the High Court and granted relief to the appellant in the facts and circumstances of the case.

The Supreme Court *inter alia* held that:

I. The preliminary issue relating to the applicability of the relevant state law, i.e., the 1952 Act or the 1998 Act, is answered by holding that the Rajasthan Stamp Law (Adaption) Act, 1952 applies to the present case.

II. We hold that the state legislature has the legislative competence to impose and collect stamp duty on policies of insurance under Entry 44 of List III, as per the rate prescribed by the Parliament under Entry 91 of List I.

III. We hold that for the execution of insurance policies within the state of Rajasthan, the appellant is bound to purchase India Insurance Stamps and pay the stamp duty to the state of Rajasthan.

LESSON ROUND-UP

- The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments.
- Entry 91 of the Union List, gives power to Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. Likewise, entry 63 of the State List confers on the States power to prescribe the rates of stamp duties on other instruments.
- Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule.
- In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments.
- Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies.
- The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution. Instrument executed out of India can be stamped within three months after it is first received in India. In some cases, stamp duty is payable on ad valorem basis, i.e. on the basis of value of property, etc. In such cases, value is decided on prescribed basis.
- An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorized to receive evidence. However, the document can be accepted as evidence in criminal court. Duly stamped means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India.

- If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid.
- If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a 'duplicate certificate' has been issued. If securities are purchased or sold under depository scheme, no stamp duty is payable.
- A levy of a penalty or payment in respect of an unstamped or insufficiently stamped document does not necessarily exempt a person from liability for prosecution for such offence. Revenue Authority has been authorized to refund the penalty in excess of duty payable on instrument in certain cases.
- The Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower court as to the instrument shall be valid except for the purposes of prosecution in this respect.
- Provisions have been incorporated in the Act to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture.

GLOSSARY

Allotment: It means a list containing details of allotment of the securities intimated by the issuer to the depository under the Depositories Act, 1996.

Chargeable: Chargeable means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in 2 India when such instrument was executed or, where several persons executed the instrument at different times, first executed.

Clearance List: Clearance List means a list of transactions of sale and purchase relating to contracts traded on the stock exchanges submitted to a clearing corporation in accordance with the law for the time being in force in this behalf.

Clearing Corporation: Clearing Corporation means an entity established to undertake the activity of clearing and settlement of transactions in securities or other instruments and includes a clearing house of a recognised stock exchange.

Issue: Issue means any person making an issue of securities.

Paper: Paper includes vellum, parchment or any other material on which an instrument may be written.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define the expression "bond".
2. D executes an agreement in favour of C, (with witnesses) by which he promises to repay a loan taken by him from C. Discuss whether this is an agreement, a promissory note or a bond.

3. Is an agreement for the sale of goods "conveyance", for the purposes of the Stamp Act? Discuss.
4. A document creates a lease of property X and also grants a gift of property Y. How is the stamp duty to be calculated, on this document?
5. Can Parliament increase or, decrease, the stamp duty on an agreement?
6. Explain the process of payment of Stamp Duty.

LIST OF FURTHER READINGS

- Bare Act of Indian Stamp Act, 1899
- Articles by the professionals and Firms
- The Indian Stamp Act. by K Krishnamurthy.

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/15510/1/a1899-2%20.pdf
- https://www.stockholding.com/estamp-index.html
- https://www.shcilestamp.com/FAQ.html

Law relating to Registration of Documents

Lesson 13

KEY CONCEPTS

■ Compulsory Registrable ■ Optionally Registrable ■ Presenting of Documents for Registration ■ Deposit of Wills ■ Effect of Non- registration ■ Certificate of Registration ■ Appeal to Registrar ■ Instrument ■ Moveable Property ■ Immoveable Property ■ Doctrine of Election ■ Doctrine of Part- Performance ■ Doctrine of Lis Pendens

Learning Objectives

To understand:

- Classes of Documents
- Consequences of Non-registration
- Procedure of Registration of Documents
- Time and place of Registration
- Important provisions relating to Transfer of Property
- Rule against perpetuity
- Doctrine of Lis Pendens
- Other important doctrines relating to Transfer of Property Act
- Concept of Lease and Mortgage

Lesson Outline

- Introduction
- Classes of Documents
- Time and Place of registration
- Other important provisions
- Consequesces of non-registration of Documents required to be registered Compulsorily
- Certain registered documents relating to land which will take effect against unregistered documents
- Miscellaneous provisions
- Procedure on admission to Registration
- Procedure after Registration of Documents relating to Land
- Precautions/ Prerequisites for Registration
- Refusal to register by the Sub-registrar
- Procedure before the Registrar
- Exemption of certain documents executed by or in favour of Government

- Provisions of Transfer of Property Act, 1882 and Registration of Documents
- Important Definitions
- Meaning of Transfer of Property
- Moveable and Immoveable Property
- Subject matter of Transfer
- Formalities of Transfer
- Restraint on transfers or rule against Inalienability
- Who can Transfer the Property?
- Properties which cannot be transferred
- Transfer for benefit of Unborn Person
- Rule against Perpetuity
- Accumulation of Income
- Doctrine of *lis pendens*
- Doctrine of Part-performance
- Provisions relating to Specific Transfers
- Sale
- Exchange
- Mortgage
- Charge
- Lease
- Gift
- Actionable Claims
- Non-actionable Claims
- Easement Right
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Registration Act, 1908
- The Transfer of Property Act, 1882

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:

1. Compulsory Registerable Documents
2. Optional Registerable Documents

Documents which are Compulsorily Registrable – Section 17

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:

(a) 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]

Example

A gifted a flat in New Delhi to B through a Gift Deed. This registration of the deed is compulsory.

Illustration 1 : A gifts his IMMOVABLE property to B and did not register the gift deed and died. The deed of gift will not have effect and cannot be enforceable under law because its registration was compulsory.

Illustration 2 : A gifts his MOVABLE property to B and did not register the gift deed and died. The deed of gift is fully enforceable under law because its registration was optional.

(b) 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.

Example

A sold a plot in Mumbai to B through a Sale Deed for Rs. 25 Lakh. The registration of this sale deed is compulsory.

(c) 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.

Example

B made a payment of Rs. 25 Lakh for purchase of a land in Mumbai to A. The document made for payment of such money is compulsory registrable.

Illustration

In a suit by *A* against *B* for lands, *B* pleads adverse possession. *B* in defence, proves *B's* acknowledgement (in a petition to the Collector) that the gift is in her favour. The petition is not admissible and does not require registration [Mulla, Registration Act (1998), page 69; *Bageshwari* v. *Jagarnath Kuare*, AIR 1932 PC 55].

(d) 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;

Example

A Lease Deed for a premises for 1 year or more is compulsorily registrable.

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.

Question : For the purpose of Section 17(1)(d), both conditions i.e. LEASE for MORE THAN ONE YEAR AND RESERVING a yearly rent, MUST be MET

(a) TRUE

(b) FALSE

Answer- (a)

(e) 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.

Example

A sold a plot in Mumbai to B by virtue of court's order, through a Sale Deed for Rs. 25 Lakhs. The registration of this sale deed is compulsory.

CASE LAWS

Delay in registration of a gift does not postpone its operation. Section 123, Transfer of Property Act, 1882 merely requires that donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration *(Kalyan Sundaram Pillai v. Karuppa Mopanar, AIR 1927 PC 42; Venkata Rama Reddy v. Pillai Rama Reddy, AIR 1923 Mad. 282).*

A document which is plainly intended to be operative immediately is non-testamentary *(Umrao Singh v. Lachhman, (1911) 1 LR 33 All 344, 355 (PC); Mulla, Registration Act (1998), page 40).*

Description of a document as a will does not make it a will *(Tirugnannpal v. Poonamma, AIR 1921 PC 89).*

The expressions "create", "assign", "limit" or "extinguish" imply a definite change of legal relation to a property by an expression of will embodied in the document. It implies a declaration of will.

The expression "declare" (as used in Section 17) has also to be interpreted on the same lines. It does not mean a mere declaration of fact, but connotes a writing effectuating a change of relation *(Bageshwari Charan v. Jagarnath Kuare, AIR 1932 PC 55; Mulla, Registration Act (1998), page 41).*

Whether an instrument requires registration under Section 17(1)(b) depends upon whether it operates or purports to bring about a change in legal relation in respect of some property. For purposes of Section 17(1)

A distinction should be drawn between

(i) a right in or to property and

(ii) such rights as are merely incidental to the ownership of property and are really in the nature of powers or options which every owner is free to exercise in dealing with his property in a particular way. The

latter may be described as rights in relation to the property, but strictly speaking, they are not rights in or to property. Generally, when a right in or to property is assigned, created, declared, limited or extinguished, then there must be a definite change of legal relation to the property.

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; or

(ii) any instrument relating to shares in Joint Stock Company; or

(iii) any debentures issued by any such Company; or

(iv) any endorsement upon or transfer of any debenture; or

(v) any document other than the documents specified under clause (c) 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; or

(vii) any grant of immovable property by the Government; or

(viii) any instrument of partition made by Revenue-officer; or

(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; or

(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; or

(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; or

(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; or

(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;

Example: A Lease Deed for a premises for less than 1 year is optionally registrable.

(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.

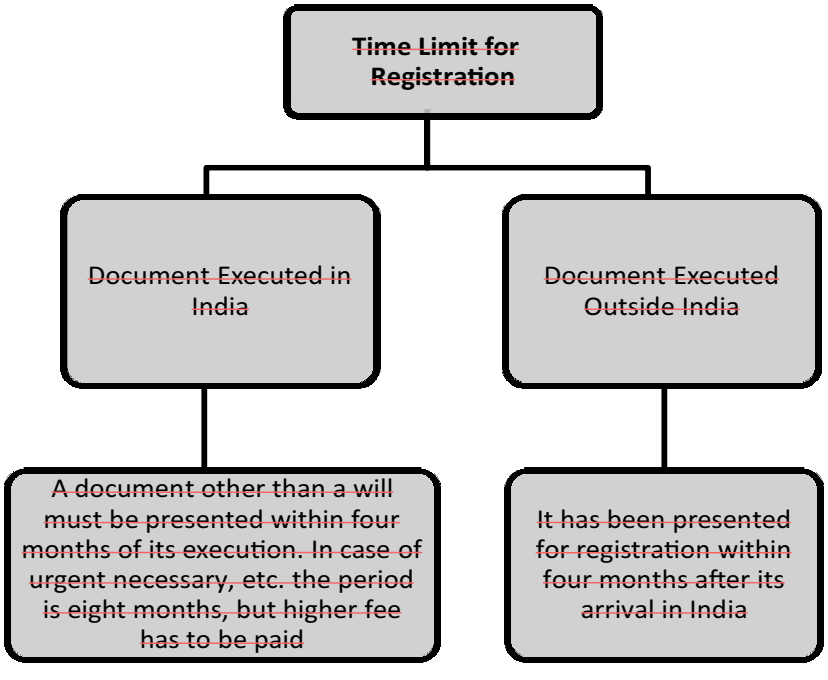
(e) Instruments (other than wills) which purport or operate to create declare, assign, limit or extinguish any right, title or interest to or in movable property;

Example: A sold his car to B. This sale deed is optionally registrable.

(f) Wills; and

(g) Other documents not required by Section 17 to be registered.

TIME AND PLACE OF REGISTRATION - SECTION 23 – 31



CASE LAWS

A document other than a will must be presented within four months of its execution. 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. These limits are mandatory (Ram *Singh* v. *Jasmer Singh*, AIR 1963 Punj. 100).

If delay is due to act of Court, it has to be disregarded (*Raj Kumar v. Tarapa*, AIR 1987 SC 2195).

If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied (*Mahaliram v. Upendra Nath, AIR 1960 Pat 470*).

Proviso to Section 23 of Registration Act prescribes a period of four months for presenting a copy of a decree or order. It is counted from the date of the decree.

OTHER IMPORTANT PROVISIONS

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)*.

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*]

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.

A document executed outside India is not valid unless it is registered in India (*Nainsukhdas v. Gowardhandas, AIR 1948 Nag. 110*).

Incidentally, Section 26 indicates that the Act applies to ex-India documents relating to property in India. (Mulla, page 166).

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(c).

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).

Example

A buys an immovable property situated in Faridabad, Haryana by way of sale deed. A is liable to register the sale deed in Sub-Registrar located in the Faridabad District of Haryana.

There is nothing in law to prohibit a person conveying property in one district and residing and owing 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:

(i) either in the office of the Sub-Registrar in whose sub-district the document was executed, or

(ii) 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:

(a) 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, or

(b) the representative or assign of such person, or

(c) the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in the manner hereinafter mentioned.

CASE LAW

It is immaterial whether the registration is compulsory or optional; but, if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void (*Kishore Chandra Singh v. Ganesh Prashad Bhagat, AIR 1954 SC 316*). However, Sections 31, 88 and 89 provide exceptions to this requirement.

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 authorised 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.

Register document when operative

(a) A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. (Section 47)

(b) As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one (K.J. Nathan v. S.V. Maruthi Reddy, AIR 1965 SC 430; Mulla page 207).

In effect, [1]Section 47 means that a document operates from the date of execution (as between the parties). [Mulla, Registration Act (1998), pages 207, 209]

Registered document relating to property when to take effect against oral Agreement

Registered documents relating to any property whether movable or immovable shall take effect against any oral agreements or declaration relating to such property unless followed by delivery of possession which constitutes a valid transfer under any law for the time being in force.

Generally, priority to rights accorded by different transfers is governed by the principles embodied in the maxim qui prior tempore potior est jure that is "he who is first in time is better in law". But this general rule is subject to exceptions created by Sections 48 and 50. Section 48 refers to the priority of the registered agreements over oral agreements and Section 50 refers to the priority of registered agreements over non-registered agreements. (Section 48)

Effect of prior notice

In spite of the explicit wording of Section 48, it has for long time been held, that a subsequent registered deed will not prevail over a prior unregistered deed or a prior oral transaction if the subsequent transferee had notice of the prior transaction. [Mulla Registration Act (1998), pages 215-216]

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:

(a) affect any immovable property comprised therein; or

(b) confer any power to adopt; or

(c) 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.

Example

A buys a land for Rs. 2.50 Crore from B in Delhi. A and B executed the sale deed but didn't register it from the Sub-Registrar. After entering into sale deed, it came into knowledge of A that some dispute was pending in the land. Now, A cannot knock the door of court as the sale deed is not registered. This is because of such document is dealt by Section 17 which contemplates mandatory registration. Afterwards, A cannot give excuse that he was unaware of the law because ignorance of law is no excuse.

However, after payment of the duty he may be allowed subject to the compliance of necessary provisions

1. Section 47 does not affect rules of personal law requiring possession. [Mulla (1998), page 209]

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.

In *K. Narasimha Rao* v. *Sai Vishnu*, AIR 2006 NOC (A.P.) p. 80, it has been held that: It is settled legal principle that an unstamped instrument is not at all admissible in evidence even for collateral purpose. But an unregistered instrument originally unstamped, if duly stamped subsequently can be admitted in evidence even though it continues to be unregistered for collateral purpose but actual terms of transaction cannot be looked into. In instant case, however settlement deed in question produced by defendant was not only unregistered but also insufficiently stamped. That apart on an objection raised by plaintiff, Court had already passed an order directing impounding of document, which was never complied with by defendant. In such circumstances, document in question, which still remained insufficiently stamped could not be admitted in evidence even for collateral purpose. Application filed by defendant seeking to admit said document for collateral purpose is liable to be dismissed.

CERTAIN REGISTERED DOCUMENTS RELATING TO LAND WHICH WILL TAKE EFFECT AGAINST UNREGISTERED DOCUMENTS

Section 50 provides as under:

(1) 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.

(2) 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

(5) 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".

(2) 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.

(3) 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)

PROCEDURE ON ADMISSION TO REGISTRATION

Particulars to be endorsed on documents admitted to registration:

(1) On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely:

(a) the signature and addition of every person admitting the execution of the document and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration, whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal. (Sections 58 to 62)

Certificate of Registration

(a) After the provisions of Sections 34, 35, 58 and 59 as applicable to the document are complied with, the registering officer shall endorse thereon a certificate containing the word "registered" along with the number, and page of the book in which the document has been copied. The certificate shall be signed, sealed and dated by the registering officer.

(b) The certificate of registration in respect of a document is prima facie an evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law. (Section 60) [See Mulla (1998), pages 296, 297]

PROCEDURE AFTER REGISTRATION OF DOCUMENTS RELATING TO LAND

Forwarding Memorandum to Sub-Registrars	On registering any non-testamentary document relating to immovable property the Registrar shall forward a memorandum of such document to each Sub-Registrar subordinate to himself in whose sub- district any part of the property is situate.

Forwarding copy to other registrars	The Registrar shall also forward a copy of such document, together with a copy of map or plan (if any) mentioned in Section 21 to every Registrar in whose district any part of such property is situate.
Registrar shall file in Book No. 1	Such Registrar, on receiving any such copy, shall file it in his Book No. 1 and shall also send a memorandum of the copy to the Sub-Registrar subordinate to him within whose sub-district any part of the property is situate.
Sub- Registrar shall file in Book No. 1	Every Sub-Registrar receiving any memorandum under this Section shall file it in his Book No. 1. (Sections 64 to 65)

PRECAUTIONS/ PREREQUISITES FOR REGISTRATION

Following are some of the pre-requisits for registration of document:

- **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.
- **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.
- **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.
- **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.,

- **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.
- **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.
- **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.
- **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.
- **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.
- **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.
- **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

(1) 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.

(2) 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 SubRegistrar) and also where denial of registration is made before the Registrar himself, the Registrar shall inquire:

(a) whether the document has been executed; and

(b) whether the requirements of the law have been satisfied so as to entitle the document to registration. (Section 74)

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)

EXEMPTION OF CERTAIN DOCUMENTS EXECUTED BY OR IN FAVOUR OF GOVERNMENT

Documents issued, received or attested by any officer engaged in making a settlement or revision of settlement of land revenue and which form part of the records of such settlement.

Documents and maps issued, received or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land which form part of the record of such survey.
Documents which, under any law for the time being in force are filed periodically in any revenue office by patwaris or other officers charged with the preparation of village records.
Sanads, inam, title deeds and other documents purporting to be an evidence, grants or assignments by Government, of land or of any interest in land.
Notices given under section 74 or section 76 of the Bombay Land Revenue Code, 1879 of relinquishment of occupancy by occupants or of land by holders of such land.

PROVISIONS OF TRANSFER OF PROPERTY ACT, 1882 AND REGISTRATION OF DOCUMENTS

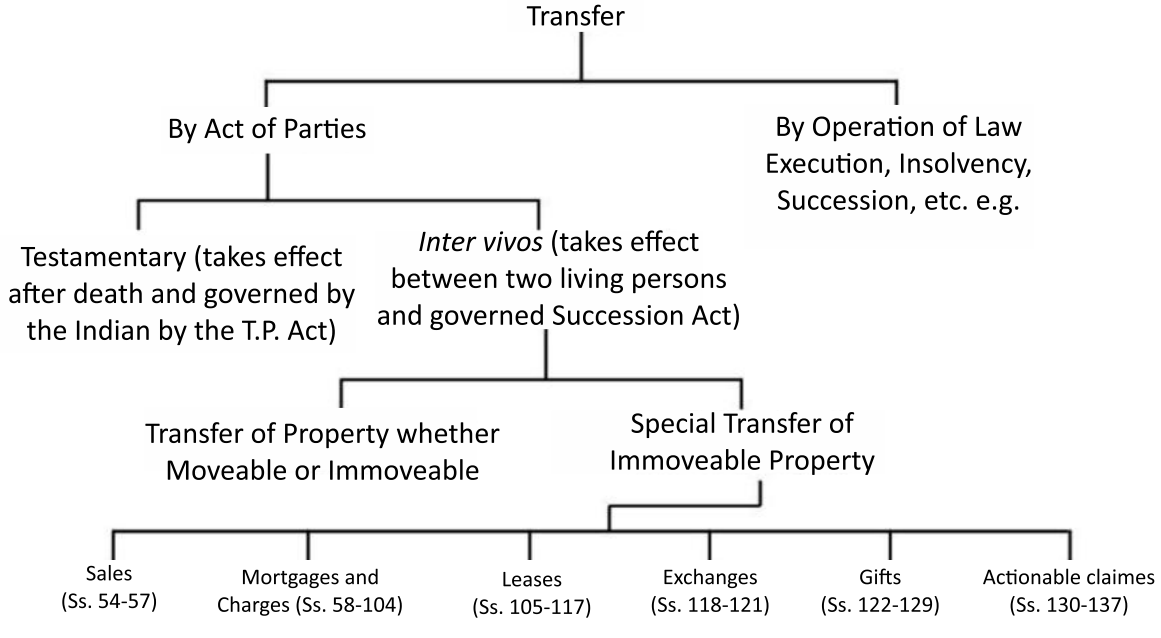
The Transfer of Property Act 1882 is legislation that came into effect on July 1, 1882. The Registration Act, 1908 prescribe compulsory registration of certain documents. The Transfer of Property Act mandates that certain documents are required to be registered to be valid. The law relating to transfer 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 THE ACT



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; or

(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 reversionery 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 interst 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 afterwords 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 will 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.

Example

A owns three properties of which he wanted to transfer one property to his grandfather B but he died two years ago the transfer will not be held valid because the transfer of property should happen between two living persons.

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) I 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. Parts 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.

CASE LAW

Thus, where the owner of a piece of land installed a bone mill along with machinery being held by iron bars which have been dug to a considerable depth then it is a permanent fixture and this will become immoveable property. Similarly, the machinery installed on a cement platform and held in position by being attached to iron pillars fixed in the ground was held to be immoveable property as the annexation was made by the person who owned the buildings as well as the machinery (*Mohamed Ibrahim v. Northern Circars Fibre Trading Company, A.I.R. 1944 Mad. 492*).

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)].

Growing crops: It includes all vegetable growths which have no existence apart form their produce such as pan leaves, sugar cane etc.

Grass: Grass is moveable property, but if it is a right to cut grass it would be an interest in land and hence forms immoveable property.

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.

Concluding Definition:

If the definitions of "immoveable property" as given in the Transfer of Property Act, the General Clauses Act and the Registration Act are viewed together, it is evident that they do not say what immoveable property is. They only say what is either included or excluded therein. Still, reading the definition in the Act with one in the General Clauses Act, immoveable property will be found to include land, benefit to arise out of land such as rent, and things attached to the earth like trees and buildings but not standing timber, growing crops and grass. The last three things are regarded as severable from the land on which they stand and, therefore, they are not included in the term "immoveable property".

Thus, the meaning of immoveable property is as under:

Immoveable property" means land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Example

A orally grants to B for Rs. 700/- the rights to catch and carry away fish from his lake. Is the grant valid? The Supreme Court in ***Ananda Behra v. State of Orissa, (1956) SCJ p. 96***, that such a right is a benefit arising out of immoveable property namely the lake. So under General Clauses Act it is immoveable property. The sale requires a registered instrument for its validity under Section 54 of the Transfer of Property Act. Therefore, the oral grant is invalid and cannot pass away any title in favour of B.



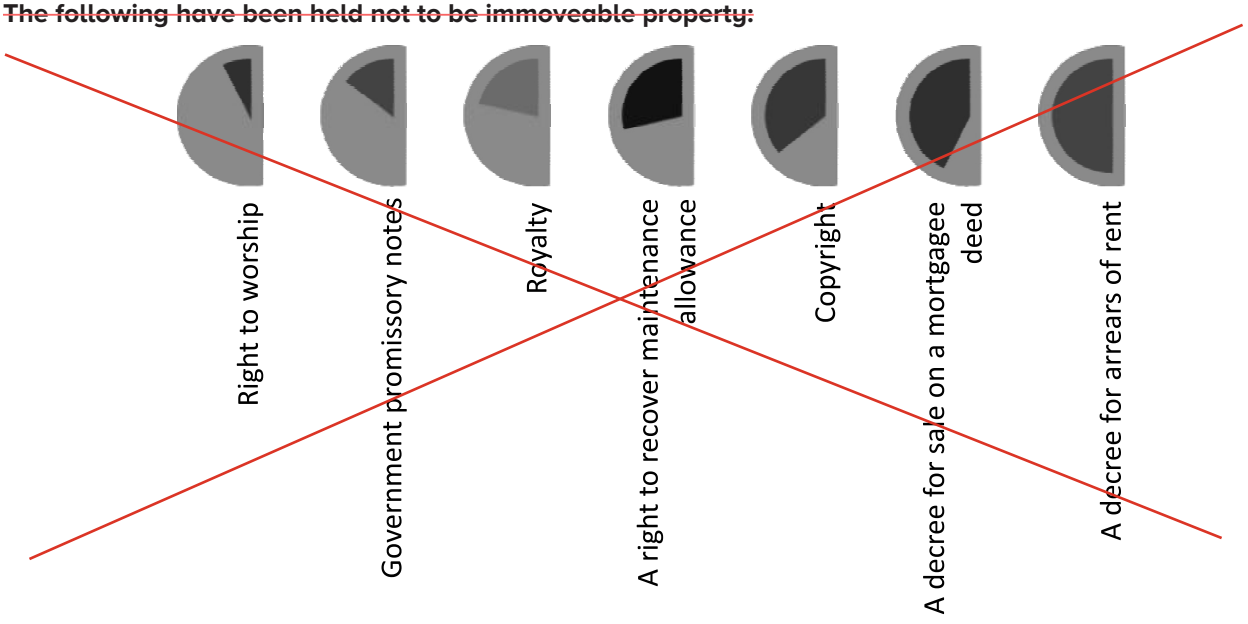
Distinction between moveable and immoveable property

The distinction between moveable and immoveable property was explained in the case of *Sukry Kurdepa v. Goondakull, (1872) 6 Mad. H.C. 71*, by Holloway J. as moveability may be defined to be a capacity in a thing of suffering alteration. Immoveablity for such alteration e.g., a piece of land in all circumstances is immoveable. If a thing cannot change its place without injury to the quality it is immoveable. Certain things e.g. trees attached to the ground are so long as they are so attached, immoveable when the severance has been effected they become moveable.

The following have been recognized as immoveable property:

Right to collect rents of immoveable property	A right to 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 lac 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:



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.

(i) Attestation

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.

Attestation is valid and complete when two witnesses sign the instrument. According to the definition given in the Transfer of Property Act (Section 3), the following essentials are required for a valid attestation:

(a) There must be at least two or more witnesses;

(b) Each witness must see

(i) the executant's sign or affix his mark to the instrument, or

(ii) some other person sign the instrument in the presence and by the direction of the executant, or

(iii) receive from the executant a personal acknowledgement of his signature or mark or of the signature of such other person; and

(c) Each witness must sign the instrument, (i.e. document), in the presence of the executant.

It is not necessary that both attesting witnesses should be present at the same time. The instrument may be attested after its execution by each of the attestators at different times. Attestation cannot take place before the execution of the deed. The Act does not insist on any particular form of attestation. The attesting witness may not be described as such on the face of the document (***Yakub v. Kalzurkan, 52 Bombay 203***). However, the attesting witness must have put his signature antmus attestandi, i.e., with intention to attest. Thus, where a Registrar or an identifying witness puts his signature on the document he cannot be regarded as an attesting witness unless it is duly proved that he signed with the necessary intention to attest.

(ii) Registration

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.

(iii) Notice

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.

The equitable doctrine of notice is recognised in various Sections of this Act. For instance in Section 39 of the Act, where a transfer is made of property out of which a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it, but not otherwise. Similarly under Section 40 if A conveys to C property, which he had by a previous contract agreed to sell to B, then B can enforce the contract against C, if C had notice of it, but not otherwise. If C had notice of the prior contract, he purchases with knowledge that it was unconscionable of A to sell to him, and it is therefore, unconscionable of him to buy.

A person is deemed in the eye of law to have constructive notice of a fact when (i) but for willful absentation from an enquiry or search which he ought reasonably to have made; or (ii) gross negligence on his part, he would have known it. Constructive notice arises from an irrefutable presumption of notice. In law such a presumption will arise when (i) there is a willful absentation on the part of a person to make necessary enquiries regarding the existence of certain facts, or (ii) he showed gross negligence in the matter.

The words "wilful absentation" suggest want of bona fide in respect of particular transaction (*Joshua v. Alliance Bank, 22 Cal. 185*).

Thus, a person who refuses to receive a registered letter is, deemed to have constructive notice of its contents.

Similarly, if a person proposes to sell his property to X who, at the same time knows that rents due in respect of the property are paid by the tenants to a third person Y, X will be fixed with notice of the rights of *Y (Mernt v. Luck (1902) 1 Ch. 429)*.

In so far as gross negligence is concerned, it does not mean a mere carelessness but means carelessness of such an aggravated nature as to indicate mental indifference to obvious risks. For example, if A buys property from B and does not care to ask whether any amount by way of municipal tax is due on that property and if the municipal corporation asks him to pay the arrears of tax, then B is responsible, and if he does not pay, then the arrears of tax may be made a charge on the property.

Other Illustrations

Where a purchaser was informed that the title deeds were in the possession of a bank for safe custody and yet failed to make any enquiry in the bank. It was held that he was guilty of gross negligence and must be deemed to have notice of the rights of the bank which has the custody of the title needs (*Imperial Bank of India vs. Rai Gyand, I A 283*).

Where a person abstained from making further enquiries about the right of a person and did not cause a search, to be made in the office of the SubRegistrar to ascertain if there was any encumbrance over the property, his omission must be held to be wilful or grossly negligent and he would be said to have notice of the prior encumbrances [*Rangappa Goundan vs. Marapa Goundan, AIR (1958) Madras 515*].

The three Explanations to the definition of notice in Section 3, further mention certain circumstances wherein statutorily presumption of knowledge arises. These circumstances relate to the fact of registration (Explanation I, Explanation II) actual possession and notice to an agent (Explanation III).

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.

Examples of absolute restraint

Suppose, A gives to B property worth only Rs. 2,000 rupees and adds a condition that B should sell property for Rs.50,000 and not below that amount, this condition will at once become invalid for no one will buy the property which is only worth Rs.2,000 for Rs. 50,000. Similarly, A gives to B property worth Rs.50,000 and stipulates that if B wants to sell the property he should sell it to C only for Rs. 1,000. This again will operate as an absolute restraint. In *Rosher vs. Rosher, (1884) 26, Ch. D. 801*, the testator gave his estate to his son and added a condition that if his son wanted to sell the property he should first give an option to the testator's wife who should be able to buy for £ 3,000. The market value of the property when the testator died was £ 15,000. It was held by the Court that the condition which compelled the son to sell the property for £ 3,000 was void.

In *Trichinpoly Varthaga Sangum vs. Shunmoga Sunderam, (1939) Madras 954*, there was a partition between a Hindu father and his five sons. The deed of partition provided that if any one of the sons wanted to sell his share, he should not sell it to a stranger but to one of his brothers who should have the option to buy for a sum not exceeding Rs.1,000. It was held by the Court that the condition absolutely prevented the son from selling the property to any one for good value. In this case the market value of the property of the son was far greater than Rs.1,000. Hence, the condition was declared invalid.

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.

Illustrations

(a) A sells his house to B and adds a condition that B only should reside in that house, the condition is invalid. This is subject to the exception that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

(b) A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should have good light and free air.

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 is 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.

Example

A, aged 16 years, is son of Mr. B. Mr. B owns a plot in Delhi and wants to transfer it to his son, A. Now, Mr. B can do so as he is competent to enter into contract. A, being a minor, can be transferee by virtue of Section 7.

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:

(a) 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.

(b) 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.

(c) An easement cannot be transfered apart from the dominant heritage.

(d) An interest is property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

(f) A mere right to sue cannot be transferred.

(g) A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.

(h) 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.

Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property

RULE AGAINST PERPETUITY

Section 14 of the Act provides that 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 the date of such transfer, and the minority of some person who shall be in existence at the expiration for that period, and to whom, if he attains full age, the interest created is to belong.

Perpetuity has been described as "exemptions from intermission or ceasing". This has been said to be "odious in law, destructive to the commonwealth, and an impediment to commence, but preventing the wholesome circulation of property".

A perpetuity in the primary sense of the word, "is a disposition which makes property inalienable for an indefinite period" (Jarman on Wills, 8th ed., vol. 1, P. 284). Section 14 of the Act adopted with certain modifications the English rule against perpetuities which is enunciated by Jarman as "Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validity created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards". Section 14 of the Act fixes the perpetuity period as: Life (or Lives) living at the time of transfer and actual minority of the then unborn ultimate transferee.

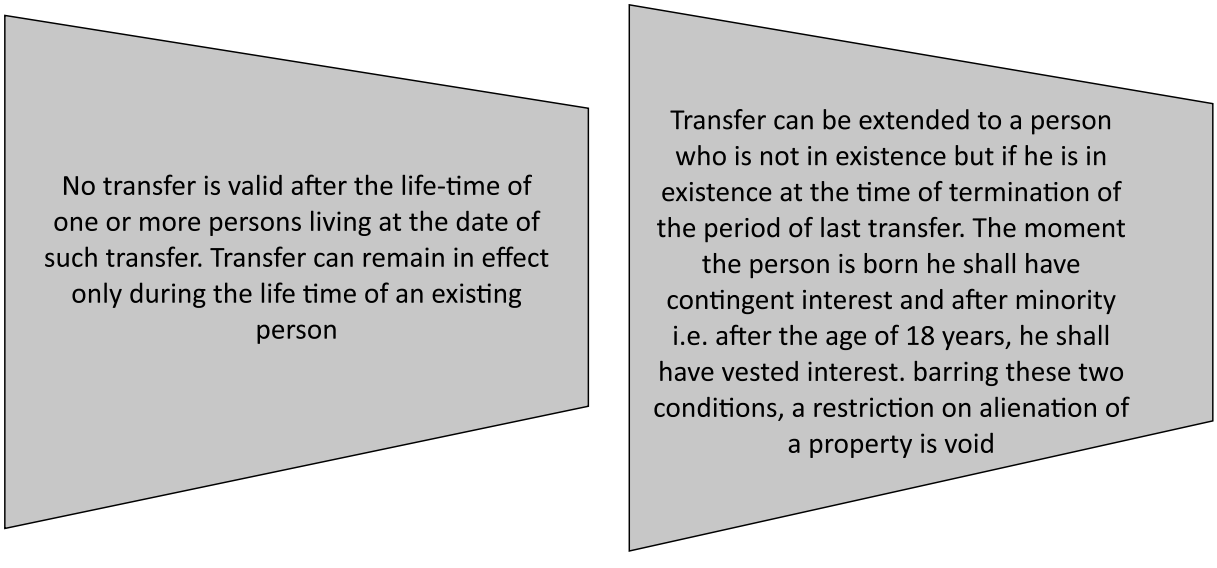
Any number of successive estates can be created between the transferees who are living persons e.g. A transfer may be made to A for life and then to B for life and then to C for life and so on, provided that A, B and C are all living persons at the date of the transfer. But if the ultimate beneficiary is some one who is not in existence at the date of the transfer, the whole residue of the estate should be transferred to him. If he is born before the termination of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but if he is not born till the termination of the last prior estate, the transfer to him fails.

Further, the rule is not that vested interest is created at the birth of the beneficiary but that vested interest cannot be delayed in any case beyond his minority. Therefore, the rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

In India minority terminates at the end of 18 years.

The rule against perpetuities applies to both moveable and immoveable property.

Thus, the rule against perpetuity contains two propositions, i.e.:



However, Section 18 provides an exception to the above rule of perpetuity, where the transfer of property is for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

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 intersts 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.

ACCUMULATION OF INCOME

Section 17 does not allow accumulation of income from the land for an unlimited period without the incomebeing enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is :

(a) the life of the transferor, or

(b) eighteen years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is void except where it is for:

(i) the payment of the debts of the transferor or any other person taking any interest under the transferor,

(ii) portions for children or any other person taking any interest in the property under the transfer, and

(iii) for the preservation and maintenance of the property transferred.

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.

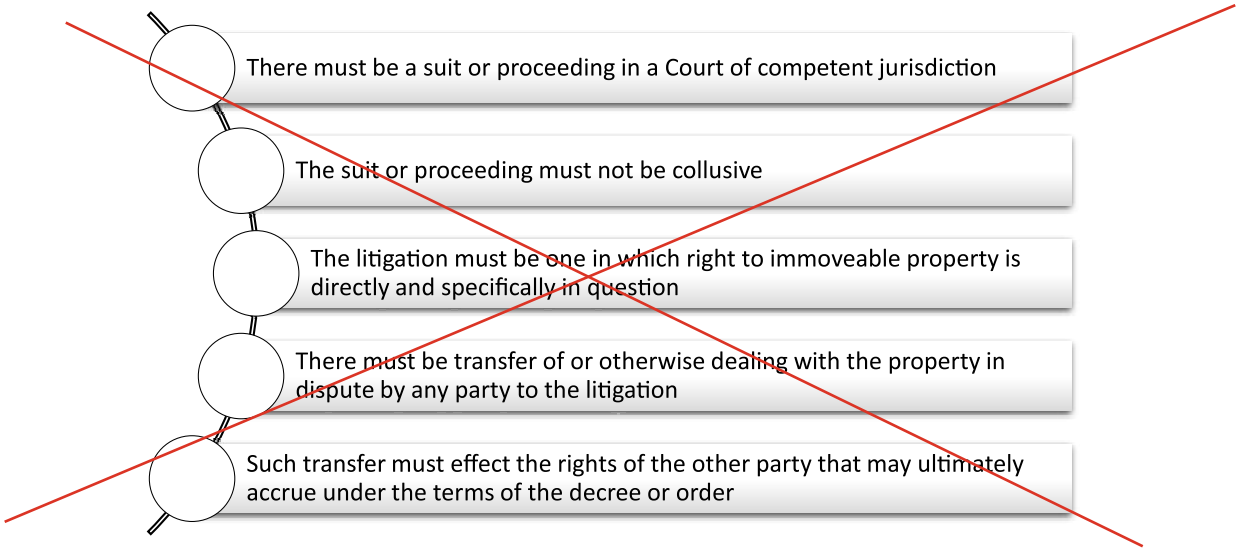
Example

A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

Section 52 lays down the Indian rule of Lis pendens being the legislative expression of the Maxim- "ut lite pendente nihil innovetur" 'During litigation nothing new should be introduced'.

Essentials

In order to constitute a *Lis pendens*, the following elements must be present:



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.

Effect

If the parties to the litigation, are completely prevented from transferring the property in litigation, it would cause unnecessary delay and hardship, as they would have to wait till the final disposal of the case. So, Section 53 creates a limitation over the transfer by making it subject to the result of the litigation. The effect of this doctrine is not to invalidate or avoid the transfer, or to prevent the vesting of title in the transfer, but to make it subject to the decision of the case, and the rule would operate even if the transferee pendente lite had no notice of the pending suit or proceeding at the time of the transfer.

DOCTRINE OF PART-PERFORMANCE

Lastly, we may also discuss briefly the doctrine of part-performance which is embodied in Section 53A of the Transfer of Property Act.

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.

The rule did not exist on the statute book before 1929. Section 53A, was inserted by an amendment to the Act in 1929. Followings are the essential conditions for the operation of the doctrine of part-performance according to Section 53A.

1. There must be a contract to transfer immoveable property.
2. It must be for consideration.
3. The contract should be in writing and signed by the transferor himself or on his behalf.
4. The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
5. The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
6. The transferee must have fulfilled or be ready to fulfill his part of the obligation under the contract.

If all the abovementioned conditions are satisfied, then, the transferor and the persons claiming under him are debarred form 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.

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.

The right conferred by this section is a right only available to a defendant to protect his possession. This section does not create a title on the defendant. It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. The section imposes a bar on the transferor. When the conditions mentioned in the sections are fulfilled, it debars him from enforcing against the transferee any right or interest expressly provided by the contract. So far as the tranferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor [***Delhi Motor Co. v. Basurkas, (1968) SCR 720***]

The English rules as to what acts constitute part-performance have been generally followed in India. These rules are as follows:

(1) An act of part-performance must be an act done in performance of the contract. An act introductory to and previous to the agreement, cannot therefore, be act of part-performance.

(2) The acts relied upon must be unequivocally and referable to no other contract than that alleged.

(3) An act of part-performance must be the act of the party seeking to avail himself of the equity.

PROVISIONS RELATING TO SPECIFIC TRANSFERS

The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease. These are as follows:

In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immoveable property and lease is a transfer of the right to enjoy immoveable property.

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

(a) 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).

(b) The subject matter is transferable property.

(c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.

(d) It must be an exchange for a price paid or promised or part paid and part promised.

(e) 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,

(a) 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, and

(b) 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

(i) The person making the exchange must be competent to contract.

(ii) There must be mutual consent.

(iii) There is a mutual transfer of ownership though things and interests may not be identical.

(iv) Neither party must have paid money only.

This Section applies to both moveable and immoveable property.

Mode of Exchange

A transfer of property in completion of an exchange can be made only in the matter provided for the transfer of such property by sale.

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:

(1) **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 mortgagor. 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 mortgagor to recover from it what is due to him, i.e., the principal plus interest.

(2) **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.

(3) **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.

Where, however, a person borrows money and agrees with the creditor that till the debt is repaid he will not alienate his property, the transaction does not amount to a mortgage. Here the person merely says that he will not transfer his property till he has repaid the debt; he does not transfer any interest in the property to the creditor. In sale as distinguished from a mortgage, all the interest or rights of ownership are transferred to the purchaser. In a mortgage, as stated earlier, only part of the interests are transferred to the mortgagee, some of them remaining vested in the mortgagor.

To sum up, it may be stated that there are three outstanding characteristics of a mortgage:

(a) the mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the Mortgage.

(b) the mortgagor has a right of foreclosure upon the mortgagor's failure to perform.

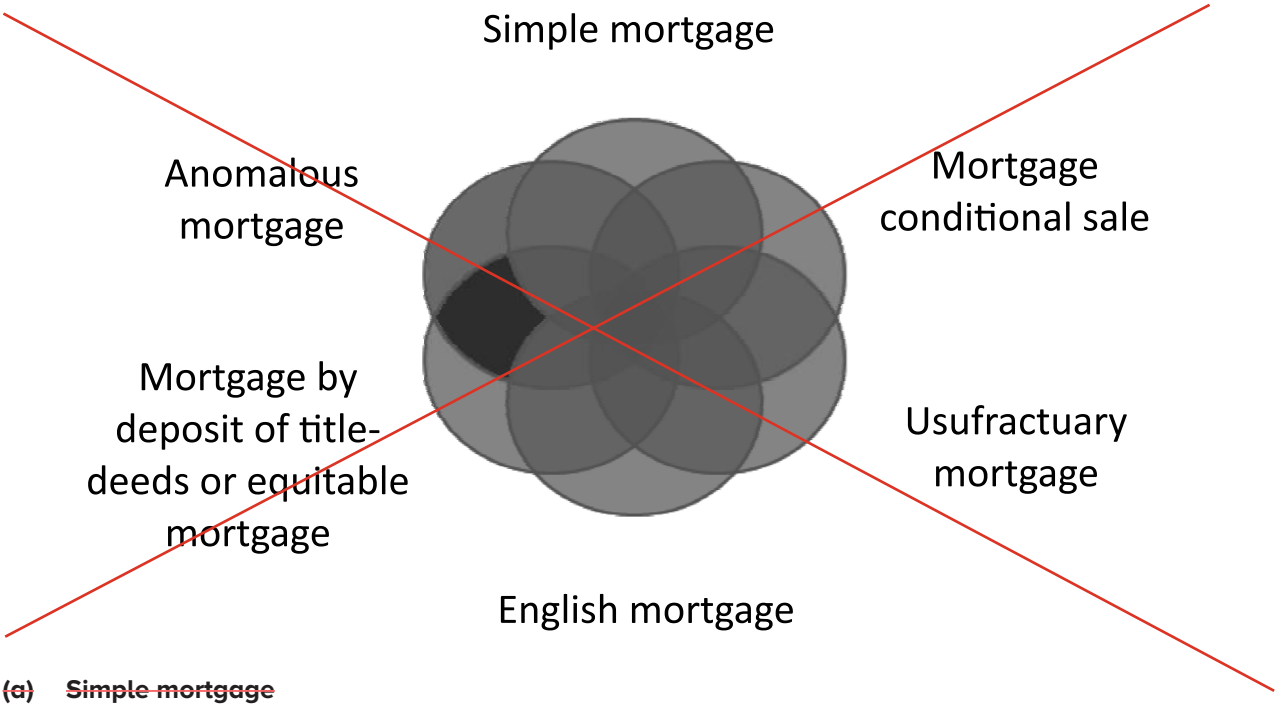
(c) the mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

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.

It may be noted that the mortgagor transfers the property with the following three conditions:

(a) If the loan is repaid, the sale becomes void.

(b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.

(c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

In case of mortgage by conditional sale, there is no personal covenant. That is unlike in the case of a simple mortgage, the mortgagor in this case does not bind himself personally to repay the debt. The mortgagee is not given the possession of the property in this type of mortgage. This is also the position in the case of a simple mortgage. Again, in a mortgage by conditional sale, the mortgagee's remedy is 'foreclosure', that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage. To "foreclose" means to debar the mortgagor from redeeming the property forever.

(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 usufractuary mortgage. It is also called a mortgage with possession.

Thus, a usufructuary mortgage has the following characteristics:

1. Possession of property must be delivered to the mortgagee;
2. There is no personal liability on the part of the mortgagor to pay;
3. The mortgagee is entitled to rents and profits in lieu of interest or principal or both; and
4. The mortgagee however is not entitled to foreclose the mortgagee or to sue for sale.

Thus is this type of mortgage the mortgagor has to deliver possession of the property to the mortgagee. If the possession is not given, the mortgagee can sue for possession. The mere fact that possession has not been delivered will not alter the nature of the transaction. In Pratap Bahadur vs. Gajadhar, 24 All 521, it was agreed that the mortgagee will put the mortgagor in possession of a village on a certain date and to pay interest till possession was delivered. It was held that mortgage was an usufructuary mortgage. The mortgagee is authorised to retain possession and receive rents, etc., until he recovers the whole debt and the interest. The usufructuary mortgagee has to look only to the profits that arise out of the property for realising his debt; there is no personal liability on the part of the mortgagor. Similarly, the mortgagee has no right to foreclose the mortgage or to sue for sale.

A mortgage may be regarded as usufructuary even though the entire debt is not to be paid out of the profits of the property. Therefore, a usufructuary mortgage may be either (i) where the entire mortgage money is to be paid from the profit of the land; or (ii) where only part of the mortgage money is principal or interest amount is to be paid from the profit of the land.

If in a usufructuary mortgage a time is mentioned during which the mortgagee should recover the debt, etc., then after the time is over, the mortgagee should deliver back the property to the mortgagor. He cannot refuse to give back the property, if he has not been able to recover the debt and the interest, etc. A usufructuary mortgagee is supposed to remain in possession of the mortgaged property and manage the same as a person of ordinary prudence would manage subject to the conditions of mortgage agreement. Any loss due to failure on his part would be debited to his account (Panchanan Sharma v. B.P. Jagnani, SCALE 1995 (2) 641).

(d) English mortgage

Section 58(c) 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.

The essential features of an English mortgage are as under:

1. The mortgagor binds himself to repay the mortgage money on a certain day. In other words, there should be a personal undertaking to pay.
2. The mortgaged property is absolutely transferred to the mortgagee.
3. Such absolute transfer is subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the fixed day.

Distinction between English mortgage and mortgage by conditional sale

An English mortgage looks like a mortgage by conditional sale but there are obvious differences between the two:

1. In English mortgage there is a personal liability undertaken by the mortgagor to pay the debt. In a mortgage by conditional sale there is no personal covenant (agreement for payment of the mortgage money and mortgagee has his remedy against the mortgaged property only;
2. In English mortgage the ownership in the mortgaged property is absolutely transferred to the creditor (i.e. mortgagee) which however, may be divested on repayment of the loan on the fixed day.

In a mortgage by conditional sale, the mortgagee gets only a qualified ownership which may, however, ripen into an absolute ownership in default of payment of the mortgage money.

(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.

In order that a valid mortgage on an immoveable property should be effected, it must be in writing and attested by two witnesses and the document must be registered. But in case of a mortgage by deposit of title deeds, it need not be registered and an oral agreement between the person and the creditor followed by the delivery of the documents of title to the property is enough. The creditor will have the possession of the documents and he will advance the money at the stipulated rate of interest. In case the mortgagor does not repay the loan,the creditor on the basis of having the title deeds in his possession can sue the debtor to recover the money. This type of mortgage has been recognized due to expediency. Many persons, specially the business people, may need money urgently and they cannot wait till a formal document is written, signed, attested and then registered. So they will simply approach the creditor and hand over the title deeds of their property and borrowmoney. This avoids delay and other formalities for effecting a valid mortgage.

There must be a clear intention on the part of the person who hands over the title deeds to effect a valid mortgage. In the absence of any intention, the mere holding in possession of the title deeds will not create a valid mortgage.

The term 'documents of title' or title deeds means such documents as will show prima facie or apparent title to the property of the person who is borrowing money. Accordingly, in one case it was held that tax receipt was not a document of title to the property on which the tax was paid.

What is necessary to deposit is a document which gives him his right to the property and the creditor should insist on the production of this document before he gives money on a pledge of documents.

Title deeds should be delivered in these areas, the property of the person may be situated elsewhere. If the deposit of title deeds has taken place in any other town, it will not be a valid mortgage. Similarly, if the property is situated in *any one of the towns* mentioned above, but the deposit of title deeds is made in other towns or areas then again it will not be a valid mortgage.

It should be noted that this type of mortgage can be created only in certain towns and not everywhere in India. The facility to create a valid mortgage is available in the following towns in India: Calcutta, Madras, Bombay, Adoni, Ajmer, Allahabad, Alwar, Bangalore, Bellary, Cochin, Coimbatore, Delhi, Jaipur, Jodhpur, Kanpur, Rajahmundry, Udaipur, Vellor, Ellora, Pali, Bhilwara, Bikaner, Kakinada, Narayanganj, Mysore, and Madurai. Though this type of mortgage is limited to specific cities it is at par with any other legal mortgage (*K.J. Nathan v. S.V. Maruthi Rao, A.I.R. 1965 S.C. 443*).

(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.

Again, a mortgagee may be given possession of the property for a fixed period with a condition that in case the debt is not discharged at the expiry of the period mentioned, the mortgage shall be regarded as a mortgage by conditional sale. In this case, the mortgage has got a right of "foreclosure" and after the expiry of the period if the debt is not paid, the mortgagee will become the owner of the property.

Two other terms in common use in connection with mortgage may be considered here. These terms are (i) Sub-mortgage; and (ii) Puisne 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:

(a) mortgagor is entitled to transfer the interest (covenant for title);

(b) mortgagor will assist the mortgagee to enjoy quiet possession;

(c) mortgagor will pay public charges in respect of the mortgaged property;

(d) mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased;

(e) 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

(i) from the mortgaged property, or

(ii) 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 immoveable 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.

A floating charge has the following characteristics:

1. It is a charge on class of assets both present and future.
2. The class of assets charged is one which in the ordinary course of business would be changing from time to time.

3. It is contemplated by the charge that until some future step is taken by those who are interested in the charge the company may carry on its business in the ordinary way, i.e., it may use its assets charged in the ordinary course of its business [Per Roman L.J. in *Reyork Shive Wool Combers Associated Limited*, (1903) 2 Ch. 284]. A floating charge is created by debentures on the company's undertaking or its estate, property and effects. It is not necessary that the charge should be on all company's assets. Thus a mortgage of a cinema and of the chattels used in the cinema premises was held to be a floating charge as to the chattles [*National Provisional Bank of England Limited* v. *Charteb Electric Theatres Limited*, (1916) Ch. 132]. Similarly, a floating charge was created by a mortgage of book and other debts which shall become due during the continuance of this security [*Reyork Shive Wool Combers Association* (*supra*)].

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; and
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.

Essentials

The essentials of a lease are:

(1) It is a transfer of a right to enjoy immoveable property;

(2) Such transfer is for a certain time or perpetuity;

(3) It is made for consideration which is either premium or rent or both;

(4) The transfer must be accepted by the transferee.

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 licencee 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.

If the document creates an interest in the property, it is a lease but if it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence because it does not create any interest in that property [*Associated Hotel of India* v. *R.N. Kapoor,* AIR (1956) SC 1962].

The question is not of words but of substance and the label which the parties choose to put upon the transaction though relevant is not decisive.

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 interst 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. For example, a lessee, accepts to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease comes to an end. Similarly, when the landlord reserves possession without any objection on the tenant's part, there is a surrender by implication. Mere non- payment of rent does not amount to surrender.

(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. Then only the lessor can re-enter the leased property and claim that the lease shall be forfeited.

In the case of a forfeiture due to default in payment of the rent, if the lessor sues the lessee to quit, the Court can direct the lessee to pay the rent or arrears of rent and continue the lease. But in a breach of any other condition, such as the breach of a condition preventing the lessee from subletting the property, the Court will not help the lessee if he breaks the condition. He will incur forfeiture. A breach of condition by the lessee gives an option to the lessor to bring the lease to an end. But if he does not exercise the option the lease will continue validly. The lessee, however, cannot on breaking the condition, take advantage of his wrong and terminate the lease.

The second case of forfeiture occurs when the tenant denies the title of the landlord and claims that somebody else or he himself is the owner of the property. In order that a denial of the landlord's title should work as a forfeiture of the lease, three things are necessary:

(a) the tenant must set up title either in himself or in a third-party;

(b) the denial must be direct and not casual;

(c) it must be made known to the landlord.

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 convenant 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 convenant 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

1. 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 immoveable 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

1. There must be a transfer of ownership.
2. The subject matter of gift must be a certain existing moveable or immoveable property.
3. The transfer must be made voluntarily.
4. It must be done without consideration.
5. 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.

There are two parties to the gift: donor and donee. The donor must be a person competent to transfer; whereas the donee may be any person. The gift can be made to any one, to an incompetent person or even to a juridicial person. The essence of a gift is that it is a gratuitous transfer.

According to Section 123, a gift of immoveable property must be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift of moveable property may be made by a registred instrument or by delivery of property. Where the donee is already in possession of the moveable property, as no future delivery is possible, the donor may make a declaration of the gift in his favour. For example, where a piece of furniture or a television set belonging to the donor is lying with a friend of his, the donor may simply declare that he makes a gift of the furniture or the television set and the gift is complete. The declaration must be clear and the donee must accept the gift.

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. The Privy Council in Kalyan Sundram v. Kumarappa, A.I.R. 1925 P.C. 42, decided that after acceptance of the deed of gift and before registration, the donor cannot revoke the gift. The gift which is accepted by the donee, will take effect from the date of the execution of the document by the donor, even though it is registered at a later date.

If the deed of gift is executed but never communicated to the intended donee and remains in the possession of the donor undelivered, it cannot be compulsory registered at the instance of the donee. The reason is that the donee did not accept the gift, the donor can at any time before such acceptance revoke the gift. But once a gift is accepted by the donee, the donor cannot revoke it. A gift may, however, be revoked if it is brought about by a fraud or misrepresentation or undue influence.

Example

Mr. Ramesh gifts his plot to Mrs. Ramesh by a gift deed. Mrs. Ramesh accepted the gift. Now, Mr. Ramesh wants to revoke the gift and changed his mind before the registration of the deed. He cannot do so as the gift is duly accepted by Mrs. Ramesh.

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.

A gift comprising both of existing property and future property is void as to the latter. For example, A makes a gift of his house and also makes a gift of the additions that he is likely to make in future. Here the gift of the house is valid but the gift of the additions that are yet to be made is invalid.

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.

The rules pertaining to gifts in the Transfer of Property Act do not apply to the gifts by Mohammedans. If a gift is made by a Mohammedan, its validity has to be judged according to Muslim law and not according to the Transfer of Property Act.

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.

Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable property it is not an actionable claim, because the Section clearly excludes such a debt. A debt is a liquidated money obligation which is usually recoverable by a suit. To create a debt, first of all, there must be a liquidated or definite sum which is actually due. For example, arrears of rent due. The term debt may also include a sum of money which is due in the sense that it exists, but is not actually payable until a later date. For example, A borrows money from B on the 1st of January and promises to repay on March 15, the amount is not payable till the 15th of March, but certainly it is a debt and it is an accruing debt. Another essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:

(i) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (*Sheu Gobind Singh v. Gauri Prasad, AIR 1925 Pat. 310*).

(ii) Provident Fund that is standing to the credit of a member of the Provident Fund.

(iii) Money due under the Insurance Policy.

(iv) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (*Thakardas vs. Vishindas*).

NON-ACTIONABLE CLAIMS

i. Debentures are secured debts and therefore not regarded as actionable claims.

ii. 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*].

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.

A gift comprising both of existing property and future property is void as to the latter. For example, A makes a gift of his house and also makes a gift of the additions that he is likely to make in future. Here the gift of the house is valid but the gift of the additions that are yet to be made is invalid.

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.

The rules pertaining to gifts in the Transfer of Property Act do not apply to the gifts by Mohammedans. If a gift is made by a Mohammedan, its validity has to be judged according to Muslim law and not according to the Transfer of Property Act.

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:

(a) if it is from year to year; or

(b) if it is for a term exceeding one year; or

(c) 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).

(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.

(e) 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.

Example

Where A is an owner and he has the right of way over the way of the land of another for purposes which are connected with the beneficial use of his own land then, this can be termed as an easement.

CASE LAW

In *Re. Ganesh Prakash v. Khandu Baksh [8]*, it was held that the right to dry clothes over the flat masonry and roofs of shops is a right of easement.

LESSON ROUND-UP

- Registration of documents relating to immovable property is compulsory. Registration of will is optional. Some documents though related to immovable property are not required to be registered. These are given in Section 17(2) of the Registration Act.
- Document should be submitted for registration within four months from date of execution.
- Documents relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated.
- All persons executing the document or their representatives, assign or agents holding power of attorney must appear before registering officer. They have to admit execution and sign the document in presence of Registrar, as required under Section 58(1)(a). Appearance may be simultaneous or at different times. If some of the persons are unable to appear within four months, further time up to additional four months can be given on payment of fine up to 10 times the proper registration fee.
- If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document. He will make necessary entries in the Register maintained by him.

- After all formalities are completed, the Registering Officer will endorse the document with the word 'Registered', and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document. A document takes effect from its date of execution and not from date of registration.
- Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property.
- The law relating to transfer of property is governed by the Transfer of Property Act, 1882. 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more other living persons, or to himself, and one or more other living persons. 'living person' includes a company or association or body of individuals, whether incorporated or not.
- Every person who is competent to contract and entitled to transferable property, or authorized to dispose of property is competent to transfer such property. Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. 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, transfer 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 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. A transfer may also be made subject to a contingency which may or may not occur. This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non- happening of an event.
- Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Election may be defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed". The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument.
- 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.
- The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease. In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immovable property and lease is a transfer of the right to enjoy immoveable property.
- Registration of documents relating to immovable property is compulsory. Registration of will is optional. Some documents though related to immovable property are not required to be registered. These are given in Section 17(2) of the Registration Act.
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- If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document. He will make necessary entries in the Register maintained by him.
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- Every person who is competent to contract and entitled to transferable property, or authorized to dispose of property is competent to transfer such property. Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. 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, transfer 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.
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- The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease. In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immovable property and lease is a transfer of the right to enjoy immoveable property.

GLOSSARY

Endorsement: Endorsement include and apply to an entry in writing by a registering officer on a rider or covering slip to any document tendered for registration under this Act.

Immovable Property: Immovable Property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

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.

Exchanges: When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".

Gift: "Gift" is the transfer of certain existing moveable or immoveable 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.

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.

Actionable claim: 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.

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.

Charge: It is defined as "Where immoveable 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".

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What is the object of the law of Registration?
2. A executes a sale deed of a garden in favour of B. The garden is situated in Udaipur. Can the sale deed be registered at Jaipur, which is the capital of Rajasthan?
3. A executes a mortgage of a house in favour of a bank, as a simple mortgage. It is not registered. Can the bank sue to enforce this mortgage?
4. Explain the procedure to be followed by registrar after registration of documents relating to land.
5. Discuss the object of the Transfer of Property Act. Distinguish between immoveable and moveable property.
6. What is the subject matter of transfer under the T.P. Act? Discuss properties which cannot be transferred.
7. Define a mortgage. Discuss various types of mortgages.
8. What is the rule against perpetuity?

9. Write short notes on
   (i) Puisne mortgage;
   (ii) Charges under the T.P. Act;
   (iii) Vested and contingent interest;
   (iv) Actionable claims

LIST OF FURTHER READINGS

- Bare Act of The Registration Act, 1908.
- Bare Act of Transfer of Property Act, 1882
- The Transfer of Property Act, 1882 with Exhaustive Case Law- Universal's Concise Commentary
- Articles by the Professionals and Firms.

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/2190/5/A1908-16.pdf
- https://www.indiacode.nic.in/bitstream/123456789/2338/1/A1882-04.pdf
- https://registration.telangana.gov.in/registrationProcedure.htm

Right to Information Law

Lesson 14

KEY CONCEPTS

■ Public Authority ■ Information ■ Request for obtaining Information ■ Chief Information Commissioner ■ Information Commissioners ■ Competent Authority

Learning Objectives

To understand:

- Citizen's Right to Information
- Procedure for obtaining information under Right to Information Act (RTI Act)
- Authorities under RTI Act and their roles and responsibilities
- Information exempted from disclosure
- Powers of Information commission(s)
- Appellate authorities under RTI Act
- Role of Central/State Government

Lesson Outline

- Introduction
- Right to Know
- The Right to Information (RTI) Act, 2005
- Salient features of the Act
- Definitions
- Obligations of Public Authority
- Designation of Public Information Officers (PIO)
- Request for obtaining Information
- Duties of a PIO
- Exemption from disclosure
- Partial disclosure allowed
- Who is excluded?
- Information Commissions
- Powers of Information Commissions
- Appellate Authorities
- Penalties
- Jurisdiction of Courts
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

The Right to Information Act, 2005 is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

REGULATORY FRAMEWORK

- The Right to Information Act, 2005

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

- The RTI Act extends to the whole of India
- It provides a very definite day for its commencement i.e. 120 days from enactment
- It shall apply to public authorities
- All citizens shall have the right to information, subject to provisions of the Act
- The Public Information Officers /Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information
- Fee will be payable by the applicant depending on the nature of information sought
- Certain categories of information have been exempted from disclosure under section 8 and 9 of the Act
- Intelligence and security agencies specified in Schedule 11 to the Act have been exemptedfrom the ambit of the Act, subject to certain conditions

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.

CASE LAW

In the case of *Anjali Bhardwaj and Others Vs. Union of India and Others in Writ Petition (Civil) No. 436 of 2018 Judgement* dated February 15, 2019 the Hon'ble Supreme Court of India in Paragraph 18, 19 and 68 observed that there is a definite link between right to information and good governance. In fact, the RTI Act itself lays emphasis on good governance and recognises that it is one of the objective which the said Act seeks to achieve. The RTI Act would reveal that four major elements/objectives required to ensure good governance are:

(i) greater transparency in functioning of public authorities;

(ii) informed citizenry for promotion of partnership between citizens and the Government in decision making process;

(iii) improvement in accountability and performance of the Government; and

(iv) reduction in corruption in the Government departments.

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.

Question: Which of the given is provided with the Right to know under RTI Act, 2005?

Options: (A) Residents

(B) Peoples

(C) All persons having age of atleast 21 years

(D) Citizens

Answer: (D)

DEFINITIONS

The meaning of important terms has been incorporated under section 2 of the RTI Act. These have been discussed herein below:

Public Authority

"Public authority" means any authority or body or institution of self-government established or constituted –

- By or under the Constitution;
- By any other law made by Parliament;
- By and other law made by State Legislature;
- By notification issued or order made by the appropriate Government,

and includes any–

- body owned, controlled or substantially financed;
- non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government [Section 2(h)]

Record

"Record" includes–

(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); and

(d) any other material produced by a computer or any other device; [Section 2(i)]

Information

"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. [Section 2(f)]

Right to Information

"Right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to–

(i) taking notes, extracts, or certified copies of documents or records;

(ii) inspection of work, documents, records;

(iii) taking certified samples of material;

(iv) 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; [Section 2(j)]

Section 3 of the Act provides that subject to the provisions of this Act, all citizens shall have the right to information.

Third Party

"Third party" means a person other than the citizen making a request for information and includes a public authority. [Section 2(n)]

OBLIGATIONS OF PUBLIC AUTHORITY

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. [Section 4(1)(a)]

According to Section 4(1)(a), every public authority shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.

As per Section 4(1)(b), every public authority has to publish within one hundred and twenty days of the enactment of this Act:

– The particulars of its organization, functions and duties;

– The powers and duties of its officers and employees;

– the procedure followed in its decision making process, including channels of supervision and accountability;

– the norms set by it for the discharge of its functions;

- the rules, regulations, instructions, manuals and records used by its employees for discharging its functions;
- a statement of the categories of the documents held by it or under its control;
- the particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;
- a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;
- a directory of its officers and employees;
- the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
- the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
- the manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;
- particulars of recipients of concessions, permits or authorizations granted by it;
- details of the information available to, or held by it, reduced in an electronic form;
- the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
- the names, designations and other particulars of the Public Information Officers;
- Such other information as may be prescribed; and thereafter update the publications every year.

and thereafter update these publications every year.

According to section 2(1)(c) of the Act, every public authority shall publish all relevant facts while formulating important policies or announcing the decisions which affect public.

According to section 2(1)(d) of the Act, every public authority shall provide reasons for its administrative or quasi-judicial decisions to affected persons.

DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

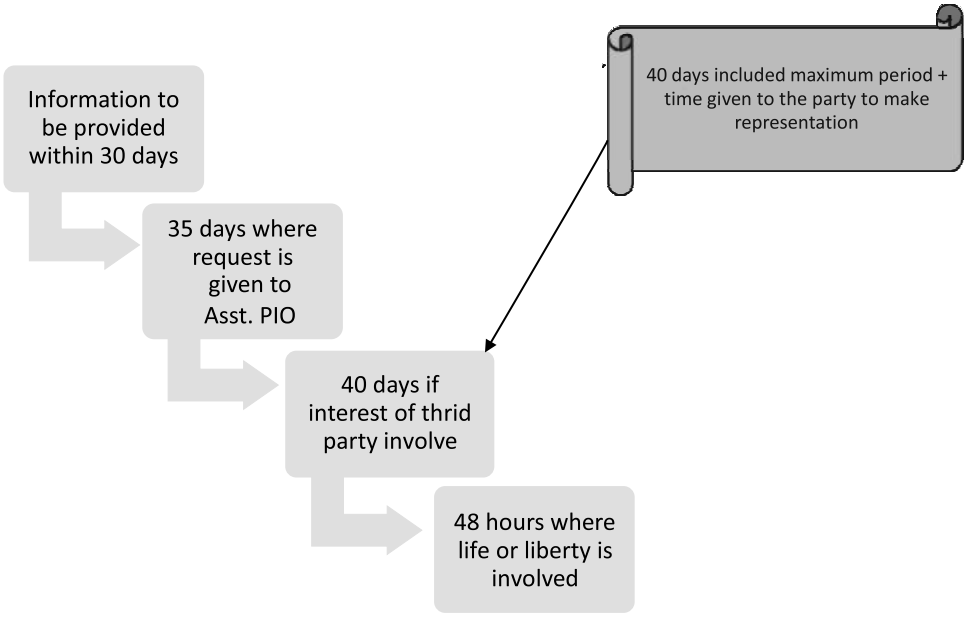
Every public authority has to–

- 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 public authority who may hold the information.

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).



Note:

- Time taken for calculation and intimation of fees excluded from the time frame.
- No action on application for 30 days is a deemed refusal.
- No fee for delayed response.

Example: A public authority received RTI application from H. The information sought for concerns the life or liberty of J. How much time is provided for providing information to this RTI application?

Answer: If the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

DUTIES OF A PIO

PIO 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. 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.

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.

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. 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.

Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice. (Sections 5,7,10 &11)

CASE LAW

Hon'ble Supreme Court of India in *Central Board of Secondary Education and Anr vs. Aditya Bandopadhyay and Ors., (Civil Appeal No.6454 of 2011, Judgment dated August 9, 2011)* observed that "Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counterproductive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquillity and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty.

Further, the Hon'ble Supreme Court of India observed that the RTI Act provides access to all information that is available and existing. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant.

Furthermore, the Supreme Court inter alia has observed that the right to access information does not extend beyond the period during which the examining body is expected to retain the answer-books. In the case of CBSE, the answer-books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/destroyed. Some other examining bodies are required to keep the answer- books for a period of six months. The fact that right to information is available in regard to answer-books does not mean that answer-books will have to be maintained for any longer period than required under the rules and regulations of the public authority. The obligation under the RTI Act is to make available or give access to existing information or information which is expected to be preserved or maintained. If the rules and regulations governing the

functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority.

EXEMPTION FROM DISCLOSURE

Certain categories of information have been exempted from disclosure under the Act. These are:

Disclosure Prejudicially affecting	Where disclosure prejudicially affects 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.
Expressly forbidden by court or tribunal	Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court.
Breach of privilege of Parliament or State Legislature	Where disclosure would cause a breach of privilege of Parliament or the State Legislature.
Harming competitive position	Information including commercial confidence, trade secrets or intellectual property, where disclosure would harm competitive position of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants.
Confidence from a third party	Information received in confidence from a foreign government.
Disclosure endangering life or physical safety	Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance.
Impede the process of investigation or apprehension or prosecution	Information that would impede the process of investigation or apprehension or prosecution of offenders.
Cabinet Papers	Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers.
Personal Information	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 the Central Public Information Officer or the 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.

Example

In case of a war or invasion, revealing or giving out information about strategically placed troops and related information, will be treated as information protected under section 8 of the Act. Such disclosure prejudicially affects the sovereignty and integrity of India.

Example

A, blows a whistle against sand corruption. His identity should be kept a secret since there is an increased risk to his safety and chances of violence against him increases. Such disclosure endangers his life and physical safety.

Example

A court while passing an order states that a particular information in that order shall not be disclosed. Such information shall fall under the disclosure by way of court order and would lead to contempt if not adhered to.

CASE LAW

Kayalvizhi vs. CPIO, Office of the Income Tax Officer, Ward-1 (19.10.2022 - CIC) : (2022)

In this case, the application was filed since the Appellant has sought income related details of her brother and her mother in response to averred RTI Application(s) which impinges on the privacy of the concerned third parties and therefore, the information has been denied to her under Section 8(1)(j) of RTI Act. Further, the other issue raised by the Appellant in the instant Appeal pertains to her family dispute which cannot be redressed from the RTI platform. The appeal was denied and it was observed that -

"....in our opinion, would indicate that personal records, including name, address, physical, mental and psychological status, marks obtained, grades and answer sheets, are all treated as personal information....."

".....Such personal information is entitled to protection from unwarranted invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied....."

Question: NCLT forbids an information to be shared under RTI Act, 2005.

Is the information exempted under Right to Information Act, 2005?

Answer: Yes, Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court are exmepted.

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.

CASE LAW

Chief Information Commissioner vs. High Court of Gujarat and Ors. (04.03.2020 - SC) : (2020)4SCC702

In this case, an appeal was filed with regards to the right of a third party to apply for certified copies to be obtained from the High Court by invoking the provisions of Right to Information Act without resorting to Gujarat High Court Rules prescribed by the High Court. Court observed that-

"We do not find any merit in the above submission and that such cumbersome procedure has to be adopted for furnishing the information/certified copies of the documents. When there is an effective machinery for having access to the information or obtaining certified copies which, in our view, is a very simple procedure i.e. filing of an application/affidavit with requisite court fee and stating the reasons for which the certified copies are required, we do not find any justification for invoking Section 11 of the RTI Act and adopt a cumbersome procedure. This would involve wastage of both time and fiscal resources which the preamble of the RTI Act itself intends to avoid."

WHO IS EXCLUDED?

The Act excludes Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, the Crime Branch-CID- CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police. Agencies specified by the State Governments through a Notification will also be excluded.

The exclusion, however, is not absolute and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of human rights violation shall be given only with the approval of the Central Information Commission within forty- five days from the date of the receipt of request. (Section 24)

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 PIO	● who has not been able to submit an information request because a PIO has not been appointed;
Refusal of Information	● who has been refused information that was requested;
Breach of privilage of Parliament or State Legislature	● where disclosure would cause a breach of privilage of Parliament or the State Legislature;
No response	● who has received no response to his/her information request within the specified time limits;
Unreasonable Fees	● who thinks the fees charged are unreasonable;
Incomplete or Misleading information	● who thinks information given is incomplete or false or misleading; and
Any other matter	● any other matter relating to obtaining information under this law.

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)

Example

'A' wants to seek the information pertaining to the functioning of a public welfare fund such as who is its head, appointment of such head, expenses incurred by that particular authority in last financial year. 'A' received a reply containing information about the functioning, the appointment of head and his name but not the expenses incurred without and reasonable explanation.

'A' shall have the right to make complaint against incomplete information given to him .

Example

'A' seeks the information pertaining the constitution of a committee. Such information was denied to him without any reasonable justifications.

'A' has right to file a complaint against such unreasonable and unjustified refusal of information.

CASE LAW

Central Information Commission v. D.D.A. & Anr. 2024 INSC 513 decided by Supreme Court on 10.07.2024

The principle of purposive interpretation supports the view that the CIC's powers under Section 12(4) of the RTI Act include all necessary measures to manage and direct the Commission's affairs effectively.

Facts of the Case/Background

The present appeal challenges the judgment and order, passed by the High Court of Delhi. The High Court, by the impugned order, quashed the Central Information Commission (Management) Regulations, 2007 framed by the Chief Information Commissioner and held that the CIC has no power to constitute Benches of the Commission. This appeal is confined to the issue of the validity of the Regulations and the powers of the CIC under Section 12(4) of the Right to Information Act, 2005.

Key Issues/Allegations

Whether the CIC, under the provisions of Section 12(4) of the Right to Information Act, 2005 has the authority to constitute benches of the CIC and frame Regulations for the effective management and allocation of work within the Commission, including the issuance of orders and the formation of committees?

Observations, Findings and Decision

In the present case, the RTI Act should be interpreted purposively, taking into account the broader objectives of the legislation. The purpose of the RTI Act is to promote transparency and accountability in the functioning of public authorities, ensuring citizens' right to information. To achieve these objectives effectively, it is essential that the Central Information Commission operates efficiently and without undue procedural constraints. The principle of purposive interpretation supports the view that the CIC's powers under Section 12(4) of the RTI Act include all necessary measures to manage and direct the Commission's affairs effectively. This includes the ability to form benches to handle the increasing volume of cases. The formation of Benches allows for the efficient allocation of work and ensures the timely disposal of cases, which is crucial for upholding the right to information.

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.

Officer senior in rank to the PIOs	● First Appeal: First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).
Central Information Commission or the State Information Commission	● Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).
Third Party appeal	● Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

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)

Example

An application by B, seeking information regarding a particular matter was denied by PIO. B filed an appeal with the officer in rank to PIO regarding such rejection/denial of information. It is upon PIO to justify such non-disclosure.

CASE LAW

N.N. Dhumane vs. PIO, Department of Posts (10.04.2018 - CIC) 2018 SCC OnLine CIC 21

In this case, the appellant was told that her pension for month of March 2017 was held up for want of Aadhaar linking up along with 55 other pensioners who were former employees of this public authority; she filed RTI application about 'linking-up of Aadhaar number to pension accounts'; that they had no authority to link up the Aadhaar Card to her pension account all of sudden without any notice and stop payment for that reason. In the judgement, it was stated that:

"In the name of linking to Aadhaar or other such conditions, the public authority cannot delay the payment of pensions to the senior citizens and retired employees in view of their post retirement requirements. The pensioners might mainly depend upon the pension for their livelihood and delaying it will be inhumane and also amounts to denial of their fundamental right to life. Even if linking with Aadhaar is necessary, it should not result in delaying the payment of pension or denial of information regarding pension."

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 particular of disadvantaged communities as to how to exercise the rights contemplated under this Act;

Encourage public authorities to participate in the development and organisation of programmes referred to in clause (a) and to undertake such programmes themselves;

Promote timely and effective dissemination of accurate information by public authorities about their activities; and

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.

CASE LAWS

HN Malviya vs. CPIO, Department of Personnel and Training on 31st October, 2022 (Central Information Commission)

The Appellant filed an RTI application dated 27.01.2021 seeking the information related to seniority of employees .

The Chief Information Commission in Second Appeal decided that the Commission based on a perusal of the facts on record observes that the information sought for in the RTI Application is in the form of mere conjecture and even futuristic query, neither of which conforms to Section 2(f) of the RTI Act, yet the CPIO & FAA have tried to facilitate the Appellant adequately in keeping with the spirit of the RTI Act. The Appellant shall note that outstretching the interpretation of Section 2(f) of the RTI Act to include deductions and inferences to be drawn by the CPIO is unwarranted as it casts immense pressure on the CPIOs to ensure that they provide the correct deduction/inference to avoid being subject to penal provisions under the RTI Act.

Mr. Raj Kumar vs. CPIO Guru Teg Bahadur Hospital dated 31st October, 2022 (Central Information Commission)

The Complainant vide his RTI application sought information relating to salary records and DA implementation.

The CPIO furnished a pointwise reply to the Complainant. Dissatisfied with the reply received from the PIO, the Complainant filed a First Appeal, which was not adjudicated by the First Appellate Authority. Thereafter, the Complainant filed a Complaint before the Commission.

The Complainant remained absent during the hearing despite notice. The Respondent present during the hearing submitted that a suitable response in accordance with the provisions of the RTI Act, 2005, had already been furnished to the Complainant. The respondent further stated that the information sought in respect of point no. 01 will be furnished in due course.

The Central Information Commission decided that Keeping in view the facts of the case and the submissions made by the respondent and after perusal of the documents available on record, the Commission directs the Respondent to furnish complete and correct information to the Complainant, in accordance with the spirit of transparency and accountability as enshrined in the RTI Act, 2005 within a period of 21 days from the date of receipt of this order under the intimation to the Commission. The Commission cautions the then CPIO to be more careful in the future while dealing with the RTI application so that no such lapse would recur and the provisions of the RTI Act are complied with in letter and spirit.

LESSON ROUND-UP

- Right to know is a necessary ingredient of participatory democracy. The Government enacted Right to Information (RTI) Act, 2005 which came into force on October 12, 2005.
- The RTI 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. Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. Further, it is obligatory on every public authority to publish the information about various particulars prescribed under the Act within one hundred and twenty days of the enactment of this Act.
- Every public authority has to 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. The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking 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 public authority who may hold the information.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.
- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.
- 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.
- 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.
- The Act envisages constitution of Central Information Commission and the State Information Commissions.
- The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of: (i) The Chief Information Commissioner; (ii) Central Information Commissioners not exceeding 10.
- 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 shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment.
- The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of: (i) One State Chief Information Commissioner (SCIC) and (ii) Not more than 10 State Information Commissioners (SIC).
- The Central /State Commission have been authorized to receive and enquire into a complaint from any person who has been denied information by the concerned authorities due to various reasons as specified under the Act. 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.
- 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.
- Stringent penalty may be imposed on a Public Information Officer for failing to provide information. The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty.
- The Act also stipulates the role of the Central/State Governments.

GLOSSARY

CIC : Central Information Commission means the Central Information Commission constituted under sub-section (1) of section 12.

SIC : State Information Commission means the State Information Commission constituted under sub-section (1) of section 15

CPIO : Central Public Information Officer means the Central Public Information Officer designated under sub-section (1) and includes a Central Assistant Public Information Officer designated as such under sub-section (2) of section 5.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. The right to impart and receive information is a species of the right to freedom of speech and expression. Discuss
2. The RTI Act confers on all citizens a right to information. Enumerate the salient features of the Act.
3. Describe the constitution and powers of the Central Information Commission under the Act.
4. Can a person who does not receive a decision within the specified time or is aggrieved by the decision of the PIO file an appeal under the Act?
5. Specify the categories of information that have been exempted from disclosure under the Act.
6. Explain the provisions of Section 20 of the Right to Information Act, 2005.
7. On what grounds can a complaint be filed with Central Information Commission/State Information Commission?
8. Write a short note on:
    - Central Information Commission (CIC)
    - State Information Commission (SIC)

LIST OF FURTHER READINGS
• Bare Act of the Right to Information Act, 2005 • Articles by the professionals and Firms • Right to Information and Jurisprudence by M. L Sharma

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)
• https://www.indiacode.nic.in/bitstream/123456789/2065/5/a2005-22.pdf • https://rti.gov.in/index.asp

Law relating to Information Technology

Lesson 15

KEY CONCEPTS

■ Criminal Intention ■ Search ■ Abetting ■ *Mens Rea* ■ *Actus Reus* ■ Congnizable Offence ■ Non-Congnizable Offence ■ Criminal conspiracy ■ Misappropriation ■ Criminal breach of Trust ■ Accusation ■ Defamation ■

Learning Objectives

To understand:

- Ingredients of Crime and law dealing with the menace of Crime
- Structure of judicial system dealing with criminal cases
- The provisions relating to Bail
- Provisions relating to Compounding of Offences
- Offences relating to the property
- Criminal Breach of Trust
- Offences relating to documents and property marks
- Defamation
- Difference between fine and penalty

Lesson Outline

- Introduction
- Definitions of basic expressions
- Digital signature
- Electronic signature & Electronic governance
- Retention of information
- Audit of documents maintained in electronic form
- Validity of contracts formed through electronic means
- Attribution and dispatch of electronic records
- Time and place of dispatch
- Secure electronic records
- Certifying authorities
- Electronic Signature Certificate
- Penalties & Adjudications
- Appellate tribunal
- Offences
- Rules relating to sensitive personal data
- Development & Law of data protection
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

Information Technology Act, 2000 provides legal framework for electronic governance by giving recognition to electronic records and digital signatures.

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Information Technology Act, 2000
- Digital Personal Data Protection Act, 2023

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 . United Nations General Assembly by resolution A/RES/51/162, dated the January 30, 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law. This is referred to as the UNCITRAL Model Law on E-Commerce. Subsequent to the adoption of this Resolution, Indian government has passed the Information Technology Act, 2000 on 17th October 2000. Indian Information Technology Act 2000 has tried to adopt legal principles, relating to information technology, enacted earlier by several other countries, as also various guidelines pertaining to information technology law. The Act is supplemented by a number of rules which includes rules for cyber cafes, electronic service delivery, data security, blocking of websites. It also has rules for observance of due diligence by internet intermediaries (ISP's, network service providers, cyber cafes, etc.). Any person affected by data theft, hacking, spreading of viruses can apply for compensation.

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:

(a) 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".

(b) It facilitates the electronic filing of documents with the Government agencies, (and also with the publication of rules etc., in the electronic form).

(c) 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

According to Section 1 (4) of the Information Technology Act, 2000 nothing in Information Technology Act, 2000, shall apply to documents or transactions specified in the First Schedule. The documents or transactions mentioned in first schedule are as under:

1. **Negotiable Instruments with exceptions:** A negotiable instrument (other than a cheque, a Demand Promissory Note or a Bill of Exchange issued in favour of or endorsed by an entity regulated by the Reserve Bank of India, National Housing Bank, Securities and Exchange Board of India, Insurance

Regulatory and Development Authority of India and Pension Fund Regulatory and Development Authority) as defined in Section 13 of the Negotiable Instrument Act, 1881.

2. **Power of Attorney with exceptions:** A power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882 but excluding those power-of-attorney that empower an entity regulated by the Reserve Bank of India, National Housing Bank, Securities and Exchange Board of India, Insurance Regulatory and Development Authority of India and Pension Fund Regulatory and Development Authority to act for, on behalf of, and in the name of the person executing them.
3. **Trusts:** A trust as defined in section 3 of the Indian Trust Act, 1882.
4. **Wills:** A will as defined in section 2(h) of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.

DEFINITIONS OF BASIC EXPRESSIONS

Section 2(1) of the Information Technology Act, 2000, contains definitions of various expressions. Some of the definitions are important, for understanding the detailed provisions of the Act and are quoted below:

"Access" with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network. [Section 2(1)(a)]

"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.

"Affixing electronic signature" with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature.[Section 2(1)(d)]

"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)]

"Certification practice statement" means a statement issued by a Certifying Authority to specify the practices that the Certifying Authority employs in issuing electronic signature Certificates. [Section 2(1) (h)]

"Communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.[Section 2(1) (ha)]

"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)]

CASE LAW

Syed Asifuddin and Ors. vs. The State of Andhra Pradesh and Ors. Andhra Pradesh High Court, 2006 (1) ALD Cri 96, 2005 Cri. LJ 4314

In this case it was contended that Insofar as the offence under Section 65 of Information Technology Act is concerned, a telephone handset is not a computer nor a computer system containing a computer programme. Alternatively, in the absence of any law which is in force requiring the maintenance of "computer source code", the allegation that the petitioners concealed, destroyed or altered any computer source code, is devoid of any substance and therefore the offence of hacking is absent.

It was observed by the court that the essential functions in the use of cell phone, which are performed by the MTSO, is the central antenna/central transmitter and other transmitters in other areas well coordinated with the cell phone functions in a fraction of a second. All this is made possible only by a computer, which simultaneously receives, analyses and distributes data by way of sending and receiving radio/electrical signals.

"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 resource" means computer, computer system, computer network, data, computer database or software. [Section 2(1)(k)]

"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)]

"Cyber cafe" means any facility from where access to the internet is offered by any person in the ordinary course of business to the members of the public.[Section 2(1)(na)]

"Cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.[Section 2(1)(nb)]

"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)]

"Electronic form" with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device. [Section 2(1)(r)]

"Electronic record" means data, recorded or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche. [Section 2(1)(t)]

"Electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.[Section 2(1)(ta)]

"Electronic Signature Certificate" means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate.[Section 2(1)(tb)]

"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)]

"Prescribed" means prescribed by rules made under this Act. [Section 2(1)(zb)]

"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.

"Security Procedure" means the security procedure prescribed under section 16 by the Central Government. [Section 2(1)(zf)]

"Subscriber" means a person in whose name the 1 [electronic signature] Certificate is issued. [Section 2(1)(zf)]

"Verify" in relation to a digital signature, or electronic record or its grammatical variations and cognate expressions, means to determine whether -

(a) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber;

(b) the initial electronic record is retained intact, or has been altered since such electronic record was so affixed with the digital signature. [Section 2(1)(zh)]

DIGITAL SIGNATURE AND ELECTRONIC SIGNATURE

As per section 2(1)(ta) of the Information Technology Act, 2000, "electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.

Electronic Signature Certificate are issued under section 35 and includes Digital Signature Certificate and Digital Signature Certificate are issued under section 35 (4) of the Act.

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)].

Example

A driver's license identifies someone who can legally drive in a particular country. Likewise, a digital certificate can be presented electronically to prove one's identity, to access information or services on the Internet or to sign certain documents digitally.

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".

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; and

(b) may be specified in the Second Schedule.

For the purposes of above any electronic signature or electronic authentication technique shall be considered reliable if—

(a) 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;

(b) 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;

(c) any alteration to the electronic signature made after affixing such signature is detectable;

(d) any alteration to the information made after its authentication by electronic signature is detectable; and

(e) 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.

ELECTRONIC GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)

The Act grants legal recognition to electronic records by laying down that where (by any law) "information" or any other matter is to be in:

(a) writing or

(b) typewritten form or

(c) printed form, then, such requirement is satisfied, if such information or matter is:

  (i) rendered or made available in an electronic form; and

  (ii) accessible, so as to be usable for a subsequent reference. (Section 4)

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".

Examples of e-governance include Digital India initiative, National Portal of India, Aadhaar Portal, filing and payment of taxes online, digital land management systems, Common Entrance Test etc.

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; or

(b) the grant of any licence, permit etc.; or

(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.

Example

A portal for Ministry of Corporate affairs, MCA 21, has been maintained and operated by Infosys. Earlier it was operated by Tata Consultancy Services. Likewise Income tax portal has also been operated by Infosys. So Infosys is service provider for this purpose.

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)

Example

A subordinate legislation was published by the authority in official gazette on 02.01.2020 and in electronic Gazette on 31.12.2019.

The date 31.12.2019 shall be deemed to be the date of publication.

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.

CASE LAW

The Supreme Court in the 2010 case of *Trimex International FZE Ltd. Dubai vs. Vedanta Aluminium Ltd., India*. ("*Trimex Case*") provided this clarity with regard to contracts concluded on emails. In the Trimex Case the Supreme Court, held that inference can be drawn from documents exchanged on telegram, emails etc. ("Tele communication") that a valid contract subsists given that intention of the party to be bound by the terms of such Tele-communications and essential elements of a valid contract are present.

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)

Example

An Automatic email is received from or on behalf of a XYZ Ltd. confirming an order placed in online platform.

This electronic record shall be attributed to the said company.

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:

(a) any communication by the addressee (automated or otherwise); or

(b) 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)]

Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall he deemed to have been never sent by the originator.[Section 12(2)]

Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgement must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent. [Section 12(2)]

These provisions emphasize on the need of acknowledgements for making electronic record binding.

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)]

If the addressee has not designated a computer resource (with or without specified timings), then receipt is deemed to occur, when the electronic record enters the computer resource of the addressee. [Sections 13(1), 13(2)] Above provisions apply, even where the place of location of the computer is different from the deemed place of receipt.

The Act also contains provisions as to the place of dispatch and receipt. [Section 13(3)]

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)

Example

If the signature creation data such as codes or private cryptographic keys are in control of 2 or more persons. The electronic signature cannot be deemed to be a secure electronic signature.

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.

Licenced Certifying Authorities[1]



1. *https://cca.gov.in/licensed_ca.html*

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:

(1) 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.

(2) Every such application shall be accompanied by prescribed fees.

(3) 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.

(4) 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:

(a) where the subscriber or any other person authorised by him makes a request to that effect; or

(b) upon the death of the subscriber; or

(c) 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) a material fact represented in the Digital Signature Certificate is false or has been concealed;

(b) a requirement for issuance of the Digital Signature Certificate was not satisfied;

(c) the Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability;

(d) 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,–

(a) accesses or secures access to such computer, computer system or computer network or computer resource;

(b) 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;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) 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;

(e) 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;

(g) 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;

(h) 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;

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;

(j) 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)

It may be noted that:

(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

(ii) "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;

(iii) "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 44)

If any person who is required under this Act or any rules or regulations made thereunder to–

(a) 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 fifteen lakh rupees for each such failure;

(b) 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 fifty thousand rupees for every day during which such failure continues;

(c) maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding one lakh rupees for every day during which the failure continues.

This section has been amended by the Jan Vishwas (Amendment of Provisions) Act, 2023 w.e.f. 30.11.2023.

By way of the amendment, the penalty under this section has now increased to 10 times of penalties provided before the amendment.

Residuary Penalty (Section 45)

Whoever contravenes any rules, regulations, directions or orders made under this Act, for the contravention of which no penalty has been separately provided, shall be liable to pay a penalty not exceeding one lakh rupees, in addition to compensation to the person affected by such contravention not exceeding—

(a) ten lakh rupees, by an intermediary, company or body corporate; or

(b) one lakh rupees, by any other person.

This section has been amended by the Jan Vishwas (Amendment of Provisions) Act, 2023 w.e.f. 30.11.2023.

By way of the amendment, the penalty has now increased from INR 25,000 to INR 1,00,000, and compensation (which was earlier an alternative to the penalty) has also been extended to (i) INR 10,00,000 for a contravention by an intermediary, company or body corporate, or (ii) INR 1,00,000 for a contravention by a person.

Power to adjudicate (Section 46)

According to section 46(1), for the purpose of adjudging under this Act whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made thereunder which renders him liable to pay penalty or compensation, the Central Government shall, subject to the provisions of section 46(3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry in the manner prescribed by the Central Government.

The adjudicating officer appointed under section 46(1) can exercise jurisdiction to adjudicate matters in which the claim for damage does not exceed rupees five crore and the jurisdiction in respect of the claim for damage exceeding rupees five crores is vested with the competent court.

Adjudicatory Process: According to section 46(2), the adjudicating officer can, after giving the person referred to in section 46(1) a reasonable opportunity for making representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section.

Qualification for Adjudicating Officer: According to section 46(3), no person shall be appointed as an adjudicating officer unless he possesses such experience in the field of Information Technology and legal or judicial experience as may be prescribed by the Central Government.

Powers of Adjudicating Officer: Every adjudicating officer shall have the powers of a civil court which are conferred on the Appellate Tribunal under section 58(2), and–

(a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code;

(b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973;

(c) shall be deemed to be a civil court for purposes of Order XXI of the Civil Procedure Code, 1908.

This section has been amended by the Jan Vishwas (Amendment of Provisions) Act, 2023 w.e.f. 30.11.2023.

By way of the amendment, the scope of adjudication through a central government appointed officer under section 46 has also been expanded to the entire Act. Earlier, it was restricted to Chapter IX of the Act, that is, the chapter related to penalties, compensation, and adjudication.

CYBER REGULATION APPELLATE TRIBUNAL

Chapter X of the Act provides for the establishment of Appellate Tribunal. (Sections 48-62). The Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997 , shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

The Central Government shall specify, by notification the matters and places in relation to which the Appellate Tribunal may exercise jurisdiction.

In the same Chapter, there are provisions regarding the compounding of offences and recovery of penalties. (Sections 63 and 64).

Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Appellate Tribunal, within 45 days. (Section 57)

Any person aggrieved by “any decision or order” of the Appellate Tribunal may appeal to the High Court, within 60 days. Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Appellate Tribunal has power to determine.

OFFENCES

Chapter XI of the Act, (Sections 65-78) deals with offences relating to computers etc. and connected matters.

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
- Cyber 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.

Chapter XI of the I T Act also contains certain provisions empowering the Controller of Certifying Authorities to issue certain directions to certifying Authorities (Section 68).

Before the Amendment, any person who intentionally or knowingly fails to comply with any order under section 68(1) were liable on conviction to imprisonment for a term not exceeding two years or a fine not exceeding one lakh rupees or with both.

However, after the enactment of the Jan Vishwas (Amendment of Provisions) Act, 2023, any person who intentionally or knowingly fails to comply with any order under section 68(1) are guilty of an offence and are liable to penalty which may extend to twenty-five lakh rupees.

The quantum of fine has been increased substantially and punishment relating to Imprisonment has now been done away with.

Further, as per section 69 where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do , in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of safeguard and procedure as may be prescribed , for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

CASE STUDY

Shreya Singhal v. Union of India (2015) 5 SCC 1

In this case, petitions were filed arguing that Section 66A of the Information Technology Act of 2000 raises very important and far-reaching questions relating primarily to the was violation of fundamental right of free speech and expression guaranteed by Article 19(1)(a) and Right to Equality under Article 14 of the Constitution of India. Court observed that:

"Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech....

We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial.....

We find, therefore, that the challenge on the ground of Article 14 must fail... Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2)."

Section 66A of the Information Technology Act, 2000 which penalised people for sending "offensive" messages through any communication services, has also now formally been removed from the Act through the Jan Vishwas (Amendment of Provisions) Act, 2023.

Extraterritorial operation

Extra-territorial operation of the Act is provided for, by enacting that the provisions of the Act apply to any offence or contravention committed outside India by any person, irrespective of his nationality, if the act or conduct in question involves a computer, computer system or computer network located in India. (Section 75)

EXEMPTION FROM LIABILITY OF INTERMEDIARY IN CERTAIN CASES

According to section 79(1) of the Act, an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him. However, this provision is subject to section 79 (2) & (3) of the Act provided below.

According to section 79(2), the provisions of sub-section (1) shall apply if:

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not:

  (i) initiate the transmission,

  (ii) select the receiver of the transmission, and

  (iii) select or modify the information contained in the transmission.

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

According to section 79(3) The provisions of sub-section (1) shall not apply if:

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

INFORMATION TECHNOLOGY (REASONABLE SECURITY PRACTICES AND PROCEDURES AND SENSITIVE PERSONAL DATA OR INFORMATION) RULES, 2011

In this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

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

An information provider is a person who provides information to the body corporate and under these rules, he has certain rights over the sensitive personal information, this information cannot be collected without the providers' consent and he or she has the right to abstain from giving consent and can withdraw the consent by writing to the body corporate.

i. **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.

ii. **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.

iii. **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.

iv. **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

v. **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.

vi. **Purpose**

Limitation Rule 5(5) requires that information must be used for the purpose that it was collected for.

vii. 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.

viii. 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.

ix. 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.

x. 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.

xi. 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.

xii. 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.

LAW OF PERSONAL DATA PROTECTION

Digital Personal Data Protection Act, 2023 has got the assent of the Hon'ble President of India on 11th August, 2023. This law will be supplemented by delegated Legislation by way of rules to be made by Central Government.

The purpose of this law is to provide the law relating to the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes and for matters connected therewith or incidental thereto.

Important Definitions

- "Board" means the Data Protection Board of India established by the Central Government.
- "Data" means a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by human beings or by automated means.
- "Data Principal" means the individual to whom the personal data relates and where such individual is—

(i) a child, includes the parents or lawful guardian of such a child;

(ii) a person with disability, includes her lawful guardian, acting on her behalf.

- "Data Processor" means any person who processes personal data on behalf of a Data Fiduciary.
- "Personal data" means any data about an individual who is identifiable by or I n relation to such data;
- "Personal data breach" means any unauthorised processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction or loss of access to personal data, that compromises the confidentiality, integrity or availability of personal data;
- "Processing" in relation to personal data, means a wholly or partly automated operation or set of operations performed on digital personal data, and includes operations such as collection, recording, organisation, structuring, storage, adaptation, retrieval, use, alignment or combination, indexing, sharing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction;
- "Data Fiduciary" means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data; and "person" includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not;

(vi) the State; and

(vii) every artificial juristic person, not falling within any of the preceding sub-clauses.

Application of the Act

According to section 3, subject to the provisions of this Act, it shall-

(a) apply to the processing of digital personal data within the territory of India where the personal data is collected–

(i) in digital form; or

(ii) in non-digital form and digitised subsequently;

(b) also apply to processing of digital personal data outside the territory of India, if such processing is in connection with any activity related to offering of goods or services to Data Principals within the territory of India;

(c) not apply to—

(i) personal data processed by an individual for any personal or domestic purpose; and

(ii) personal data that is made or caused to be made publicly available by—

(A) the Data Principal to whom such personal data relates; or

(B) any other person who is under an obligation under any law for the time being in force in India to make such personal data publicly available.

Illustration. X, an individual, while blogging her views, has publicly made available her personal data on social media. In such case, the provisions of this Act shall not apply.

Digital Data Protection Act, 2023 will come into force only after notification in the Official Gazette by the Central Government which is yet to be notified.

LESSON ROUND-UP

- The Information Technology Act has been passed to give effect to the UN resolution and to promote efficient delivery of Government services by means of reliable electronic records. The Act came into effect on 17.10.2000.
- The purpose of the Act is (a) to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as"electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information and (b) to facilitate electronic filing of documents with the Government agencies.
- Any subscriber may authenticate an electronic record by affixing his electronic signature.
- "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 of the Act.
- The digital signature will be certified by 'Certifying Authority'. The 'certified authority' will be licensed, supervised and controlled by 'Controller of Certifying Authorities'.
- The Act contemplates a dual scheme in regard to wrongful acts concerning computers, etc. Certain acts are visited with (so called) "penalties", which are however, adjudicated, not before courts, but before adjudication officers.
- The Act provides for the establishment of one or more Appellate Tribunal and lays down various provisions regarding its jurisdiction, composition, powers and procedure.
- Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Appellate Tribunal.
- Chapter XI of the Act spells out provisions regarding offences relating to computers, etc. This chapter also contains provisions empowering the Controller of Certifying Authorities to issue certain directions to Certifying Authorities and to subscribers. There is also a provision for confiscation.
- A committee led by former Supreme Court Justice B.N. 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.

GLOSSARY

Affixing electronic Signature: Affixing electronic signature with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature.

Biometrics : Biometrics means the technologies that measure and analyse human body characteristics, such as 'fingerprints', 'eye retinas and irises', 'voice patterns', "facial patterns', 'hand measurements' and 'DNA' for authentication purposes.

Cyber incidents: Cyber incidents means any real or suspected adverse event in relation to cyber security that violates an explicitly or implicitly applicable security policy resulting in unauthorised access, denial of service or disruption, unauthorised use of a computer resource for processing or storage of information or changes to data, information without authorisation.

Cyber Security: Cyber security means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.

Electronic Record: Electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Electronic Signature: Electronic signature means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Summaries the main provisions contained in the Information Technology Act, 2000.
2. What is the significance of electronic records under the Information Technology Act, 2000?
3. State very briefly the gist of the concepts of "computer network", "electronic form" and "key pair", under the Information Technology Act, 2000.
4. What are the offences provided in the Information Technology Act, 2000, for various kinds of misuse of computer?
5. State, in brief, about the Appellate Tribunal, under the Information Technology Act, 2000.
6. Enumerate the offences punishable under section 66 of Information Technology Act, 2000.

LIST OF FURTHER READINGS

- Bare Act of the Information Technology Act, 2000
- Articles by the professionals and Firms
- Kamath Nandan, Law Relating to Computers Internet & E-commerce - A Guide to Cyber laws & The Information Technology Act, Rules, Regulations and Notifications along with Latest Case Laws (2012)
- Karnika Seth, Computers Internet and New Technology Laws (2013)
- Law of Information Technology (Cyber Law) — D.P. Mittal.

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/1999/1/A2000-21%20%281%29.pdf

Contract Law

Lesson 16

KEY CONCEPTS

■ Agreement ■ Contract ■ Void Agreement ■ Quantum Meruit ■ Contingent Contract ■ Quasi Contract ■ Bailment and Pledge ■ E-Contract

Learning Objectives

To understand:

- General Principles relating to the formation and Enforceability of Contracts
- Types of Contracts
- Offer and Acceptance
- Consideration
- Capacity to Contract
- Free Consent
- Termination of Contract
- Remedies for breach of Contract
- Indemnity and Guarantee
- Bailment and Pledge
- Agency and types of Agents
- E-Contracts
- Joint Venture Agreements

Lesson Outline

- Formation of an Agreement, intention to create legal relationship
- Essential elements of a Valid Contract
- Kinds of offer, communication, acceptance and revocation of offer and acceptance
- Consideration
- Exceptions of Consideration
- Void, Voidable & Illegal Contracts: Flaws in Contract and Free Consent
- Certain relations resembling those of contract (Quasi Contracts)
- Discharge or Termination of Contracts
- Remedies for Breach of Contract
- Contract of Indemnity and Guarantee (sections 124 to 147)
- Contract of Bailment and Pledge
- Law of Agency
- Joint venture/ foreign collaboration/ multinational agreement
- E-contracts
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Indian Contract Act, 1872

FORMATION OF AN AGREEMENT, INTENTION TO CREATE LEGAL RELATIONSHIP

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. The preamble to the Act says that it is an Act "to define and amend certain parts of the law relating to contract". The Act is by no means exhaustive on the law of contract. It does not deal with all the branches of the law of contract. Thus, contracts relating to partnership, sale of goods, negotiable instruments, insurance etc. are dealt with by separate Acts.

The Indian Contract Act has defined contract in Section 2(h) as "an agreement enforceable by law".

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.

These definitions indicate that a contract essentially consists of two distinct parts. First, there must be an agreement. Secondly, such an agreement must be enforceable by law. To be enforceable, an agreement must be coupled with an obligation.

A contract therefore, is a combination of the two elements: (1) an agreement and (2) an obligation.

Example

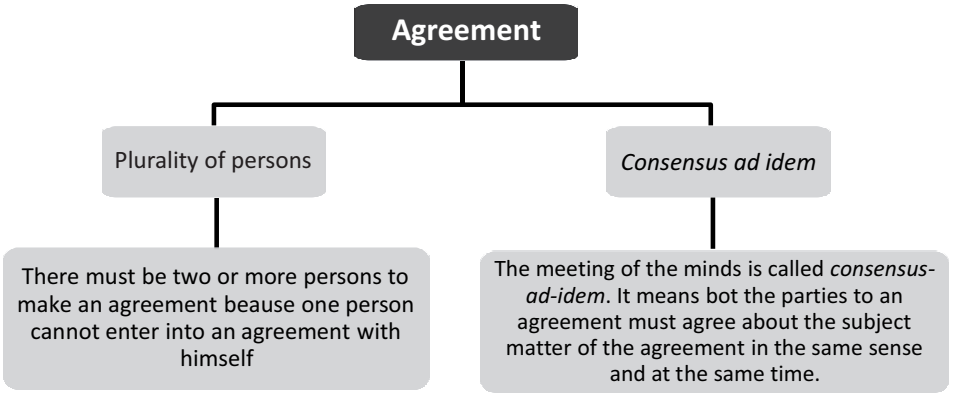
A orally agreed to supply goods to B and to receive payment against it. Is it an agreement?

Yes, it is an oral agreement.

Agreement

An agreement gives birth to a contract. 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. It is evident from the definition given above that an agreement is based on a promise. What is a promise? According to Section 2(b) of the Indian Contract Act "when the 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. An agreement, therefore, comes into existence when one party makes a proposal or offer to the other party and that other party signifies his assent thereto. In nutshell, an agreement is the sum total of offer and acceptance."

An analysis of the definition given above reveals the following characteristics of an agreement:



Obligation

An obligation is the legal duty to do or abstain from doing what one has promised to do or abstain from doing. A contractual obligation arises from a bargain between the parties to the agreement who are called the promisor and the promisee. Section 2(b) says that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; and a proposal when accepted becomes a promise. In broad sense, therefore, a contract is an exchange of promises by two or more persons, resulting in an obligation to do or abstain from doing a particular act, where such obligation is recognised and enforced by law.

Rights and Obligations

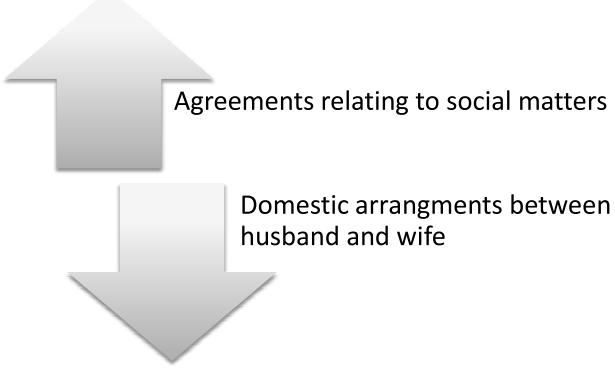
Where parties have made a binding contract, they have created rights and obligations between themselves. The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for Rs. 10,000 to him. In this example, the following rights and obligations have been created:

(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 the idea of bargain is absent and 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. There cannot be any offer and acceptance to hospitality.

(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.

Three consequences follow from the above discussion:

(i) To constitute a contract, the parties must intend to create legal relationship.

(ii) The law of contract is the law of those agreements which create obligations, and those obligations which have their source in agreement.

(iii) Agreement is the genus of which contract is the specie and, therefore, all contracts are agreements but all agreements are not contracts.

Intention to Create Legal Relations

Intention to Create Legal Relations is an 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. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts.

A proposal or an offer is made with a view to obtain the assent to the other party and when that other party expresses his willingness to the act or abstinence proposed, he accepts the offer and a contract is made between the two. But both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective. The Courts seek to give effect to the presumed intention of the parties. Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct. The Court is not concerned with the mental intention of the parties, but rather with what a reasonable man would say, was the intention of the parties, having regard to all the circumstances of the case.

For example, if two persons agree to assist each other by rendering advice, in the pursuit of virtue, science or art, it cannot be regarded as a contract. In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is rebuttable which means that it must be shown that the parties did not intend to be legally bound.

Other Important Types of Contracts

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.

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.

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.

(i) A makes a contract to buy B's house if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(ii) 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.

(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.

(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.

(f) 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.

Law relating Other Important Types of Contracts

There are some special type of contracts. These are:

1. Indemnity
2. Guarantee
3. Bailment
4. Pledge
5. Joint Ventures, Collaborations and Multinational Agreements

It is necessary to understand these concepts for complete understanding of Contract Law. However, before understanding these topics basic understanding of contract law is beneficial. Therefore, these topics are covered later in the study material for proper understanding.

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".

Therefore, 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.

(vi) The object and consideration of the contract is legal and is not opposed to public policy.

(vii) The terms of the contract are certain.

(viii) 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.

***Question*:** Can an agreement on ambiguous terms be valid?

No, The agreement shall be on valid terms.

***Question*:** A & B, entered into contract in which A will send goods to B free of cost and B is not required to do anything against it. Is the contract valid?

No, a valid contract must have consideration unless falls into in to exempted category.

KINDS OF OFFER, COMMUNICATION, ACCEPTANCE AND REVOCATION OF OFFER AND ACCEPTANCE

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.

What is an Offer or a Proposal?

A proposal is also termed as an offer. The word 'proposal' is synonymous with the English word "offer". An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for a promise, act or forbearance. The person making the proposal or offer is called the *proposer or offeror* and the person to whom the proposal is made is called the *offeree*.

1st Definition - Proposal: When one person signifies to another his willingness to do or to 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. Section 2(a)

Kinds of Offers

There are generally 7 type of Offers with difference as to type of offers and their parties. They are as under:

1. ***Particular offer/Specific Offer:*** *The offer is made and addressed to a certain person only. It can only be accepted by person to whom it has been made or its authorized person.*

> ***Example***
>
> A offers to sell his car to B on a consideration of Rs. 1,00,000/-. This is a type of particular offer.

2. ***General Offer:*** *In general offers, the Offer are made to public at large and may be accepted by any one. Tickets are one such example of general offer.* 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.

> ***Example***
>
> *Participation in Lottery, Purchasing the ticket of performance etc.*

3. ***Cross Offers:*** *When two parties gives offers to each other. This is not material that the counter offers are made with similar terms of different terms. Even when two offers were made with similar terms and no offer was accepted, there can be no concluded contract.*

> ***Example***
>
> *A offers to sell his old mobile phone to B at a price of Rs. 10,000/-. B offers to purchase A's old mobile phone at a price of Rs. 10,000/-. There is no concluded contract.*

4. ***Open/Continuing/Standing Offer:*** 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. Thus, a tender to supply goods as and when required, amounts to a standing offer.

   A standing offer or a tender is of the nature of a continuing offer. An acceptance of such an offer merely amounts to intimation that the offer will be considered to remain open during the period specified and that it will be accepted from time to time by placing order for specified quantities. 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 to all [*Percival Ltd. vs. L.C.C. (1918)*].

> ***Example***
>
> *A tender was floated to obtain raw coffee beans by a Company. The coffee beans were required to be provided as and when the order is placed. The tender was awarded to a partnership firm. There is no concluded contract. Contract will be concluded on placing of the order.*

5. ***Counter offer:*** *An offer made against an offer already made. In these offers, the contracts can be made only after acceptance of counter offer.*

> ***Example***
>
> A offers to sell his old mobile phone to B at a price of Rs. 10,000/-. B made a counter offer to purchase the said phone at a price of Rs. 9500/-. There is a situation of counter offer.

6. ***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.
7. ***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* (1959) AIR, M.P. 234].

Rules Governing Offers

A valid offer must comply with the following rules:

(a) 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.

(b) 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.

(c) 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 Rs. 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.

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 LAWS

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. 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.

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.

Example

A advertises in the newspapers that he will pay rupees one thousand to anyone who brings to him his lost cat. B without knowing of this reward finds A's lost cat 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 cat and brings him to A.

Offer and invitation to offer

Invitation to offer is a communication to invite certain person(s) or public for making offer. The same may be understood from below mentioned examples:

(a) *An invitation to treat or an invitation to make an offer:* e.g., an auctioneers 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 shopkeepers 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 piece of land [***Harvey v. Facey (1893) A.C. 552***].

An offer that has been communicated properly continues as such until it lapses, or until it is revoked by the offeror, or rejected or accepted by the offeree.

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. An offer to keep open for a specified time (option) is not binding unless it is supported by consideration.

Mode of Revocation

A proposal may revoked in different ways. Revocation may revoked either by act or by omission. Section 6 provides the following modes for revocation:

(1) by the communication of notice of revocation by the proposer to the other party.

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance.

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance.

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Point no. 1 of the above is revocation by an act and 2 to 3 are revocation by omission.

Acceptance

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under 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.

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. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. 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 one which is to be accepted by being acted upon, no communication of acceptance to the offeror

is necessary, unless communication is stipulated for in the offer itself.

Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer, and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

(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.

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 Rs. 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. This something in return is the consideration for the promise.

Definition of Consideration

Sir Fredrick Pollock has defined consideration "as an act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought".

It is "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" [***Currie* v. *Misa* (1875) L.R. 10 Ex. 153**].

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".

The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems:

(a) Consideration at the desire of the promisor: 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.

(b) 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. 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 donors 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 donors 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.

Doctrine of Privity of Contract and of 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, tittle 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.

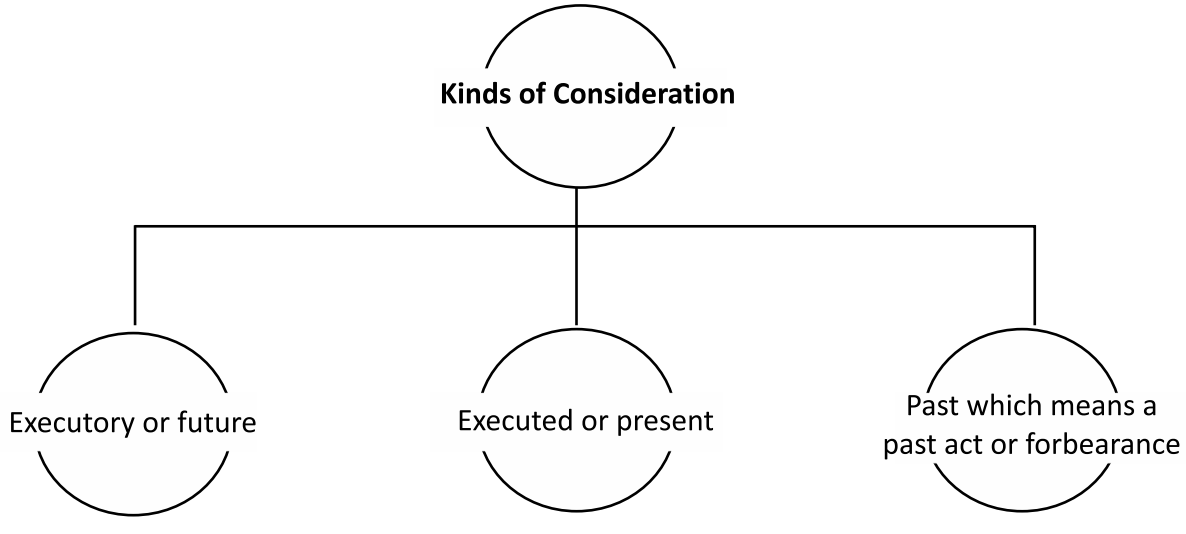
(v) Whenever the promisor is by his own conduct estopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable.

(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.

Privity of consideration

In India privity of consideration is not strictly applicable. It means that consideration may be paid by parties or any other person. The doctrine of privity of contract provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. It is applicable in India with certain exception like trust, covenant running with land, family settlements etc.

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.

According to English law, a consideration may be executory or executed but never past. The English law is that past consideration is no consideration. *The Indian law recognizes all the above three kinds of consideration.*

Rules Governing Consideration

(a) Every simple contact 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 Rs. 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. Section 25 (Exp. II) clearly provides that "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate". It is upon the parties to fix their own prices. For example, where A voluntarily agreed to sell his motor car for Rs. 500 to B, it became a valid contract despite the inadequancy of the consideration.

(f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime.

If the consideration is unlawful, the agreement is void.

(g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: ***Stilk v. Myrick (1809).***

EXCEPTIONS OF CONSIDERATION

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.

Thus, an agreement without consideration is valid:

- 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
- If it is made to compensate a person who has already done something voluntarily for the promisor, or done something which the promisor was legally compellable to do; or
- 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
- Besides, according to Section 185 of the Indian Contract Act, consideration is not required to create an agency
- 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

The requirements in the above exceptions are noteworthy. The first one requires written and registered promise.

The second may be oral or in writing and the third must be in writing.

Illustrations

A, for natural love and affection, promises to give his son B Rs. 10,000. A put his promise to B into writing and registered it. This is a contract.

A registered agreement between a husband and his wife to pay his earnings to her is a valid contract, as it is in writing, is registered, is between parties standing in near relation, and is for love and affection [***Poonoo Bibi* v. *FyazBuksh*, (1874) 15 Bom L.R. 57].**

But where a husband by a registered document, after referring to quarrels and disagreement between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was heldthat the promise was unenforceable, as it was not made for love and affection [***Rajluckhy Deb* v. *Bhootnath* (1900) 4 C.W.N. 488].**

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.

Consideration therefore, is some detriment to the promisee or some benefit to the promisor. Detriment to one person and benefit to the other are the same things looked from two angles. Ordinarily a promisor is not bound by his promise, unless some consideration is offered by the promisee.

Terms Must be Certain

It follows from what has been explained in relation to offer, acceptance and consideration that to be binding, an agreement must result in a contract. That is to say, the parties must agree on the terms of their contract. They must make their intentions clear in their contract. The Court will not enforce a contract the terms of which are uncertain. Thus, an agreement to agree in the future *(a contract to make a contract)* will not constitute a binding contract e.g., a promise to pay an actress a salary to be *"mutually agreed between us"* is not a contract since the salary is not yet agreed: *Loftus v. Roberts (1902).*

Similarly, where the terms of a final agreement are too vague, the contract will fail for uncertainty. Hence, the terms must be definite or capable of being made definite without further agreement of the parties.

The legal maxim, therefore, is "a contract to contract is not a contract". If you agree "subject to contract" or "subject to agreement", the contract does not come into existence, for there is no definite or unqualified acceptance.

Thus, a contract is always based upon:

(i) Agreement **(*consensus ad idem*)** an unqualified acceptance of a definite offer;

(ii) An intent to create legal obligations; and

(iii) Consideration.

VOID, VOIDABLE & ILLEGAL CONTRACTS: FLAWS IN CONTRACT AND FREE CONSENT

There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement. Where there is no real agreement, the law has three remedies:

Firstly: The agreement may be treated as of no effect and it will then be known as void agreement.

Secondly: The law may give the party aggrieved the option of getting out of his bargain, and the contract is then known as voidable.

Thirdly: The party at fault may be compelled to pay damages to the other party.

(a) Void Agreement

A void agreement is one which is destitute of all legal effects. It cannot be enforced and confers no rights on either party. It is really not a contract at all, it is non-existent. Technically the words 'void contract' are a contradiction in terms. But the expression provides a useful label for describing the situation that arises when a 'contract' is claimed but in fact does not exist. For example, a minor's contract is void.

(b) Voidable Contract

A voidable contract is one which a party can put to an end. He can exercise his option, if his consent was not free. The contract will, however be binding, if he does not exercise his option to avoid it within a reasonable time. The consent of a party is not free and so he is entitled to avoid the contract, if he has given his consent due to misrepresentation, fraud, coercion or undue influence.

(c) Illegal Agreement

An illegal agreement is an unlawful agreement. The law prohibits agreements made with unlawful object or consideration. Such an agreement, like the void agreement has no legal effects as between the immediate parties. Further, transactions collateral to it also become tainted with illegality and are, therefore, not enforceable. Parties to an unlawful agreement cannot get any help from a Court of law, for no polluted hands shall touch the pure fountain of justice. On the other hand, a collateral transaction can be supported by a void agreement..

Example

A & B entered into contract in which A will steal a Diamond from a museum and B will give him Rs. 5,00,000/-. Is it a valid contract?

No, the consideration should not be illegal.

The chief flaws in contract are:

Incapacity	Mistake	Misrepresentation	Fraud
Undue Influence	Coercion	Illegality	Impossibility

Capacity to contract

Flaw in Capacity – Capacity and Persons

In law, persons are either natural or artificial. Natural persons are human beings and artificial persons are corporations. Contractual capacity or incapacity is an incident of personality.

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:

(i) minors,

(ii) lunatics, and

(iii) persons disqualified from contracting by any law to which they are subject.

These persons are not competent to contract. Section 11 provides that every "person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject". A valid agreement requires that both the parties should understand the legal implications of their conduct. Thus, both must have a mature mind. The legal yardstick to measure maturity according to the law of contract is, that both should be major and of sound mind and if not, the law would presume that the maturity of their mind has not reached to the extent of visualising the pros and cons of their acts, hence, a bar on minors and lunatics competency to contract.

The contractual capacity of a corporation depends on the manner in which it was created.

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. *DharmodasGhose,* (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.

But where the loan was obtained by fraudulent representation by the minor or some property was sold by him and the transactions are set aside as being void, the Court may direct the minor to restore the property to the other party.

> ***Example***
>
> A minor fraudulently overstates his age and takes delivery of a motor car after executing a promissory note in favour of the trader for its price. The minor cannot be compelled to pay the amount to the promissory note, but the Court on equitable grounds may order the minor to return the car to the trader, if it is still with the minor.

Thus, according to Section 33 of the Specific Relief Act, 1963 the Court may, if the minor has received any benefit under the agreement from the other party require him to restore, so far as may be such benefit to the other party, to the extent to which he or his estate has been benefited thereby.

(d) A minors estate is liable to pay a reasonable price for necessaries supplied to him or to anyone whom the minor is bound to support (Section 68 of the Act).

The necessaries supplied must be according to the position and status in life of the minor and must be things which the minor actually needs. The following have also been held as necessaries in India.

Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy; costs incurred in defending him in a prosecution; and money advanced to a Hindu minor to meet his marriage expenses have been held to be necessaries.

(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

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.

A person of unsound mind cannot enter into a contract. A lunatics agreement is therefore void. But if he makes a contract when he is of sound mind, i.e., during lucid intervals, he will be bound by it.

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. 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.

Agreement by persons of unsound mind are void. But for necessaries supplied to a lunatic or to any member of his family, the lunatics estate, if any, will be liable. There is no personal liability incurred by the lunatic.

If a contract entered into by a lunatic or person of unsound mind is for his benefit, it can be enforced (for the benefit) against the other party but not vice-versa [*Jugal Kishore* v. *Cheddu,* (1903) l All. L.J 43].

Other Persons qualified and disqualified from contracting

Some statues 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.

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.

For the purposes of civil rights, an Indian citizen of the subject of a neutral state who is *voluntarily* resident in hostile territory or is carrying on business there is an alien enemy. Trading with an alien enemy is considered illegal, being against public policy.

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.

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].

Corporations

A corporation is an artificial person created by law, e.g., a company registered under the Companies Act, public bodies created by statute, such as Municipal Corporation of Delhi. 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 in ultra vires and void.

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 wifes contracts but since 1935 this liability no longer arises unless the wife is acting as the husbands agent. Now, therefore, even in England a married woman has full contractual capacity, and can sue and be sued in her own name.

Free Consent: Flaw in Consent

The basis of a contract is agreement, i.e., mutual consent. In other words, the parties should mean the something in the same sense and agree voluntarily. It is when there is consent, that the parties are said to be consensus ad idem i.e. their minds have met. Not only consent is required but it must be a free consent. Consent is not free when it has been caused by coercion, undue influence, misrepresentation, fraud or mistake. These elements if present, may vitiate the contract.

When this consent is wanting, the contract may turn out to be void or voidable according to the nature of the flaw in consent. Where there is no consent, there can be no contract as in the case of mutual mistake. Where there is consent, but it is not free, a contract is generally voidable at the option of the party whose consent is not free. In the case of misrepresentation, fraud, coercion, undue influence, the consent of one of the parties is induced or caused by the supposed existence of a fact which did not exist.

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.

Effect of Mistake

A mistake in the nature of miscalculation or error of judgement by one or both the parties has no effect on the validity of the contract. For example, if A pays an excessive price for goods under a mistake as to their true value, the contract is binding on him [*Leaf* v. *International Galleries* (1950) 1 All E.R. 693].

Therefore, mistake must be a "vital operative mistake", i.e. it must be a mistake of fact which is fundamental to contract. To be operative so as to render the contract void, the mistake must be:

(a) of fact, and not of law or opinion;

(b) the fact must be essential to agreement, i.e., so fundamental as to negative the agreement; and

(c) must be on the part of both the parties.

Thus, where both the parties to an agreement are under a mistake as to a matter of fact essential to agreement, the agreement is void (Section 20). Such a mistake prevents the formation of any contract at all and the Court will declare it void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void.

Mistake of Law and Mistake of Fact

Mistakes are of two kinds: (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 execusable.

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. Similarly, if a contract is made in ignorance of private right of a party, it would be void, e.g., where A buys property which already belongs to him.

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 unless (i) it concerns some fundamental fact and (ii) the other party is aware of the mistake. For this reason, error of judgement on the part of one of the parties has no effect and the contract will be valid.

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.

In Couturier v. Hastie (1856), there was a contact to buy cargo described as shipped from port A to port B and believed to be at sea which in fact got lost earlier unknown to the parties and hence not in existence at the time of the contract. Held, the contract was void due to the parties mistake.

(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.

In Raffles v. Wichelhhaks (1864), A agreed to buy from B a cargo of cotton to arrive "ex Peerless from Bombay". There were two ships called "Peerless" sailing from Bombay, one arriving in October and the other in December. A meant the earlier ship and B the latter. Held, the contract was void for mistake.

(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.

In Henkel v. Pape (1870), P wrote to H inquiring the price of rifles and suggested that he might buy as many as fifty. On receipt of a reply he wired send three rifles. Due to the mistake of the telegraph clerk the message transmitted to H was send the rifles. H despatched 50 rifles. Held, there was no contract between the parties.

(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.

The general rule is that a party to a contract does not owe any duty to the other party to discloses all the facts in his possession during negotiations. Even if he knows that the other party is ignorant of or under some misapprehension as to an important fact, he is under no obligation to enlighten him. Each party must protect his own interests unaided. In contract of sale of goods, this rule is summed up in the maxim *caveat emptor* (Let the buyer beware.) The seller is under no duty to reveal the defects of his goods to the buyer, subject to certain conditions.

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.*

Mistake as to the identity of the person with whom the contract is made will operate to nullify the contract only if:

(i) the identity is for material importance to the contracts; and

(ii) the mistake is known to the other person, i.e., he knows that it is not intended that he should become a party to the contract.

In *Cundy* vs. *Lindsay* (1878) 3 A.C. 459, one Blenkarn posing as a reputed trader Blankiron, placed an order forsome goods with M/s Lindsay and Co. The company, thought that it is dealing with Blankiron and supplied the goods. Blenkarn sold the goods to Cundy and did not pay to Lindsay. The latter sued Cundy. The Court held thatthere was no contract between Lindsay and Blenkarn and therefore Cundy has no title to the goods.

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.

But in order to avoid a contract on the ground of misrepresentation, it is necessary to prove that:

(i) there was a representation or assertion.

(ii) such assertion induced the party aggrieved to enter into the contract.

(iii) the assertion related to a matter of fact (and not of law as ignorance of law is no excuse).

(iv) the statement was not a mere opinion or hearsay, or commendation (i.e., reasonable praise). For example an advertisement saying, "washes whiter than the whitest".

(v) the statement which has become or turned out to be untrue, was made with an honest belief in its truth. Damages for Innocent Misrepresentation.

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.

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:

(i) a false representation or assertion,

(ii) of fact (and not a mere opinion),

(iii) made with the intention that it should be acted upon,

(iv) the representation must have actually induced the other party to enter into the contract and so deceived him,

(v) the party deceived must thereby be indemnified, for there is no fraud without damages, and

(vi) 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 *uberrimaefidei*- (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 uberrimae fidei 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 Bharatiya Nyaya Sanhita.

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.

It has been held that mere threat by one person to another to prosecute him does not amount to coercion. There must be a contract made under the threat and that contract should be one sought to be avoided because of coercion (*Ramchandra* v. *Bank of Kohlapur,* 1952 Bom. 715). It may be pointed out that coercion may proceed from any person and may be directed against any person, even a stranger and also against goods, e.g., by unlawful detention of goods.

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. The words "unfair advantage" do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. In the words of Lord Kingston, "the principle applies to every case where influence is acquired and abused where confidence is reposed and betrayed".

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.

Illustration

A, having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence a bond upon B for a greater amount than the sum due in respect of the advance. A employs undue influence.

A, a man enfeebled by disease or age is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

A parent stands in a fiduciary relation towards his child and any transaction between them by which any benefit is procured by the parent to himself or to a third party, at the expense of the child will be viewed with jealousy by Courts of Equity and the burden will be on the parent or third-party claiming the benefit of showing that the child while entering into the transaction had independent advice, that he thoroughly understood the nature of transaction and that he was removed from all undue influence when the gift was made [*Marim Bibi v. Cassim Ebrahim (1939) 184 I.C. 171 (1939) A.I.R. 278*].

Where there is a presumption of undue influence, the presumption can be rebutted by showing that

(i) full disclosure of all material facts was made,

(ii) the consideration was adequate, and

(iii) the weaker party was in receipt of independent legal advice.

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 Koer* v. *Rai Sham Krishen* (1907) 34 Cal. 150, C.R. 34 I.A. 9].

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

(i) lawful unless it is 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.*

Illustration

(i) X, Y and Z enter into an agreement for the division among them of gains acquired by them by fraud. The agreement is void as its object is unlawful.

(ii) X promises to obtain for Y an employment in the Government service and Y promises to pay Rs. 1,500 to X. The agreement is void, as the consideration for it is unlawful.

(iii) X promises to Y to drop a prosecution which he has instituted against Y for robbery, and Y promises to restore the value of the things taken. The agreement is void as its object is unlawful.

(iv) A who is B's mukhtr promises to exercise his influence, as such, with B in favour of C and C promises to pay Rs. 1,000 to A. The agreement is void because it is immoral.

(v) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void as it implies or involves injury to the person of another.

Void and Illegal Contracts

A void contract is one which is destitue 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 potierest condition defendeties- 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.

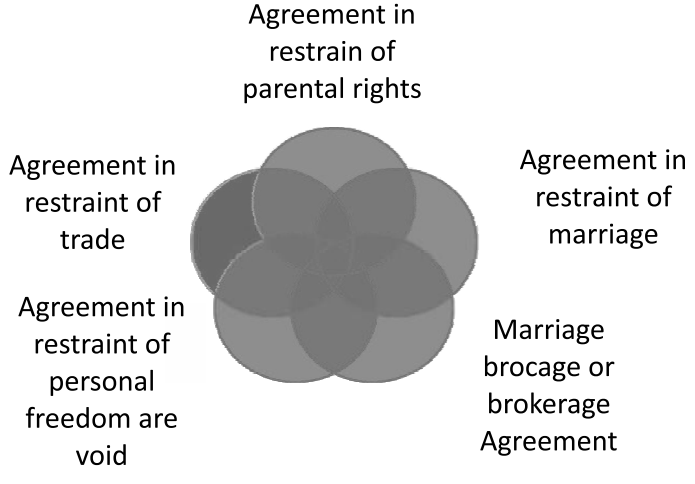
(b) If the plaintiff can frame a cause of action entirely dependent of the contract.

(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 a branch of Common Law and like any other branch of Common Law it is governed by the precedents [*Gherulal Parakh v. Mahadeodas Maiya (1959) 2 S.C.R. (Suppl.) 406; AIR 1959 S.C. 781*]. 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 [*Lord Halsbury, Janson v. Driefontien Consolidated Mines (1902) A.C. 484, 491*]. 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 restrain 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

Section 27 of the Indian Contract Act states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, 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 his 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. In *Madhub Chunder* v. *RaCoomar* (1874) 14 Bang. L.R. 76, A paid Rs. 900 to B's workman. B undertook to stop his business in a particular locality in Calcutta. He did not keep his promise. A's suit for the sum was dismissed since the agreement was void under Section 27. The reasonableness or otherwise of the restraint was not discussed. However, if a restrictive meaning is adopted, most of the ordinary mercantile agreements may be hit. Thus, the Courts have held that if the restraint is one which is really necessary for the carrying on business, the same is not prohibited. In *Mackenzie* v. *Sitarmiah,* (1891) 15 Mad. 79, A agreed to sell to B all the salt he manufactured and B agreed to buy such salt. A further agreed not to sell salt to third-parties. The Court held that the agreement wasvalid.

Other type of restrains is personal covenants between an employer and his employee whereby the latter agrees not to compete with the former or serve with any of his competitors after employment. This issue came before the Supreme Court in *Niranjan Shanker Golikari* v. *The Century Spinning and Manufacturing Co. Ltd.,* AIR 1967 S.C. 1098. In this case N entered into a bond with the company to serve for a period of five years. In case, N leaves his job earlier and joins elsewhere with companys competitor within five years, he was liable for damages. N was imparted the necessary training but he left the job and joined another company. The former employer instituted a suit against N. The Supreme Court, held that the restraint was necessary for the protection of the companys interests and not such as the Court would refuse to enforce.

In other case, it has been reiterated that the restriction should be reasonable taking into account the facts and circumstances of the case. In *Superintendence Company of India Ltd*. v. *Krishna Murgai* [(1981) 2 SCC 246], the Supreme Court laid down that a restraint beyond the term of service would be void and the only ground on which it can be justified is by showing it is necessary for the protection of the employers goodwill.

The words "to the extent" in Section 27 make it clear that if in an agreement there are some convenants which are prohibited whereas the others are not and if the two parts can be separated then only those convenants which operate as restraint of trade would be void and not whole of the agreement itself. To illustrate, in *Brahmputra Tea Co. Ltd.* v. *Scarth*(1885) I.L.R. Cal. 545, the employee agreed with the employer firstly, not to compete with latter after leaving the job and, secondly, not to injure employer's interest during employment. The Court held that the first condition is a restraint of trade but the second is binding.

Example

A & B entered into contract in which A will not engage in the business of selling spices in Delhi. B paid Rs. 5,00,00/- as consideration to this agreement. Is this agreement void?

Yes, this agreement is void pursuant to section 27 of Indian Contract Act, 1872.

When Contracts in Restraint of Trade Valid

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.

***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 [*Fraster& Co.* v. *Laxmi Narain,* (1931) 63 All 316].

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". Wagerning agreements are nothing but ordinary betting agreements. For example, A and B enter into an agreement that if Englands 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 losses, 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 looses 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.

Sometimes, commercial transactions assume the form of wagering contracts. The sample test to find out whether a particular transaction is a wager or a genuine commercial transaction is: "Where delivery of the goods sold is intended to be given and taken, it is valid contract, but where only the differences are intended to be paid, it will be a wagering contract and unenforceable".

In a wagering contract there must be mutuality in the sense that the gain of one party should be loss to the other on the happening of an uncertain event which is the subject matter of the contract.

Void Agreements

The following types of agreements are void under Indian Contract Act:

(a) Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - Section 11.

(b) Agreement made under a mistake of fact, material to the agreement on the part of the both the parties - Section 20.

(c) An agreement of which the consideration or object is unlawful - Section 23.

(d) 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.

(e) An agreement made without consideration subject to three exceptions provided to Section 25.

(f) An agreement in restraint of marriage - Section 26.

(g) An agreement in restraint of trade - Section 27.

(h) An agreement in restraint of legal proceedings - Section 28.

(h) Agreements, the meaning of which is not certain, or capable of being made certain - Section 29.

(j) Agreement by way of wager- Section 30.

(k) An agreement to enter into an agreement in the future.

(l) An agreement to do an act impossible in itself - Section 56(1)

When contract becomes void

An agreement not enforceable by law is void *ab initio* - Section 2(g).

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable - Section 2(j) A contract becomes void when, by reason of some event which the promisor could not prevent, the performance of the contract becomes impossible, e.g., by destruction of the subject- matter of the contract after the formation of the contract.

A contract becomes void by reason of subsequent illegality. A in India agrees to supply goods to B in Pakistan. After the formation of the contract war breaks out between India and Pakistan and the supply of goods to Pakistan is prohibited by legislation. The contract becomes void.

A contingent contract to do or not do to anything if an uncertain future event happens becomes void if the event becomes impossible.

Where a contract is voidable at the option of the aggrieved party, the contract becomes void when the option is exercised by him.

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.

Restitution is also provided for by Section 65 where an agreement is discovered to be void. A pays Rs. 500 in consideration of B's promising to marry, C, A's daughter C is dead at the time of the promise. The agreement is discovered to be void and B must pay back Rs. 500.

But there is no resolution where the parties are wholly incompetent to contract, e.g., where one of the parties is a minor. The minor cannot be asked to restore the benefit, e.g., a minor borrowed Rs. 1,000 from B, he cannot be asked to pay back Rs. 1,000 to B because the contract is void (*Mohori Bibis* case).

CERTAIN RELATIONS RESEMBLING THOSE OF CONTRACT (QUASI CONTRACTS)

Nature of 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. It is the duty and not an agreement or intention which defines it. A very simple illustration is money paid under mistake. Equity demands that such money must be paid back.

Quasi-Contracts or Implied Contracts under the Indian Contract Act

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.

Example

R and S enter a contract under which R agrees to deliver Groceries at S's residence and S promises to pay Rs. 15,000 end of the month. However, R erroneously delivers the groceries at T's residence instead of S's.

When T gets home he assumes that the groceries was send by his uncle and consumed. In this case, even there is no contract between T and R, it may be treated as Quasi contract and T is Liable to pay for the groceries.

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 necessaries 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. For example, where A's goods are wrongfully attached in order to realise arrears of Government revenue due by B, and A pays the amount to save his goods from being sold, he is entitled to recover the amount from B.

(c) Money obtained by defendant from third-parties. For example, where an agent has obtained a secret commission or a fraudulent payment from a third-party, the principle can recover the amount from the agent.

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.

The party in default may also sue on a *"quantum meruit"* for what he has done if the contract is divisible and the other party has had the benefit of the part which has been performed. But if the contract is not divisible, the party at fault cannot claim the value of what he has done.

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.

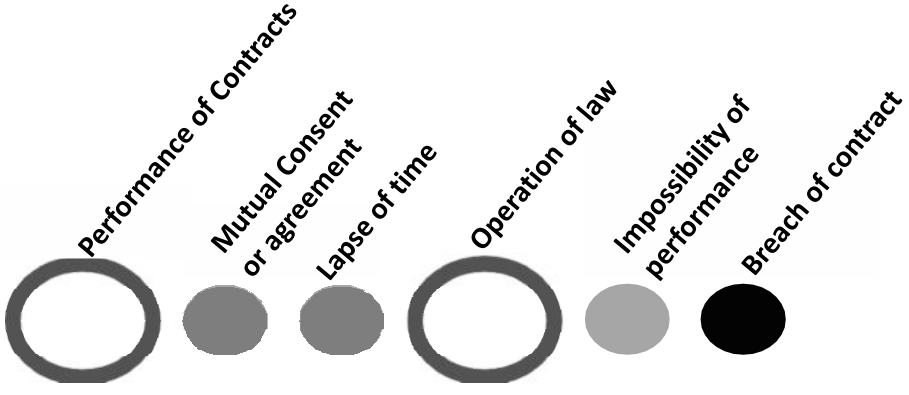
Obligation of a person enjoying benefit of non-gratuitous act

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. For example, when one of the two joint tenants pays the whole rent to the landlord, he is entitled to compensation from his co-tenant, or if A, a tradesmen, leaves goods at B's house by mistake and B treats the goods as his own, he is bound to pay A for them.

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:



(a) 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.

To be valid, a tender must fulfil the following conditions

i. it must be unconditional;

ii. if must be made at a proper time and place;

iii. it must be made under circumstances enabling the other party to ascertain that the party by whom it is made is able and willing then and there to do the whole of what he is bound, to do by his promise;

iv. if the tender relates to delivery of goods, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver;

v. tender made to one of the several joint promisees has the same effect as a tender to all of them.

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.

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.

Example

(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 ore more promisors make default in such contribution, the remaining joint promisors should bear the loss arising from such default in equal share.

Under Section 44 of the Act, where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor(s); neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

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

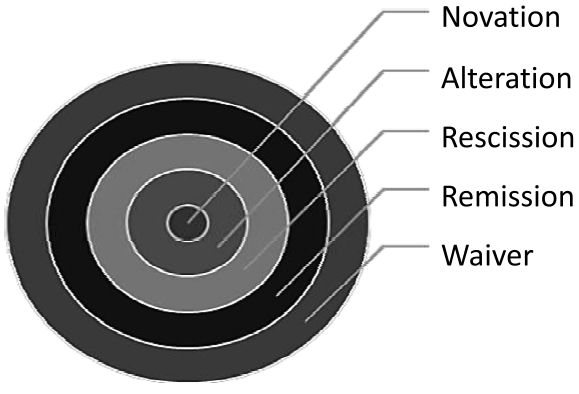
The promisee may assign rights and benefits of contract and the assignee will be entitled to demand performance by the promisor. But the assignment to be complete and effectual, must be made by an instrument in writing.

An obligation or liability under a contract cannot be assigned. For example, if A owes B Rs. 500 and A transfers the liability to C i.e. asks C to pay the sum to B, this would not bind B, and B may not consent to this arrangement, as he may know nothing of C's solvency. But if B consents to accept performance by C, there is a substitution of new contract and the old contract is discharged and all rights and liabilities under it are extinguished. This is technically called *novation*.

(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.

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 infact 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:

(a) By merger: When the parties embody the inferior contract in a superior contract.

(b) 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.

(c) 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 inspite of the agreement being void *ab-initio* (Section 56, para 3).

In *Satyabarta Ghose* v. *Mugnuram* A.I.R. 1954 S.C. 44 the Supreme Court interpreted the term 'impossible appearing in second paragraph of Section 56. The Court observed that the word 'impossible has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain; it can very well be said that the promisor found it impossible to do the act which he promised to do. In this case, A undertook to sell a plot of land to B but before the plot could be developed, war broke out and the land was temporarily requisitioned by the Government. A offered to return earnest money to B in cancellation of contract. B did not accept and sued A for specific performance. A pleaded discharge by frustration. The Court held that Section 56 is not applicable on the ground that the requisition was of temporary nature and there was no time limit within which A was obliged to perform the contract. The impossibility was not of such a nature which would strike at the root of the contract.

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.

Discharge by Supervening Illegality

A contract which is contrary to law at the time of its formation is void. But if, after the making of the contract, owing to alteration of the law or the act of some person armed with statutory authority the performance of the contract becomes impossible, the contract is discharged. This is so because the performance of the promise is prevented or prohibited by a subsequent change in the law. A enters into contract with B for cutting trees. By a statutory provision cutting of trees is prohibited except under a licence and the same is refused to A. The contract is discharged.

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.

Supervening impossibility or illegality is known as frustration under English Law.

(f) 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

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.

In *Hochester* v. *De La Tour* (1853) E.R. 922, A hired B in April to act as a courier commencing employment from 1st June, but wrote to B in May repudiating the agreement, B sued A for breach of contract immediately after repudiation. A contended that there could not be breach of contract before June 1. *Held,* B was immediately entitled to sue and need not wait till 1st June, for his right of action to accrue.

In *Avery* v. *Bowden* (1856) 116 E.R. 1122, A hired B's ship to carry a cargo from Russia. Later on B repudiated the contract. A delayed taking action hoping B would change his mind before the performance date. War broke outbetween Russia and Britain before the performance date frustating the contract. *Held,* A lost his right to sue B for damages by his delay.

In *Frost* v. *Knight* (1872) L.R. 7 Ex. 111, the law on the subject of anticipatory breach was summed up as follows:

"The promisee if he pleases may treat the notice of intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance: but inthat case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it."

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.

(i) Remedies for Breach of Contract

In case of breach of contract, the injured party may:

(a) Rescind the contract and refuse further performance of the contract;

(b) Sue for damages;

(c) Sue for specific performance;

(d) Sue for an injunction to restrain the breach of a negative term; and

(e) Sue on quantum meruit.

When a party to a contract has broken the contract, the other party may treat the contract as rescinded and he is absolved from all his obligations under the contract. Under Section 65, when a party treats the contract as rescinded, he makes himself liable to restore any benefits he has received under the contract to the party from whom such benefits were received. Under Section 75 of the Indian Contract Act, if a person rightfully rescinds a contract, he is entitled to a compensation for any damage which he has sustained through the non-fulfilment of the contract by the other party. Section 64 deals with consequences of rescission of voidable contracts, i.e., where there is flaw in the consent of one party to the contract. Under this Section when a person at whose option a contract is voidable rescinds, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder, from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

(ii) Damages for Breach of Contract

Under Section 73 of the Indian Contract Act, 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, *which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it.* Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

The foundation of the claim for damages rests in the celebrated case of *Hadley* v. *Baxendale*, (1854) 9 Ex. 341. The facts of this case were as follows:

There was a breakdown of a shaft in A's mill. He delivered the shaft to B, a common carrier to be taken to a manufacturer to copy and make a new one. A did not make known to B that delay would result in loss of profits. By some neglect on the part of B, the *delivery of the shaft was delayed in transit beyond a reasonable time*. As a result, the mill was idle for a longer period than it would otherwise have been, had there been no such delay. It was held, B was not liable for the loss of profits during the period of delay as the circumstances communicated to A did not show that the delay in the delivery of the shaft would entail loss of profits to the mill. In the course of the judgement it was observed:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both the parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation, the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case and of this advantage it would be very unjust to deprive them."

Liquidated and *Unliquidated* 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,

(b) special damages,

(c) exemplary or punitive damages, and

(d) nominal damages.

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. Thus, it applies only to the proximate consequences of the breach of the contract and the remote consequences are not generally regarded. For example, in a contract for the sale of goods, the damages payable would be the difference between the contract price and the price at which the goods are available on the date of the breach.

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. For example, A delivered goods to the Railway Administration to be carried to a place where an exhibition was being held and told the goods clerk that if the goods did not reach the destination on the stipulated date he would suffer a special loss. The goods reached late. He was entitled to claim special damages.

Exemplary 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 customer scheque 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.

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.

Liquidated Damages and Penalty

Where the contracting parties fix at the time of contract the amount of damages that would be payable in case of breach, in English law, the question may arise whether the term amounts to "liquidated damages" or a "penalty"? The Courts in England usually give effect to liquidated damages, but they always relieve against penalty.

The test of the two is that where the amount fixed is a genuine pre-estimate of the loss in case of breach, it is liquidated damages and will be allowed. If the amount fixed is without any regard to probable loss, but is intended to frighten the party and to prevent him from committing breach, it is a penalty and will not be allowed.

In Indian law, there is no such difference between liquidated damages and penalty. Section 74 provides for "reasonable compensation" upto the stipulated amount whether it is by way of liquidated damages or penalty. For example, A borrows Rs. 500 from B and promises to pay Rs. 1,000 if he fails to repay Rs. 500 on the stipulated date. On A's failure to repay on the given date, B is entitled to recover from A such compensation, not exceeding Rs. 1,000 as the Court may consider reasonable. (*Union of India* v. *Raman Iron Foundry,* AIR 1974 SC 1265).

(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. In case of sale of goods, it will only be granted if the goods are unique and cannot be purchased in the market, e.g., a particular race horse, or one of special value to the party suing by reason of personal or family association, e.g., an heirloom.

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. Injunction may be prohibitory or mandatory. In prohibitory, the Court restrains the commission of a wrongful act whereas in mandatory, it restrains continuance of a wrongful commission.

In *Lumley* v. *Wagner* (1852) 90 R.R. 125. W agreed to sing at L's theatre and nowhere else. W, in breach of contract with L entered into a contract to sing for Z. *Held,* although W could not be compelled to sing at L's theatre, yet she could be restrained by injunction from singing for Z.

CONTRACT OF INDEMNITY AND GUARANTEE (SECTIONS 124 TO 147)

Meaning of Indemnity

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).

Example

A contracts to indemnify B against the consequence of legal proceedings which C may take against B in respect of 3 lakh rupees. This is a contract of indemnity. The contract of indemnity may be express or implied.

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. 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.

Under the Indian Contract Act, the contract of indemnity is restricted to such cases only where the loss promised to be reimbursed, is caused by the conduct of the promisor or of any other person. The loss caused by events or accidents which do not depend on the conduct of any person, it seems, cannot be sought to be reimbursed under a contract of indemnity.

Rights of Indemnity Holder when Sued

Under Section 125, the promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

1. all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
2. all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as if it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit; and
3. 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, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

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

Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is sufficient for surety. Section 127 provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustration

(i) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.

(ii) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is sufficient consideration for C's promise.

Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is sufficient for surety. Section 127 provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

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.

(e) 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.

Example

Indemnity – X agree to Pay Y Rs. 50000/- in case of loss to any property of later during the use by former.

Guarantee - Z agree to Pay Y in case of loss to any property of later during the use by X.

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.

Section 128 only explains the quantum of a surety's obligation when terms of the contract do not limit it. Conversely it doesn't follow that the surety can never be liable when the principal debtor cannot be held liable. Thus, a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. Where the agreement

between the principal debtor and creditor is void as for example in the case of minority of principal debtor, the surety is liable as a principal debtor; for in such cases the contract of the so-called surety is not collateral, but a principal contract [*Kashiba* v. *Shripat* (1894) 19 Bom. 697].

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 losses 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.

In some circumstances, the surety may get certain rights even before payment. The surety has remedies against the principal debtor before payment and after payment. In Mamta Ghose v. United Industrial Bank (AIR 1987 Cal. 180) where the principal debtor, after finding that the debt became due, started disposing of his properties to prevent seizure by surety, the Court granted an injunction to the surety restraining the principal debtor from doing so. The surety can compel the debtor, after debt has become due to exonerate him from his liability by paying the debt.

(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. A, B and C are sureties to D for the sum of Rs. 3,000 lent to E who makes default in payment. A, B and C are liable, as

between themselves to pay Rs. 1,000 each. If any one of them has to pay more than Rs. 1,000 he can claim contribution from the other two to reduce his payment to only Rs. 1,000. If one of them becomes insolvent, the other two shall have to contribute the unpaid amount equally.

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).

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

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). The person who delivers the goods is called the *bailor* and the person to whom they are delivered is called the *bailee*.

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. The ownership of the goods remains with the bailor, the bailee getting only the possession. 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

A gratuitous bailment is one in which neither the bailor nor the bailee is entitled to any remuneration. 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. In neither case any charge is made.

A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

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.

Bailment for Reward

This is for the mutual benefit of both the bailor and the bailee. For example, A lets out a motor-car for hire to B. A is the bailor and receives the hire charges and B is the bailee and gets the use of the car. Where, A hands over his goods to B, a carrier for carriage at a price, A is the bailor who enjoys the benefit of carriage and B is the bailee who receives a remuneration for carrying the goods.

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). The degree of care required from the bailee is the same whether the bailment is for reward or gratuitous.

Of course, the bailee may agree to take special care of the goods, e.g., he may agree to keep the property safe from all perils and answers for accidents or thefts. But even such a bailee will not be liable for loss happening by an act of God or by public enemies.

(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 used (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, the bailor and the bailee shall have an interest, in production to their respective shares, in the mixture thus produced. 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).

(f) In the absence of any contract to the contrary, the baliee 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 is 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, expands 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. A gives a piece of cloth to B, a tailor, for making it into a suit, B promises to have the suit ready for delivery within a fortnight, B has the suit ready for delivery. He has a right to retain the suit until he is paid his dues. The section expresses the Common Law principle that if a man has an article delivered to him on the improvement of which he has to bestow trouble and expenses, he has a right to detain it until his demand is paid.

The right of lien arises only where labour and skill have been used so as to confer an additional value on the article.

Example

A gave clothes to B for Laundry. A denies to make full payment. B denied to return the clothes. Can B deny to return the goods?

Yes, he can deny to return the goods as a bailee.

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.

The right of general lien is expressly given by Section 171 of the Indian Contract Act to bankers, factors, warfingers, attorneys of High Court and policy-brokers, provided there is no agreement to the contrary.

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. A is liable for all the resulting damage to men and other goods.

In the case of bailment for hire, a still greater responsibility is placed on the bailor. He will be liable even if he did not know of the defects (Section 150). A hires a carriage of B. The carriage is unsafe though B does not know this. A is injured. B is responsible to A for the injury.

(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 house 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

Where the bailee wrongfully uses or dispose of the goods bailed, the bailor may determine the bailment (Section 153.)

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). 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.

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).

A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

Finder of Lost Goods

The position of a finder of lost goods is exactly that of a bailee. The rights of a finder are that he can sue the owner for any reward that might have been offered, and may retain the goods until he receives the reward. But where the owner has offered no reward, the finder has only a particular lien and can detain the goods until he receives compensation for the troubles and expenses incurred in preserving the property for finding out the true owner. But he cannot file a suit for the recovery of the compensation [Section 168].

Thus, as against the true owner, the finder of goods in a public or quasi public place is only a bailee; he keeps the article in trust for the real owner. As against every-one else, the property in the goods vests in the finder on his taking possession of it.

The finder has a right to sell the property—

(a) where the owner cannot with reasonable diligence be found, or

(b) when found, he refuses to pay the lawful charges of the finder and—

  (i) if the thing is in danger of perishing or losing greater part of its value, or

  (ii) when the lawful charges of the finder for the preservation of goods and the finding out of the owner amounts to two-thirds of the value of the thing (Section 169).

Carrier as Bailee

A common carrier undertakes to carry goods of all persons who are willing to pay his usual or reasonable rates. He further undertakes to carry them safely, and make good all loses, unless they are caused by act of God or public enemies. Carriers by land including railways and carriers by inland navigation, are common carriers. Carriers by Sea for hire are not common carriers and they can limit their liability. Railways in India are now common carriers.

Inn-keepers: The liability of a hotel keeper is governed by Sections 151 and 152 of the Contract Act and is that of an ordinary bailee with regard to the property of the guests.

C stayed in a room in a hotel. The hotel-keeper knew that the room was in an insecure condition. While C was dining in the dining room, some articles were stolen from his room. It was held that the hotel-keeper was liable as he should have taken reasonable steps to rectify the insecured condition of the rooms (*Jan & San* v. *Caneron* (1922) 44 All. 735).

(b) Pledge

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 depositee the “Pawnee” (Section 172). Since pledge is a branch of bailment, the pawness is bound to

take reasonable care of the goods pledged with him. 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

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). The pawnee must return the goods to the pawnor on the tender of all that is due to him. The pawnee cannot confer a good title upon a *bona fide* purchaser for value.

Should the pawnor make a default in payment of the debt or performance of the promise at the stipulated time, the pawnee may-

(i) file a suit for the recovery of the amount due to him while retaining the goods pledged as collateral security; or

(ii) sue for the sale of the goods and the realisation of money due to him; or

(iii) 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 (iii) above. If after sale of the goods, there is surplus, the pawnee must pay it to the pawnor (Section 176).

Rights of Pawnor

On default by pawnor to repay on the stipulated date, the pawnee may sell the goods after giving reasonable notice to the pawnor. If the pawnee makes an unauthorised sale without giving notice to the pawnor, the pawnor has the following rights—

(i) He can file a suit for redemption of goods by depositing the money treating the sale as if it had never taken

(ii) place; or He can ask for damages on the ground of conversion.

Pledge by Non-owners

(a) 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 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

Definition of Agent (Section 182)

An agent is a person who is employed to bring his principal into contractual relations with third-parties. As the definition indicates, an agent is a mere connecting link between the principal and a third-party. But during the period that an agent is acting for his principal, he is clothed with the capacity of his principal.

Creation of Agency

A contract of agency may be express or implied, (Section 186) but consideration is not an essential element in this contract (Section 185). Agency may also arise by estoppel, necessity or ratification.

(a) *Express Agency*: A contract of agency may be made orally or in writing. The usual form of written contract of agency is the Power of Attorney, which gives him the authority to act on behalf of his principal in accordance with the terms and conditions therein. In an agency created to transfer immovable property, the power of attorney must be registered. A power of attorney may be general, giving several powers to the agent, or special, giving authority to the agent for transacting a single act.

(b) *Implied Agency*: Implied agency may arise by conduct, situation of parties or necessity of the case.

(i) *Agency by Estoppel (Section 237)*: Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact. Thus, where P allows third- parties to believe that A is acting as his authorised 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 husbands authority to pledge his credit for the purchase of necessaries of life suitable to their standard of living. But the husband will not be liable if he shows that (a) he had expressly warned the trademan not to supply goods on credit to his wife; or (b) he had expressly forbidden the wife to pledge his credit; or (c) his wife was already sufficiently supplied with the articles in question; or (d) she was supplied with a sufficient allowance.

Similarly, where any person is held out by another as his agent, the third-party can hold that person liable for the acts of the ostensible agent, or the agent by holding out. Partners are each others agents for making contracts in the ordinary course of the partnership business.

(iii) *Agency of Necessity (Sections 188 and 189)*: In certain circumstances, a person who has been entrusted with anothers property, may have to incur unauthorised 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.

A wife deserted by her husband and thus forced to live separate from him, can pledge her husbands credit to buy all necessaries of life according to the position of the husband even against his wishes.

(iv) *Agency by ratification (Sections 169-200)*: 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 agents 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. The effect of ratification is to render the contract binding on the principal as if the agent had been authorised before hand. Also ratification relates back to the original making of the contract so that the agency is taken to have come into existence from the moment the agent first acted, and not from the date the principal ratified it.

Ratification is effective only if the following conditions are satisfied –

(a) The agent must expressly contract as agent for a principal who is in existence and competent to contract.

(b) The principal must be competent to contract not only at the time the agent acted, but also when he ratified the agents act.

(c) The principal at the time of ratification has full knowledge of the material facts, and must ratify the whole contract, within a reasonable time.

(d) Ratification cannot be made so as to subject a third-party to damages, or terminate any right or interest of a third person.

(e) Only lawful acts can be ratified.

Classes of Agents

Agents may be special or general or, they may be mercantile agents:

(a) *Special Agent*: A special agent is one who is appointed to do a specified act, or to perform a specified function. He has no authority outside this special task. The third-party has no right to assume that the agent has unlimited authority. Any act of the agent beyond that authority will not bind the principal.

(b) *General Agent*: A general agent is appointed to do anything within the authority given to him by the principal in all transactions, or in all transactions relating to a specified trade or matter. 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. The third party is not affected by any private restrictions on the agents authority.

Sub-Agent

A person who is appointed by the agent and to whom the principal's work is delegated to known as sub-agent. Section 191 provides that "a sub-agent is a person employed by, and acting under the control of the original agent in the business of the agency." So, the sub-agent is the agent of the original 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 wilful 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. As regards third persons, the principal is represented by sub-agent and he is bound and responsible for all the acts of sub-agent as if he were an agent originally appointed by the principal.

Mercantile Agent

Section 2(9) of the Sale of Goods Act, 1930, defines a mercantile agent as "a mercantile agent having in the customary course of business as such agent authority either to sell goods or consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods". This definition covers factors, brokers, auctioneers, commission agents etc.

Factors

A factor is a mercantile agent employed to sell goods which have been placed in his possession or contract to buy goods for his principal. He is the apparent owner of the goods in his custody and can sell them in his own name and receive payment for the goods. He has an insurable interest in the goods and also a general lien in respect of any claim he may have arising out of the agency.

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. He acts in the name of principal. He has no lien over the goods as he is not in possession of them.

Del Credere Agent

A *del credere* agent is a mercantile agent, who is 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 owned by third-party.

Auctioneers

An auctioneer is an agent who sells goods by auction, i.e., to the highest bidder in public competition. He has no authority to warrant his principals title to the goods. He is an agent for the seller but after the goods have been knocked down he is agent for the buyer also for the purpose of evidence that the sale has taken place.

Partners

In a partnership firm, every partner is an agent of the firm and of his co-partners for the purpose of the business of the firm.

Bankers

The relationship between a banker and his customer is primarily that of debtor and creditor. In addition, a banker is an agent of his customer when he buys or sells securities, collects cheques dividends, bills or promissory notes on behalf of his customer. He has a general lien on all securities and goods in his possession in respect of the general balance due to him by the customer.

Duties of the Agent

An agent's duties towards his principal are as follows (which give corresponding rights to the principal who may sue for damages in the event of a breach of duty by the agent):

(a) An agent must act within the scope of the authority conferred upon him and carry out strictly the instructions of the principal (Section 211).

(b) in the absence of express instructions, he must follow the custom prevailing in the same kind of business at the place where the agent conducts the business (Section 211).

(c) He must do the work with reasonable skill and diligence whereby the nature of his profession, the agent purports to have special skill, he must exercise the skill which is expected from the members of the profession (Section 212).

(d) He must disclose promptly any material information coming to his knowledge which is likely to influence the principal in the making of the contract.

(e) He must not disclose confidential information entrusted to him by his principal (Section 213).

(f) He must not allow his interest to conflict with his duty, e.g., he must not compete with his principal (Section 215).

(g) The agent must keep true accounts and must be prepared on reasonable notice to render an account.

(h) He must not make any secret profit; he must disclose any extra profit that he may make.

Where an agent is discovered taking secret bribe, etc., the principal is entitled to (i) dismiss the agent without notice, (ii) recover the amount of secret profit, and (iii) refuse to pay the agent his remuneration. He may repudiate the contract, if the third-party is involved in secret profit and also recover damages.

(i) An agent must not delegate his authority to sub-agent. A sub-agent is a person employed by and acting under the control of the original agent in the business of agency (Section 191). This rule is based on the principle: Delegatus non-potest delegare — a delegate cannot further delegate (Section 190).

But there are exceptions to this rule and the agent may delegate (i) where delegation is allowed by the principal, (ii) where the trade custom or usage sanctions delegation, (iii) where delegation is essential for proper performance, (iv) where an emergency renders it imperative, (v) where nature of the work is purely ministerial, and (vi) where the principal knows that the agent intends to delegate.

Rights of Agents

Where the services rendered by the agent are not gratuitous or voluntary, the agent is entitled to receive the agreed remuneration, or if none was agreed, a reasonable remuneration. The agent becomes entitled to receive remuneration as soon as he has done what he had undertaken to do (Section 219).

Certain classes of agents, e.g., factors who have goods and property of their principal in their possession, have a lien on the goods or property in respect of their remuneration and expense and liabilities incurred. He has a right to stop the goods in transit where he is an unpaid seller.

As the agent represents the principal, the agent has a right to be indemnified by the principal against all charges, expenses and liabilities properly incurred by him in the course of the agency (Sections 222-223).

Example

B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B (as an agent) for such damages, costs and expenses.

Extent of Agent's Authority

The extent of the authority of an agent depends upon the terms expressed in his appointment or it may be implied by the circumstances of the case. The contractual authority is the real authority, but implied authority is to do whatevers incidental to carry out the real authority. This implied authority is also known as apparent or ostensible authority, Thus, an agent having an authority to do an act has authority to do everything lawful which is necessary for the purpose or usually done in the course of conducting business.

An agent has authority to do all such things which may be necessary to protect the principal from loss in an emergency and which he would do to protect his own property under similar circumstances. Where butter was becoming useless owing to delay in transit and was therefore sold by the station master for the best price available as it was not possible to obtain instructions from the principal, the sale was held binding upon the principal.

Responsibilities of Principal to Third-parties

The effect of a contract made by an agent varies according to the circumstances under which the agent contracted.

There are three circumstances in which an agent may contract, namely—

(a) the agent acts for a named principal;

(b) the agent acts for an undisclosed principal; and

(c) the agent acts for a concealed principal.

(a) Disclosed principal: Where the agent contracts as agent for a named principal, he generally incurs neither rights nor liabilities under the contract, and drops out as soon as it is made. The contract is made between the principal and the third-party and it is between these two that rights and obligations are created. The legal effect is the same as if the principal had contracted directly with the third-party.

The effect is that the principal is bound by all acts of the agent done within the scope of actual, apparent or ostensible authority. This ostensible authority of the agent is important, for the acts of a general agent are binding on the principal if they are within the scope of his apparent authority, although they may be outside the scope of his actual authority. Therefore, a private or secret limitation or restriction of powers of an agent do not bind innocent third- party.

(b) Undisclosed principal: Where the agent disclose that he is merely an agent but conceals the identity of his principal, he is not personally liable, as he drops out in normal way. The principal, on being discovered, will be responsible for the contract made by the agent.

(c) Concealed principal: Where an agent appears to be contracting on his own behalf, without either contracting as an agent or disclosing the existence of an agency (i.e., he discloses neither the name of the principal nor his existence), he becomes personally liable. The third-party may sue either the principal (when discovered) or the agent or both. If the third-party chooses to sue the principal and not the agent, he must allow the principal the benefit of all payments made by him to the agent on account of the contract before the agency was disclosed. The third-party is also entitled to get the benefit of anything he may have paid to the agent.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, if he had known who the principal in the contract was, or if he had known that the agent was not the principal, he would not have entered into the contract.

Principal Liable for Agent's Torts (Section 238)

If an agent commits a tort or other wrong (e.g., misrepresentation or fraud) during his agency, whilst acting within the scope of his actual or apparent authority, the principal is liable. But the agent is also personally liable, and he may be sued also. The principal is liable even if the tort is committed exclusively for the benefit of the agent and against the interests of the principal.

Personal Liability of Agent to Third-party

An agent is personally liable in the following cases:

(a) Where the agent has agreed to be personally liable to the third-party.

(b) Where an agent acts for a principal residing abroad.

(c) When the agent signs a negotiable instrument in his own name without making it clear that he is signing it only as agent.

(d) When an agent acts for a principal who cannot be sued (e.g., he is minor), the agent is personally liable.

(e) An agent is liable for breach of warranty of authority. Where a person contracts as agent without any authority there is a breach of warranty of authority. He is liable to the person who has relied on the warranty of authority and has suffered loss.

(f) Where authority is one coupled with interest or where trade, usage or custom makes the agent personally liable, he will be liable to the third-party.

(g) He is also liable for his torts committed in the course of agency.

Meaning of Authority Coupled with Interest (Section 202)

An agency is coupled with an interest when the agent has an interest in the authority granted to him or when the agent has an interest in the subject matter with which he is authorised to deal. Where the agent was appointed to enable him to secure some benefit already owed to him by the principal, the agency was coupled with an interest. For example, where a factor had made advances to the principal and is authorised to sell at the best price and recoup the advances made by him or where the agent is authorised to collect money from third-parties and pay himself the debt due by the principal, the agencies are coupled with interest. But a mere arrangement that the agent's remuneration to paid out of the rents collected by him, it does not give him any interest in the property and the agency is not the one coupled with an interest. An agency coupled with interest cannot be terminated in the absence of a contract to the contrary to the prejudice of such interest.

The principal laid down in Section 202 applies only if the following conditions are fulfilled:

(a) The interest of the agent should exist at the time of creation of agency and should not have arisen after the creation of agency.

(b) Authority given to the agent must be intended for the protection of the interest of the agent.

(c) The interest of the agent in the subject matter must be substantial and not ordinary.

(d) The interest of the agent should be over and above his remuneration. Mere prospect of remuneration is not sufficient interest.

Termination of Agency

An agency comes to an end or terminates—

(a) By the performance of the contract of agency; (Section 201)

(b) By an agreement between the principal and the agent;

(c) By expiration of the period fixed for the contract of agency;

(d) By the death of the principal or the agency; (Section 201)

(e) By the insanity of either the principal or the agent; (Section 201)

(f) By the insolvency of the principal, and in some cases that of the agent; (Section 201)

(g) Where the principal or agent is an incorporated company, by its dissolution;

(h) By the destruction of the subject-matter; (Section 56)

(i) By the renunciation of his authority by the agent; (Section 201)

(j) By the revocation of authority by the principal. (Section 201)

When Agency is Irrevocable

Revocation of an agency by the principal is not possible in the following cases:

(a) Where the authority of agency is one coupled with an interest, even the death or insanity of the principal does not terminate the authority in this case (Section 202).

(b) When agent has incurred personal liability, the agency becomes irrevocable.

(c) When the authority has been partly exercised by the agent, it is irrevocable in particular with regard to obligations which arise from acts already done (Section 204).

Example

1. A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
2. A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

When Termination Takes Effect

Termination of an agency takes effect or is complete, as regards the agent when it becomes known to the agent. If the principal revokes the agents authority, the revocation will take effect when the agent comes to know of it. As regards the third-parties, the termination takes effect when it comes to their knowledge (Section 208). Thus, if an agent whose authority has been terminated to his knowledge, enters into a contract with a third-party who deals with him *bona fide*, the contract will be binding on the principal as against the third-party. The termination of an agent's authority terminates the authority of the sub-agent appointed by the agent (Section 210).

The revocation of agency as regards the agent and as regards the principal takes effect at different points of time. Section 209 charges the agent with duty to protect the principal's interest where the principal dies or becomes of unsound mind. It provides that when an agency is terminated by the principal dying or becoming of

unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interest entrusted to him. So it is the duty of the agent to take all steps to protect the interest of his deceased principal on his death.

JOINT VENTURE/ FOREIGN COLLABORATION/MULTINATIONAL AGREEMENTS

International business professionals use the term "modes of entry" to describe the different methods and approaches available to enter markets and conduct business in other countries. One mode of entry is the joint venture where two or more organizations join together in a cooperative effort to further their business goals. The joint venture is one of the most common and effective means of conducting business internationally. The joint venture documents and agreements are critical to the success of the venture. The joint venture agreement forms the basis of the understanding between and among the parties. It is relied upon to ensure that all parties understand their roles, rights, responsibilities, and remedies in the conduct of the venture. Organizations enter into joint ventures in good faith but closely scrutinize the joint venture documents if anything goes awry.

The importance of the documents and the purpose of this part is to cover, step by step, the critical elements to consider and include in joint venture agreements. Equity participation, for example, may or may not be as important as operational control. Technical participation in the venture may or may not be as important as the intellectual property rights that may result from the venture. A key to developing joint venture agreements is to determine goals and objectives in advance and ensure that the interests are reflected in the agreement.

Selection of good local partner is the key to success of any joint venture. Personal interviews with a prospective joint venture partner should be supplemented with proper due diligence. Once a partner is selected generally the parties highlighting the basis of the future joint venture agreement sign a memorandum of understanding or a letter of intent. Before signing the joint venture agreement, the terms should be thoroughly discussed to avoid any misunderstanding at a later stage. Negotiations require an understanding of the cultural and legal background of the parties.

It is difficult to prepare a set frame of the terms and conditions. The conditions may differ according to the requirements.

While drafting a foreign collaboration agreement, the following factors should be kept in mind:

- Capability of the collaborator and the requirements of the party are clearly indicated.
- Clear definitions of technical terms are given.
- Specify if the product shall be manufactured/sold on exclusive or non-exclusive basis.
- Terms and conditions regarding nature of technical know-how, disclosure of drawings, specifications and other documents, furnishing of technical information in respect of processes with flow charts etc., plant outlay list of equipment, machinery and tool with specification have to be provided.
- Provisions for making available the engineers and/or skilled workers of the collaborator on payment of expenses relating to their stay per diem etc. are given.
- Details regarding specification and quality of the product to be manufactured are given.
- Quality control and trademarks to be used are also specified.
- Responsibility of the collaborator in establishing or maintaining assembly plants should be clearly determined and provided for.
- If sub-contracting of the work is involved, clarify if there would be any restrictions.
- The rate of royalty, mode of calculation and payment etc. Also, make provision as to who will bear the taxes/cess on such payments.
- Use of information and industrial property rights should also be provided for in the agreement.

- A clause on force majeure should be included.
- A clause that the collaborating company has to train the personnel of Indian company within a specified period should be incorporated The clause should also specify the terms and conditions of such assistance, place of training, period of training and fees payable.
- A comprehensive clause on arbitration containing a clear provision as to the kind of arbitrator and place of arbitration should be included.
- There should be provision in the agreement for payment of interest on delayed payments.

E-CONTRACT

Electronic contracts are not paper based but rather in electronic form are born out of the need for speed, convenience and efficiency. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. The conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. The Information Technology Act, 2000 solves some of the peculiar issues that arise in the formation and authentication of electronic contracts

As in every other contract, an electronic contract also requires the following necessary ingredients:

- An offer needs to be made
- The offer needs to be accepted
- There has to be lawful consideration
- There has to be an intention to create legal relations
- The parties must be competent to contract
- There must be free and genuine consent
- The object of the contract must be lawful
- There must be certainty and possibility of performance.

Basic Type of e-contracts

1. **Shrink wrap agreements:** In these type of agreements the product is wrapped. Terms and Conditions are placed with the product itself. These are End user Licence Agreements. Example: purchase of Anti Virus.
2. **Clickwrap Agreements:** These agreements requires the users to accept the proposal by clicking the “I agree”. User agree by clicking on the agree button. Example: Creation of email id.
3. **Browse Wrap Agreements:** These agreements are entered by continued use of the website. By using the website, the user is deemed to have accepted the conditions. Example: Sale and Purchase on online platforms.
4. **Scroll Wrap Agreements:** In these agreements, Where users are required to scroll to the complete terms and conditions of the documents and give their implied consent. Example: Few mobile applications requires the user to scroll down.
5. **Sign-In Wrap Agreements:** In these agreements, user agree by signing in to a particular website or mobile application. User agree with the terms and conditions by Signing in.

E-contracts are binding only if they have all the essentials required under Indian Contract Act. If any term or condition are not in accordance with the law than the agreements are valid.

CASE LAWS

Trimex International FZE Ltd. Dubai (Petitioner) vs. Vedanta Aluminium Ltd., India (Respondent) on 22nd January, 2010

This case may be referred to understand the position of law relating to contract contract concluded by emails. In this case, the court has held that an contract may be concluded by exchange of emails. It was stated:

As rightly pointed out by the learned senior counsel for the petitioner, when Mr A of Trimex opened the email of Mr. B of Vedanta at 3:06 PM on 16.10.2007, it came to his knowledge that an irrevocable contract was concluded. Apart from this, the mandate of Section 7 of the Indian Contract Act stipulated that an acceptance must be absolute and unconditional has also been fulfilled. It is true that in the first acceptance conveyed by the respondent contained a rider, namely, cancellation after 2 shipments which made acceptance conditional. However, taking note of the said condition, the petitioner requested the respondent to convey an unconditional acceptance which was readily done through his email sent at 3:06 PM with the words "we confirm the deal for 5 shipments", which is unconditional and unqualified.

Maharashtra State Electricity Distribution Company Limited v. Ratnagiri Gas and Power Private Limited & Ors. decided by Supreme Court on 09th November, 2023

In this case, in order to resolve the issue of non-payment of fixed charges, the first respondent filed a petition under Section 79 of the Electricity Act 2003 *inter alia* seeking the resolution of the issue of shortfall of domestic gas. Central Electricity Regulatory Commission (CERC) allowed the above petition and held the appellant liable to pay fixed capacity charges. CERC's decision was upheld by (Appellate Tribunal For Electricity) APTEL. Later, the appeal was filed before the Hon'ble Supreme Court.

The issue arose before the Supreme Court for consideration was whether the CERC and APTEL were justified in affixing liability to pay fixed charges on the appellant. The dispute primarily turns on the terms of the Power Purchase Agreement (PPA). For the reasons stated hereafter, the court answered the issue in the affirmative.

The Apex Court said that a commercial document cannot be interpreted in a manner that is at odds with the original purpose and intendment of the parties to the document. A deviation from the plain terms of the contract is warranted only when it serves business efficacy better. The appellant's arguments would entail reading in implied terms contrary to the contractual provisions which are otherwise clear. Such a reading of implied conditions is permissible only in a narrow set of circumstances.

LESSON ROUND-UP

- A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.
- Every promise and every set of promises, forming the consideration for each other, is an agreement.
- 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.
- In flaw contract There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement.

- Section 27 of the Indian Contract Act states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.
- The literal meaning of the word "wager" is a "bet". Wagerning agreements are nothing but ordinary betting agreements.
- An agreement not enforceable by law is void *ab initio*.
- 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. Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.
- 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 one 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. It is the duty and not an agreement or intention which defines it.
- A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished.
- 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.
- 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.
- 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.
- 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 depositee the "Pawnee" (Section 172)
- Electronic contracts are not paper based but rather in electronic form are born out of the need for speed, convenience and efficiency. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract.

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Define consideration and state its essential features.
2. "No consideration, no contract". Do you agree?
3. "The essence of every agreement is that there ought to be free consent on both the sides". Discuss.
4. How does a contract differ from agreements?
5. Write short notes on:
   (a) Reciprocal promises.
   (b) Substituted Agent.
6. An agreement without Free Consent is Voidable. Analyse the Statement.

LIST OF FURTHER READINGS
• The Indian Contract & Specific Relief Acts (Set of 2 Volumes) (2017)- Pollock and Sir Dinshaw Fardunji Mulla • Bare Act of Indian Contract Act, 1872

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)
• https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf

Law relating to Sale of Goods

Lesson 17

KEY CONCEPTS

■ Sale ■ Goods ■ Future Goods ■ Contract of Sale ■ Agreement to Sell ■ Doctrine of Caveat Emptor

Learning Objectives

To understand:

- Essentials of Contract of Sale of Goods
- How sale is different from Agreement to Sell
- Bailment
- Conditions and Warranties
- Doctrine of Caveat Emptor
- Mutual Consent

Lesson Outline

- Introduction
- Important Definitions
- Contract of Sale of Goods
- Distinction between Sale and Agreement to Sell
- Sale and Bailment
- Sale and Contract for Work and Labour
- Subject matter of contract of Sale of Goods
- Implied Warranties
- Doctrine of Caveat Emptor
- Effects of Contracts
- Performance of the Contract of Sale
- Suits for Breach of Contract
- Unpaid Seller
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Sale of Goods Act, 1930

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.

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. It has to be read as part of the Indian Contract Act, 1872 [Sections 2(5) and (3)].

IMPORTANT DEFINITIONS

Section 2, Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

1) **"buyer"** means a person who buys or agrees to buy goods;

2) **"delivery"** means voluntary transfer of possession from one person to another;

3) goods are said to be in a **"deliverable state"** when they are in such state that the buyer would under the contract be bound to take delivery of them;

4) **"document of title to goods"** includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, 1[multimodal transport document,] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;

5) **"fault"** means wrongful act or default;

6) **"future goods"** means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;

7) **"goods"** means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

8) a person is said to be **"insolvent"** who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not;

9) **"mercantile agent"** means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;

10) **"price"** means the money consideration for a sale of goods;

11) **"property"** means the general property in goods, and not merely a special property;

12) **"quality of goods"** includes their state or condition;

13) **"seller"** means a person who sells or agrees to sell goods;

14) **"specific goods"** means goods identified and agreed upon at the time a contract of sale is made; and

expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

CONTRACT OF SALE OF GOODS

According to Section 4, a contract of sale of goods is a contract whereby the seller:

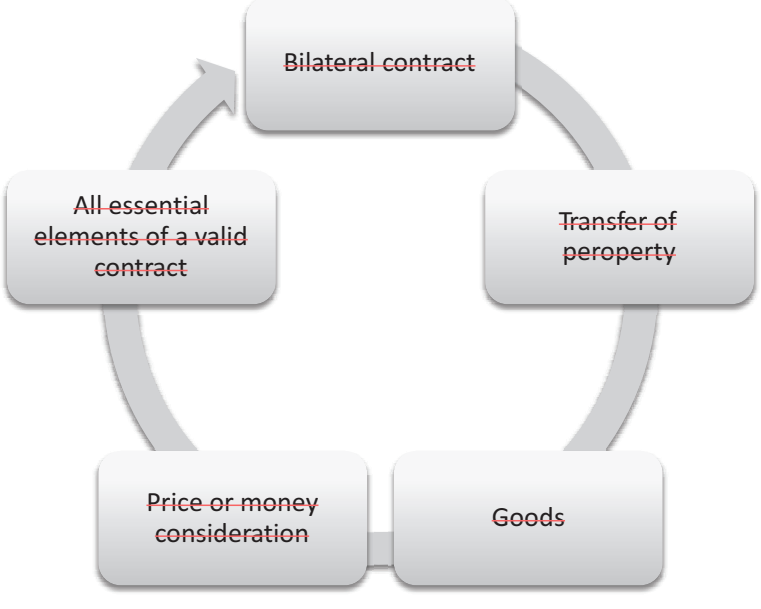
(i) transfers or agrees to transfer the property in goods,

(ii) to the buyer,

(iii) for a money consideration called the price.

It shows that the expression "contract of sale" includes both a sale where the seller transfers the ownership of the goods to the buyer, and an agreement to sell where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on.

The following are thus the essentials of a contract of sale of goods:



(i) *Bilateral contract*: It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.

(ii) *Transfer of property*: The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.

(iii) *Goods*: The subject matter must be some goods.

(iv) *Price or money consideration*: The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.

(v) All essential elements of a valid contract must be present in a contract of sale.

DISTINCTION BETWEEN SALE AND AGREEMENT TO SELL

The following points will bring out the distinction between sale and an agreement to sell:

(a) In a sale, the property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.

(b) An agreement to sell is an executory contract, a sale is an executed contract.

(c) An agreement to sell is a contract pure and simple, but a sale is contract plus conveyance.

(d) If there is an agreement to sell and the goods are destroyed by accident, the loss falls on the seller. In a sale, the loss falls on the buyer, even though the goods are with the seller.

(e) If there is an agreement to sell and the seller commits a breach, the buyer has only a personal remedy against the seller, namely, a claim for damages. But if there has been a sale, and the seller commits a breach by refusing to deliver the goods, the buyer has not only a personal remedy against him but also the other remedies which an owner has in respect of goods themselves such as a suit for conversion or detenue, etc.

SALE AND BAILMENT

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 (Section 148 of the Indian Contact Act, 1872).

The property in the goods is not intended to and does not pass on delivery though it may sometimes be the intention of the parties that it should pass in due course. But where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.

SALE AND CONTRACT FOR WORK AND LABOUR

The distinction between a "sale" and a "contract for work and labour" becomes important when question of passing of property arises for consideration.

"Sale", is a contract by which property in goods passes from the seller to the buyer for a price.

However, these two are difficult to distinguish. The test generally applied is that if as a result of the contract, property in an article is transferred to one who had no property therein previously for a money consideration, it is a sale, where it is otherwise it is a contract for work and labour.

SALE AND HIRE PURCHASE AGREEMENT

A "hire purchase agreement" is basically a contract of hire, but in addition, it gives the hirer an option to purchase the goods at the end of the hiring period. Consequently, until the final payment, the hirer is merely a bailee of goods and ownership remains vested in the bailor. Under such a contract, the owner of goods delivers the goods to person who agrees to pay certain stipulated periodical payments as hire charges. Though the possession is with the hirer, the ownership of the goods remains with the original owner.

The essence of hire purchase agreement is that there is no agreement to buy, but only an option is given to the hirer to buy by paying all the instalments or put an end to the hiring and return the goods to the owner, at any time before the exercise of the option.

Since the hirer does not become owner of the goods until he has exercised his option to buy, he cannot pass any title even to an innocent and *bona fide* purchaser. The transaction of hire-purchase protects the owner of the goods against the insolvency of the buyer, for if the buyer becomes insolvent or fails to pay the instalments,

he can take back the goods as owner. And if the hirer declines to take delivery of the goods, the remedy of the owner will be damages for non-hiring and not for rent for the period agreed.

It is important to note the difference between a hire purchase agreement and mere payment of the price by instalments because, the latter is a sale, only the payment of price is to be made by instalments.

The distinction between the two is very important because, in a hire-purchase agreement the risk of loss or deterioration of the goods hired lies with the owner and the hirer will be absolved of any responsibility therefor, if he has taken reasonable care to protect the same as a bailee. But it is otherwise in the case of a sale where the price is to be paid in instalments.

SUBJECT MATTER OF CONTRACT OF SALE OF GOODS

Goods

The subject matter of the contract of sale is essentially goods. According to Section 2(7) of the Sale of Goods Act, "goods" means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

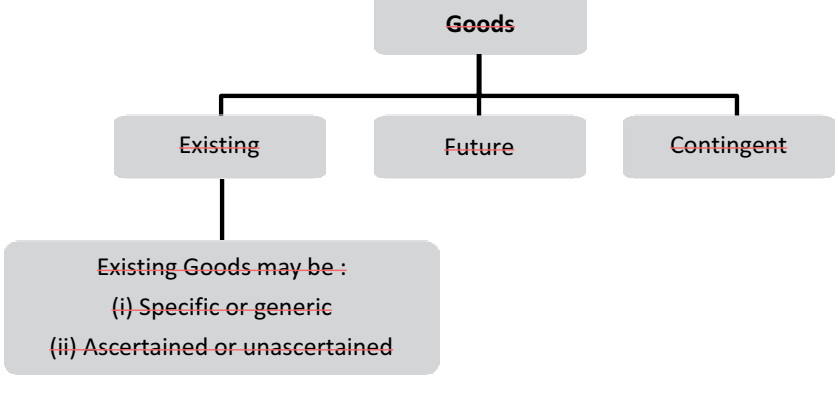
Actionable claims and money are not goods and cannot be brought and sold under this Act. Money means current money, i.e., the recognised currency in circulation in the country, but not old and rare coins which may be treated as goods. An actionable claim is what a person cannot make a present use of or enjoy, but what can be recovered by him by means of a suit or an action.

In H. Anraj and Ors. vs. Government of Tamil Nadu and Ors. (04.10.1985 - SC) : AIR 1986 SC 63, it was held that lottery tickets were goods and not actionable claims. Thus, sale of lottery tickets is sale of goods.

Thus, a debt due to a man from another is an actionable claim and cannot be sold as goods, although it can be assigned. Under the provisions of the Transfer of Property Act, 1882, goodwill, trade marks, copyrights, patents are all goods, so is a ship. As regards water, gas, electricity, it is doubtful whether they are goods (*Rash Behari v. Emperor,* (1936) 41 C.W.N. 225; *M.B. Electric Supply Co. Ltd.* vs. *State of Rajasthan,* AIR (1973) Raj. 132).

Further, In the case of *Commissioner of Sales Tax, Madhya Pradesh, Indore vs. Madhya Pradesh Electricity Board, Jabalpur (26.11.1968 - SC): AIR 1970 SC 732* , the Supreme Court observed that the electricity can be transmitted, transferred, delivered, stored, possessed, etc., in the same way as any other movable property. If there can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of goods.

Goods may be (a) existing, (b) future, or (c) contingent. The existing goods may be (i) specific or generic, (ii) ascertained or unascertained.



Existing Goods

Existing goods are goods which are either owned or possessed by the seller at the time of the contract. Sale of goods possessed but not owned by the seller would be by an agent or pledgee.

Generic or unascertained goods are goods which are not specifically identified but are indicated by description. 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. As soon as a particular set is separated or identified for delivery and the buyer has notice of it, the goods are ascertained and become specific goods.

Future Goods

Future goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. A agrees to sell all the mangoes which will be produced in his garden next season. This is an agreement for the sale of future goods. [Section 2(6)]

Contingent Goods

Where there is a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen—such goods are known as contingent goods. Contingent goods fall in the class of future goods. A agrees to sell a certain TV set provided he is able to get it from its present owner. This is an agreement to sell contingent goods. In such a case, if the contingency does not happen for no fault of the seller, he will not be liable for damages.

Actual sale can take place only of specific goods and property in goods passes from the seller to buyer at the time of the contract, provided the goods are in a deliverable state and the contract is unconditional. There can be an agreement to sell only in respect of future or contingent goods.

Effect of Perishing of Goods

In a contract of sale of goods, the goods may perish before sale is complete. Such a stage may arise in the following cases:

(i) Goods perishing before making a contract

Where in a contract of sale of specific goods, the goods without the knowledge of the seller have, at the time of making the contract perished or become so damaged as no longer to answer to their description in the contract, the contract is void. This is based on the rule that mutual mistake of fact essential to the contract renders the contract void. (Section 7)

If the seller was aware of the destruction and still entered into the contract, he is estopped from disputing the contract. Moreover, perishing of goods not only includes loss by theft but also where the goods have lost their commercial value.

(ii) Goods perishing after agreement to sell

Where there is an agreement to sell specific goods, and subsequently the goods without any fault of any party perish or are so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. 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. (Section 8)

Price

No sale can take place without a price. Thus, if there is no valuable consideration to support a voluntary surrender of goods by the real owner to another person, the transaction is a gift, and is not governed by the Sale of Goods Act. Therefore, price, which is money consideration for the sale of goods, constitutes the essence for a contract of sale. It may be money actually paid or promised to be paid. If a consideration other than money is to be given, it is not a sale.

Example

With a view to boosting the sales HNMA Automobiles sells a motorcar to Mr. A on a trial basis for a period of three days with a condition that if Mr. A is not satisfied with the performance of the car, he can return back the car. However, the car was destroyed in a fire accident at the place of Mr. A before the expiry of three days. Decide whether Mr. A is liable for the loss suffered.

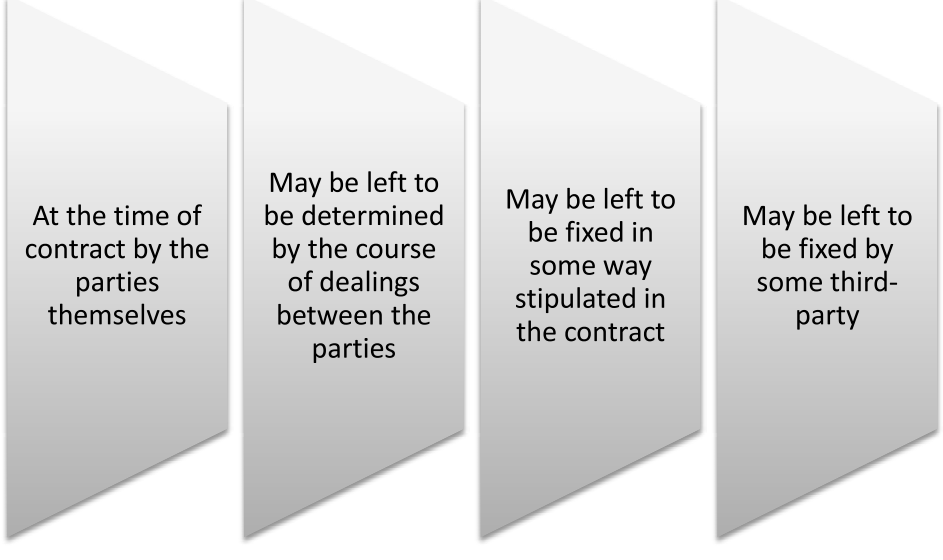
Provision: As per Section 8 of the Sale of Goods Act, 1930, where there is an agreement to sell specific goods, and subsequently without any fault on the part of the seller or buyer the goods perish or become so damaged as no longer to answer to their description, the agreement is thereby avoided. Thus, the contract becomes void.

In the given case that the subject matter of the contract i.e. Motorcar was destroyed before the transfer of property from the seller to the buyer. As no ownership is passed on to the buyer, the risk is also not passed on to him. The ownership and risk are still with the seller (ie. HNMA Automobiles).

Conclusion/Decision: Therefore, in the present case Mr. A is not liable for the loss suffered due to the fire accident over which A has no control. HNMA Automobiles will have to bear whatever loss that has taken place due to the fire accident

Modes of Fixing Price (Sections 9 and 10)

The price may be fixed:



Where the contract states that the price is to be fixed by a third-party and such third-party fails to do so, the contract is void. But if the buyer has already taken the benefit of the goods, he must pay a reasonable price for

them. If the third-party's failure to fix the price is due to the fault of the seller or buyer, then that party is liable for an action for damages.

Where nothing is said by the parties regarding price, the buyer must pay a reasonable price. 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.

Conditions and Warranties (Sections 12-17)

The parties are at liberty to enter into a contract with any terms they please. As a rule, before a contract of sale is concluded, certain statements are made by the parties to each other. The statement may amount to a stipulation, forming part of the contract or a mere expression of opinion which is not part of the contract. If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere commendation by the seller of his goods it does not amount to a stipulation and does not give the right of action.

The stipulation may either be a condition or a warranty. Section 12 draws a clear distinction between a condition and a warranty. Whether a stipulation is a condition or only a warranty is a matter of substance rather than the form of the words used. A stipulation may be a condition though called a warranty and vice versa.

Conditions

If the stipulation forms the very basis of the contract or is essential to the main purpose of the contract, it is a condition. The breach of the condition gives the aggrieved party a right to treat the contract as repudiated. Thus, if the seller fails to fulfil a condition, the buyer may treat the contract as repudiated, refuse the goods and, if he has already paid for them, recover the price. He can also claim damages for the breach of contract.

Warranties

If the stipulation is collateral to the main purpose of the contract, i.e., is a subsidiary promise, it is a warranty. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only claim damages. Thus, if the seller does not fulfil a warranty, the buyer must accept the goods and claim damages for breach of warranty.

Section 11 states that the stipulation as to time of payment are not to be deemed conditions (and hence not to be of the essence of a contract of sale) unless such an intention appears from the contract. Whether any other stipulation as to time (e.g., time of delivery) is of the essence of the contract or not depends on the terms of the contract.

When condition sinks to the level of warranty

In some cases a condition sinks or descends to the level of a warranty. The first two cases depend upon the will of the buyer, but the third is compulsory and acts as estoppel against him.

(a) A condition will become a warranty where the buyer waives the condition; or

(b) A condition will sink to the level of a warranty where the buyer treats the breach of condition as a breach of warranty; or

(c) 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.

Sometimes the seller may be excused by law from fulfilling any condition or warranty and the buyer will not then have a remedy in damages.

Example

X ordered basmati rice 5 kg at ₹ 200 per kg to Y. Mr. Y delivered kolam rice 5 kgs at ₹ 120 per kg. Now X would have canceled the contract but he was in urgent need of rice so he accepted kolam rice instead of basmati rice and he claimed damages from Mr. Y.

However, where there is a term in the contract, that the buyer can reject the goods and repudiate the contract, the buyer can still exercise his right as the breach of condition.

CASE LAW

Aron & Co. v. Comptoir Wegimont, 1921 3 KB 435 There was an offer of sale of goods c.i.f. Antwerp to be shipped in October. The vendor was not to reject delivery even if there was any difference in the type or value or grade specified. The goods couldn't be transported till November by virtue of strike at the port. It was held that the purchaser could decline to take delivery of the goods.

Implied Warranties/Conditions

Even where no definite representations have been made, the law implies certain representations as having been made which may be warranties or conditions. An express warranty or condition does not negative an implied warranty or condition unless inconsistent therewith.

Implied Warranties [Section 14(b), 14(c) and 16(3)]

(a) Implied warranty of quiet possession: If the circumstances of the contract are such as there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(b) Implied warranty against encumbrances: There is a further warranty that the goods are not subject to any right in favour of a third-party, or the buyer's possession shall not be disturbed by reason of the existence of encumbrances. This means that if the buyer is required to, and does discharge the amount of the encumbrance, there is breach of warranty, and he is entitled to claim damages from the seller.

Implied Conditions [Sections 14(a), 15(1), (2), 16(1) and Proviso 16(2), and Proviso 16(3) and 12(b) and 12(c)].

Different implied conditions apply under different types of contracts of sale of goods, such as sale by description, or sale by sample, or sale by description as well as sample. The condition, as to title to goods applies to all types of contracts, subject to that there is apparently no other intention.

Implied Conditions as to title

There is an implied condition that the seller, in an actual sale, has the right to sell the goods, and, in an agreement to sell, he will have a right to sell the goods at the time when property is to pass. As a result, if the title of the seller turns out to be defective, the buyer is entitled to reject the goods and can recover the full price paid by him.

In *Rowland* v. *Divall* (1923) 2 K.B. 500The complainant, a car dealer, purchased a car from the defendant. He painted the car and displayed it and sold it to a customer. The police impounded the car two months later as it was stolen. It was then returned to the original owner. The complainant as well as the defendant

did not know the car was stolen. The complainant returned the car to the consumer and filed a lawsuit under the Sale of Goods Act against the defendant. The defendant did not have the right to sell the goods as he did not obtain good title from the thief. Ownership remained with the original owner. The defendant was using the car for 2 months and was not obliged to pay for it and the plaintiff was not entitled to compensation for his work and money spent on the car. It was held that defendant had broken the condition as to title and complainant was therefore, entitled to recover the purchase money from defendant.

Example

X brought a bike from Y. Y had no title to the bike. He had stolen the bike from Z. X had to hand over it true owner, Z. There is a breach of implied condition as to title from Y, and X can recover the price of a bike as well as can claim damages from Y.

Question: Jolly bought a second-hand car from Yogesh for ₹ 85,000 and paid for it. After Jolly had used the car for six months he was deprived of it because Yogesh had no title to it. Can Jolly recover the price of the car from Yogesh? Advice Jolly.

As per Section 14 of the Sale of Goods Act, 1930, in 'contract of sale', the seller should have a good and valid title, so that he can transfer good and valid title to the buyer. If it turns out that the seller's title is defective, then the buyer can repudiate the contract.

In the given case, "implied condition as to title" is violated by Yogesh. Jolly can recover the price of the car as well as can claim damages from Yogesh.

Implied conditions under a sale by description

In a sale by description there are the following implied conditions:

(a) Goods must correspond with description: It is provided under Section 15 of the Act that when there is a sale of goods by description, there is an implied condition that the goods shall correspond with description.

In a sale by description, the buyer relies for his information on the description of the goods given by the seller, e.g. in the contract or in the preliminary negotiations.

Where 'A' buys goods which he has not seen, it must be sale by description, e.g., where he buys a 'new Fiat car' from 'B' and the car is not new, he can reject the car.

CASE LAW

Beale v. Taylor (1967)[2]

The defendant announced a 1961 Triumph Herald 1200 car for sale which he believed to be real. The plaintiff tested the car and saw a metal disc in the back of the car written "1200" and bought the car. The car was subsequently found to consist of a rear 1961 Herald Triumph 1200 sold to the front of a former Triumph Herald 948 model. It was held to be a breach of Section 13 despite the fact that claimant had inspected the car as he relied on the description in the advertisement and the metal disc at the rear of the car.

Nagan Das Mathura Das v. N.V. Valmamohomed (1930)[6] AIR 1930 Bombay 249

If a buyer orders goods of a certain description, and the seller delivers goods of a different description, it is open to the buyer to reject them. But if he does not reject them but keeps the goods,

even if he does so in ignorance of the fact that they are of a description different from that provided for by the contract he is debarred from rejecting the goods thereafter, and can only fall back upon a claim for damages, as upon a breach of warranty.

Wallis, Son & Wells v. Pratt & Haynes [1911] A. C. 394 In this case, the buyer could recover loss, as there was a breach of condition on contract for sale of seeds referred to as Sainfoin' the seeds supplied to the purchaser were of a different quality.

Baldry v. Marshall L.R. [1925] 1 K.B. 260 A consulted a car seller for the acquisition of a car appropriate for touring purposes. The vendor sold a car saying that it will deliver the needs of a buyer. The car ended up being unfit for touring purposes. It was held that the purchaser can restore the car and get back the cost as well as damages, on the ground of breach of condition. In this case, the contract will not be void if the purchaser demands for a good car.

(b) ***Goods must also be of merchantable quality:*** If they are bought by description from dealer of goods of that description. [Section 16(2)]

Merchantable quality means that the goods must be such as would be acceptable to a reasonable person, having regard to prevailing conditions. They are not merchantable if they have defects which make them unfit for ordinary use, or are such that a reasonable person knowing of their condition would not buy them. 'P' bought black yarn from 'D' and, when delivered, found it damaged by the white ants. The condition of merchantability was broken.

But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. If, however, examination by the buyer does not reveal the defect and he approves and accepts the goods, but when put to work, the goods are found to be defective, there is a breach of condition of merchantable quality.

The buyer is given a right to examine the goods before accepting them. But a mere opportunity without an actual examination, however, cursory, would not suffice to deprive him of this right.

Example

A inspects a hot water bottle at a chemist's shop and enquires whether it will stand boiling water. A is told that it will stand hot water but not boiling water and then he buys it. The moment A puts hot water into the bottle, it bursts causing him an injury. Has A any remedy against the chemist? Would there be any difference if he had asked for the hot water bottle under its patent name of "fuller's flaw lets Bottle"?

As per Section 16(2) of the Sale of Goods Act, 1930, where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. The term 'merchantable quality' is not defined in the Sale of Goods Act, 1930.

For the present case it means, the bottle must be properly sealed. In other words, if the goods are purchased for self-use, they should be reasonably fit for a purpose for which it is being used. In the instant case, on an examination of the hot water bottle, it exploded and injured the buyer. Applying the provision of section 16(2), Mr. Amit would succeed in claiming damage from the owner of the shop.

Mareli v Fitch and Gibbons

A buyer bought a Stone's Ginger Wine. While he was attempting to draw its cork with a corkscrew and with due care, the bottle broke off and injured the hand of the buyer. It was held that the bottle was not of merchantable quality, so the seller was liable.

Effect of buyer examining goods: If the buyer has examined the goods there shall be no implied condition with regard to defects, which such inspection ought to have revealed. However, the implied condition as to merchantability will continue to apply so far as latent defects in the goods are concerned, since such defects cannot be discovered by ordinary examination of the goods.

(c) Condition as to wholesomeness: The provisions, (i.e., eatables) supplied must not only answer the description, but they must also be merchantable and wholesome or sound. 'F' bought milk from 'A' and the milk contained typhoid germs. 'F's wife became infected and died. 'A' was liable for damages. Again, 'C' bought a bun at 'M's bakery, and broke one of his teeth by biting on a stone present in the bun. 'M' was held liable.

(d) Condition as to quality or fitness for a particular purpose: Ordinarily, in a contract of sale, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied.

But there is an implied condition that the goods are reasonably fit for the purpose for which they are required if:

(i) the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgement, and

(ii) the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not). There is no such condition if the goods are bought under a patent or trade name.

CASE LAW

In *Priest* v. *Last* (*1903*) *2 K.B. 148*, a hot water bottle was bought by the plaintiff, a draper, who could not be expected to have special skill knowledge with regard to hot water bottles, from a chemist, who sold such articles stating that the bottle will not stand boiling water but was intended to hold hot water. While being used by the plaintiff's wife, the bottle bursted and injured her. *Held,* the seller was responsible for damages as the bottle was not fit for use as a hot water bottle.

In *Grant* v. *Australian Knitting Mills* (*1936*) *70 MLJ 513*, 'G' a doctor purchased woollen underpants from 'M' a retailer whose business was to sell goods of that description. After wearing the underpants, 'G' developed some skin diseases. *Held,* the goods were not fit for their only use and 'G' was entitled to avoid the contract and claim damages.

Implied conditions under a sale by sample *(Section 17)*

In a contract of sale by sample:

(a) there is an implied condition that the bulk shall correspond with the sample in quality;

(b) there is another implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) it is further an implied condition of merchantability, as regards latent or hidden defects in the goods which would not be apparent on reasonable examination of the sample. "Worsted coating" quality equalto sample was sold to tailors, the cloth was found to have a defect in the fixture rendering the same unfitfor stitching into coats. The seller was held liable even though the same defect existed in the sample, which was examined.

Example

X send 3 sample of sugar and named them as Sugar fine, Sugar refined, sugar superfine to Y. Y orders 500 kg of Sugar refined to X. The whole lot of sugar should be of quality of the sample send by X.

This is sale by sample.

CASE LAW

James Drummond & Sons v. E H van Ingen & Company

In this case it was observed that the buyer can abandon the contract on discovering the defect in the supplied of cloth (not as per sample) by the seller.

Implied conditions in sale by sample as well as by description

In a sale by sample as well as by description, the goods supplied must correspond both with the samples as well as with the description. Thus, in *Nichol* vs. *Godts (1854) 158 E.R. 426*, 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. It was held that the seller was liable, and the buyer could refuse to accept.

IMPLIED WARRANTIES

Implied warranties are those which the law presumes to have been incorporated in the contract of sale inspite of the fact that the parties have not expressly included them in a contract of sale. Subject to the contract to the contrary, following are the implied warranties in a contract of sale:

(i) Warranty as to quiet possession: Section 14(b) of the Sale of Goods Act provides that there is an implied warranty that the buyer shall have and enjoy quiet possession of goods. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer is entitled to hold the seller liable for breach of warranty.

(ii) Warranty as to freedom from encumbrances: Section 14(c) states that in a contract of sale, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. But if the buyer is aware of any encumbrance on the goods at the time of entering into the contract, he will not be entitled to any compensation from the seller for discharging the encumbrance.

(iii) Warranty to disclose dangerous nature of goods: If the goods are inherently dangerous or likely to be dangerous and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger.

(iv) Warranties implied by the custom or usage of trade: Section 16(3) provides that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

DOCTRINE OF CAVEAT EMPTOR

This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose. The doctrine of *caveat emptor* is embodied in Section 16 of the Act which states that "subject to the provisions of this Act and of any other law for the time being

The term "*caveat emptor*" is a Latin word which means "let the buyer beware".

in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale". In simple words, 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. The principle was applied in the case of *Ward* vs. *Hobbs,* (1878) 4 A.C. 13, where 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 all but one died of typhoid fever. They also infected some of the buyer's own pigs. 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.

Exceptions:* Section 16 lays down the following exceptions to the doctrine of *Caveat Emptor:

(1) Where the seller makes a false representation and the buyer relies on it.
(2) When the seller actively conceals a defect in the goods which is not visible on a reasonable examinationof the same.
(3) When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicatedto him the purpose for which the goods are required.
(4) Where goods are bought by description from a seller who deals in goods of that description.

Example

A goes to B shop and purchases silk-saree thinking that it is made of Banarsi silk. The shopkeeper knows that A thinking is wrong. He however does not correct A impression. Later on, when A discovers that the saree is not made of Banarsi silk he wants to avoid the contract. Would A succeed? Give reasons.

Generally, it is no part of the seller's duty in a contract of sale of goods to give to the buyer an article suitable for a particular purpose, or of a particular quality. Also, the seller is under no obligation to point out the defects in the goods. It is the duty of the buyer to thoroughly examine the goods or to make known to the seller the purpose for which goods are required before he buys. If he makes the wrong choice, he cannot blame the seller. In the given case, A himself has made the selection without depending upon the skills and judgment of the seller. Therefore, A cannot avoid the contract.

Position of the doctrine of *Caveat Emptor* as enshrined in the present era.

With the enactment of Consumer Protection Act, 2019, the legislature corroborated the rights of buyers as against the misleading and delusive practices of the vendors. It has been established that goods being transacted in large numbers and online purchases are two of the most crucial reasons behind why *Caveat Emptor* in isolation will not be feasible for modern day contracts. However, this does not mean that *Caveat Emptor* should be eradicated in absolute sense. A blend of both the doctrines should be applied to ensure that the blanket immunity which the doctrine of Caveat Emptor places on the sellers is being restricted with the help of *Caveat Venditor* which confers accountability on sellers as well.

CASE LAW

In the case of *Mandava Krishna Chaitanya vs. UCO Bank, Asset Management Branch (21.02.2018 - HYHC): [2018 (3) ALD 266]* It was opined that the rule of *Caveat Emptor* has become insignificant instead the doctrine of *Caveat Venditor* has gained momentum within the commercial contracts. However, with the help of detailed interpretation of the relevant sections of the statute along with perusal of some of the landmark judgments by the Indian judiciary, it can be said that *Caveat Venditor* has relieved consumers from exercising utmost caution and has essentially divided the responsibility between both the parties.

EFFECTS OF CONTRACTS

Passing of Property or Transfer of Ownership (Sections 18-20)

The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. It is important to know the precise moment of time at which the property in the goods passes from the seller to the buyer for the following reasons:

(a) The general rule is that risk follows the ownership, whether the delivery has been made or not. If the goods are lost or damaged by accident or otherwise, then, subject to certain exceptions, the loss falls on the owner of the goods at the time they are lost or damaged.

(b) When there is a danger of the goods being damaged by the action of third parties, it is generally the owner who can take action.

(c) The rights of third parties may depend upon the passing of the property if the buyer resells the goods to a third party, the third party will only obtain a good title if the property in the goods has passed to the buyer before or at the time of the resale. Similarly, if the seller, in breach of his contract with the buyer, attempts to sell the goods to a third party in the goods, has not passed to the buyer, e.g., where there is only an agreement to sell.

(d) In case of insolvency of either the seller or the buyer, 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.

Thus in this context, ownership and possession are two distinct concepts and these two can at times remain separately with two different persons.

Passing of property in specific goods

In a sale of specific or ascertained goods, the property in them passes to the buyer as and when the parties intended to pass. The intention must be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties:

(a) Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made. Deliverable state means such a state that the buyer would be bound to take delivery of the goods. The fact that the time of delivery or the time of payment is postponed does not prevent the property from passing at once. (Section 20)

Example

X sales a machine to Y which was ready for delivery. Y tells X that he will take delivery the next day. At night, the machine was destroyed by fire without the fault of any party. As the machine was in a deliverable state, property in goods had passed to Y and he has to bear the loss.

(b) Where there is a contract for the sale of specific goods not in a deliverable state, i.e., the seller has to do something to the goods to put them in a deliverable state, the property does not pass until that thing is done and the buyer has notice of it. (Section 21)

Example

X offered to sell a car to Y for ₹ 50,000 after doing some repair work, which was accepted Y. While the car being repaired, it was destroyed without the fault of any party. It is clear from the contract that parties had the intention to pass the property in goods after repair and the car had destroyed before repair, hence no property in goods was transferred to Y and X has to bear the loss.

A certain quantity of oil was brought. The oil was to be filled into casks by the seller and then taken away by the buyer. Some casks were filled in the presence of buyer but, before the remainder could be filled, a fire broke out and the entire quantity of oil was destroyed, Held, the buyer must bear the loss of the oil which was put into the casks (i.e., put in deliverable state) and the seller must bear the loss of the remainder (*Rugg vs. Minett (1809) 11 East 210*).

(c) Where there is a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property to the goods for the purpose of ascertaining the price, does not pass until such act or thing is done and the buyer has notice of it. (Section 22)

(d) When goods are delivered to the buyer "on approval" or "on sale of return" or other similar terms the property therein passes to the buyer:

(i) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction;

(ii) if he does not signify his approval or acceptance but retains the goods without giving notice of rejection, in such a case—

(a) if a time has been fixed for the return of the goods, on the expiration of such time; and

(b) if no time has been fixed, on the expiration of a reasonable time.

Example

Amar delivers some cotton bales to Bharat on a sale or return basis. Bharat then delivers the same goods to Chandan and Chandan further delivers it to Dhruv on the same terms and conditions on which Amar delivers to Bharat. Before Dhruv could give his acceptance, goods are suddenly destroyed by fire. Who is to bear the loss under these circumstances? Give reasons in support of your answer.

As per Section 24 of the Sale of Goods Act, 1930, when goods are delivered to the buyer on sale or return terms, the property passes to the buyer, if. the buyer does any act adopting the transaction.

Property in goods gets transferred from A to B, when B delivers watch on sale or return basis to C, from B to C, when C delivers watch on sale or return basis to D and from C to D, when D delivers watch on sale or return basis to E. Ownership is with D and hence he will bear the loss.

Example

Ankur agreed to sell a horse to Eswar on the condition that Eswar will keep the horse for 10 days on a trial basis and have the option to return the horse within the stipulated period if he does not find the horse suitable. However, the horse died on the third day without any fault of either seller or buyer. State the legal position.

In case of 'sale or return basis, if goods get lost before property passes to the buyer without the fault of either party, the loss has to be borne by the seller.

In the given case horse died on the 3rd day whereas the buyer has the time of 10 days to signify his assent and he has not yet given his approval adopting the transaction. Thus, property in the horse has not been passed to the buyer and hence seller will bear the loss.

Ownership in unascertained goods

The property in unascertained or future goods does not pass until the goods are ascertained.

Unascertained goods are goods defined by description only, for example, 100 quintals of wheat; and not goods identified and agreed upon when the contract is made.

Unless a different intention appears, the following rules are applicable for ascertaining the intention of the parties in regard to passing of property in respect of such goods:

(a) The property in unascertained or future goods sold by description passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Such assent may be expressed or implied and may be given either before or after the appropriation is made. (Section 23)

(b) If there is a sale of a quantity of goods out of a large quantity, for example, 50 quintals of rice out of a heap in B's godown, the property will pass on the appropriation of the specified quantity by one party with the assent of the other.

(c) Delivery by the seller of the goods to a carrier or other buyer for the purpose of transmission to the buyer in pursuance of the contact is an appropriation sufficient to pass the property in the goods.

(d) 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:

  (i) 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.

  (ii) 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.

Passing of Risk (Section 26)

The general rule is that goods remain at the seller's risk until the ownership is transferred to the buyer. After the ownership has passed to the buyer, the goods are at the buyer's risk whether the delivery has been made or not.

For example, 'A' buys goods of 'B' and property has passed from 'B' to 'A'; but the goods remain in 'B's warehouse and the price is unpaid. Before delivery, 'B's warehouse is burnt down for no fault of 'B' and the goods are destroyed. 'A' must pay 'B' the price of the goods, as he was the owner. The rule is *resperit domino* - the loss falls on the owner.

But the parties may agree that risk will pass at the time different from the time when ownership passed. For example, the seller may agree to be responsible for the goods even after the ownership is passed to the buyer or *vice versa.*

In *Consolidated Coffee Ltd.* v. *Coffee Board, (1980 3 SCC 358)*, one of the terms adopted by coffee board for auction of coffee was the property in the coffee knocked down to a bidder would not pass until the payment ofprice and in the meantime the goods would remain with the seller but at the risk of the buyer, In such cases, risk and property passes on at different stages.

In *Multanmal Champalal* v. *Shah & Co., AIR (1970) Mysore 106,* goods were despatched by the seller from Bombayto Bellary through a public carrier. According to the terms of the contract, the goods were to remain the property of the seller till the price was paid though the risk was to pass to the buyer when they were delivered to public carrier for despatch. When the goods were subsequently lost before the payment of the price (and the consequentto the passing of the property to the buyer), the Court held that the loss was to be borne by the buyer.

It was further held in the same case that the buyer was at fault in delaying delivery unreasonably and therefore on that ground also he was liable for the loss, because such loss would not have arisen but for such delay.

Thus, where delivery has been delayed through the fault of either the buyer or the seller, in such a case, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

Transfer of Title by Person not the Owner (Section 27-30)

The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer. The rule is expressed by the maxim; *"Nemo Dat Quod Non Habet"* i.e. no one can pass a better title than he himself has. As applied to the sale of goods, the rule means that a seller of goods cannot give a better title to the buyer than he himself possess. Thus, even a *bona fide* buyer who buys stolen goods from a thief or from a transfree from such a thief can get no valid title to them, since the thief has no title, nor could he give one to any transferee.

Example:

(1) A, the hirer of goods under a hire purchase agreement, sells them to B, then B, though a bona fide purchaser, does not acquire the property in the goods. At most he can acquire such an interest as the hirer had.

(2) A finds a ring of B and sells it to a third person who purchases it for value and in good faith. The true owner, i.e. B can recover from that person, for A having no title to the ring could pass none the better.

Exception to the General Rule

The Act while recognizing the general rule that no one can give a better title than he himself has, laid down important exceptions to it. Under the exceptions the buyer gets a better title to the goods than the seller himself. These exceptions are given below:

(a) Sale by a mercantile agent: A buyer will get a good title if he buys in good faith from a mercantile agent who is in possession either of the goods or documents of title to the goods with the consent of the owner, and who sells the goods in the ordinary course of his business.

Example: X gives his car to A, a mercantile agent for sale not below ₹ 1,00,000. A sells the car for ₹ 75,000 to Y. Y bought in good faith and without notice of instruction given by X to A. Y gets a good title.

(b) Sale by a co-owner: A buyer who buys in good faith from one of the several joint owners who is in sole possession of the goods with the permission of his co-owners will get good title to the goods.

Example

Aman, Raman, and Vinod were joint-owners of a truck, and possession of the said truck was with Raman. Sudhir purchased the truck from Raman without knowing that Aman and Vinod were also co-owners of the truck. Decide in the light of the provisions of the Sale of Goods Act, 1930 whether the sale between Raman and Sudhir is valid.

No one can give a better title to the goods than what he himself has. However, as per Section 28 of the Sale of Goods Act, 1930, if one of several joint owners of goods has the sole possession of goods with the permission of other co-owners, the property in the goods is transferred to the person who buys in good faith and has not to notice that the seller has no authority to sell. In the given case, one of the joint owners Raman had possession of the Truck and Sudhir had purchased the truck without knowing that Aman and Vinod were also co-owners of the truck. Hence, applying the provision of section 28 property in Truck has been passed to the Sudhir.

(c) **Sale by a person in possession under a voidable contract:** A buyer buys in good faith from a person in possession of goods under a contract which is voidable, but has not been rescinded at the time of the sale.

Example: X purchases jewelry from Y, by committing fraud. But before Y terminate the contract,' X sells the jewelry to Z who buys it in good faith and without notice of X's defective title. Z gets a good title.

(d) **Sale by seller in possession after sale:** Where a seller, after having sold the goods, continues or is in possession of the goods or of the documents of title to the goods and again sells them by himself or through his mercantile agent to a person who buys in good faith and without notice of the previous sale, such a buyer gets a good title to the goods.

Example: B buys a mobile from S which he agrees to deliver to B the next day. S sells the same mobile to T who pays a higher price than B. T buys in good faith and without notice of the previous sale. T gets a good title.

(e) **Sale by buyer in possession:** If a person has brought or agreed to buy goods obtains, with the seller's consent, possession of the goods or of the documents of title to them, any sale by him or by his mercantile agent to a buyer who takes in good faith without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer. In any of the above cases, if the transfer is by way of pledge or pawn only, it will be valid as a pledge or pawn.

Example: B bought a TV on hire purchase from S. B sold it to T, who purchased it in good faith. T gets a good title.

(f) **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.

Example: In presence of Z, X sells goods to Y by telling that goods belong to him (X). Z does not object to X's statement, Y gets a good title and Z will be estopped from denying the want of authority of X.

(g) **Sale by an unpaid seller:** Where an unpaid seller has exercised his right of lien or stoppage in transit and is in possession of the goods, he may resell them and the second buyer will get absolute right to the goods.

(h) **Sale by person under other laws:** A pawnee, on default of the pawnee to repay, has a right to sell the goods, pawned and the buyer gets a good title to the goods. The finder of lost goods can also sell under certain circumstances. 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.

PERFORMANCE OF THE CONTRACT OF SALE

It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer is to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods are concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.

Delivery (Sections 33-39)

Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic. *Actual or physical delivery* takes place where the goods are handed over by the seller to the buyer

or his agent authorised to take possession of the goods. *Constructive* delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer. For example, where the seller, after having sold the goods, may hold them as bailee for the buyer, there is constructive delivery. *Symbolic* delivery is made by indicating or giving a symbol. Here the goods themselves are not delivered, but the "means of obtaining possession" of goods is delivered, e.g, by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

Rules as to delivery

The following rules apply regarding delivery of goods:

(a) Delivery should have the effect of putting the buyer in possession.

(b) The seller must deliver the goods according to the contract.

(c) The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to claim delivery.

(d) 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.

(e) The seller should tender delivery so that the buyer can take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides. But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reasonable time.

(f) The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract of sale and if not then in existence they are to be delivered at the place at which they are manufactured or produced.

(g) The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller. In other words, 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.

(h) If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.

(i) Unless otherwise agreed, the buyer is not bound to accept delivery in instalments.

Acceptance of Goods by the Buyer

Acceptance of the goods by the buyer takes place when the buyer:

(a) intimates to the seller that he has accepted the goods; or

(b) retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejectedthem; or

(c) does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells. If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:

  (i) reject the whole; or

(ii) accept the whole; or

(iii) accept the quantity ordered and reject the rest.

If the seller delivers with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.

Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates the seller that he refuses to accept them. In that case, the seller has to remove them.

Example

Amil sells to Sachin a specific horse which is to be delivered to Sachin the next week. Sachin is to pay the price on delivery. In the next week, Sachin was ready to pay price for the horse. But Amil was not in a position to deliver the horse to Sachin. Amit asks Sachin to take the delivery of the horse after another week. The horse dies before it is delivered to and paid for. Who shall bear the loss? Explain.

As per Section 32 of the Sale of Goods Act, 1930, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. Thus, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

In the given case Anil's main duty is to deliver the horse to the buyer Sachin. He has failed to perform his part under the contract of sale. Hence, Anil will bear the loss.

Example

J & H Ritchie Ltd v. Lloyd Ltd (2007)[5]

Mr Ritchie bought an all in one seed drill and harrow from Lloyd Ltd. It did not work. Lloyd Ltd agreed to take it back, investigate, and repair it. Lloyd Ltd returned it, and just said it had been repaired to factory gate standard. Mr Ritchie found out a serious defect. He would be using this in the next summer and till that time manufacturers guarantee would be affected. So, Mr Ritchie rejected the machine. Under sec 35. The House of Lords all agreed that Mr Ritchie was entitled to reject the equipment, even though it had in fact been repaired.

INSTALMENT DELIVERIES

When there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and either 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.

Suits for Breach of Contract

Where the property in the goods has passed to the buyer, the seller may sue him for the price.

Where the price is payable on a certain day regardless of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed.

Where the buyer wrongfully neglects or refuses to accept the goods and pay for them, the seller may sue the buyer for damages for non-acceptance.

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue him for damages for non-delivery.

Where there is a breach of warranty or where the buyer elects or is compelled to treat the breach of condition as a breach of warranty, the buyer cannot reject the goods. He can set breach of warranty in extinction or diminition of the price payable by him and if loss suffered by him is more than the price he may sue for the damages.

If the buyer has paid the price and the goods are not delivered, the buyer can sue the seller for the recovery of the amount paid. In appropriate cases the buyer can also get an order from the court that the specific goods ought to be delivered.

CASE STUDY

Chhunna Mal Ram Nath vs. Mool Chand Ram Bhagat (1928) 30 BOMLR 837

FACTS

Plaintiffs entered into contract for taking deliveries of the goods packed in wooden boxes from the defendants, which latter was to secure from London. Since British government prohibited the supply of such goods in wooden boxes, hence, defendants offered to supply the goods in bales to which plaintiffs refused and "cancel[ed] the goods" without claiming any compensation thereof in any of the correspondences. Plaintiffs later claimed damages for non-delivery.

DECISION

Plaintiffs upon the ancillary breach of defendants claimed to have 'put an end to the contract' u/s 39; however, it is the plaintiffs themselves who by wrongfully refusing to take deliveries under the contract have given a chance to defendants to 'put an end to it'. Nevertheless, defendants did not exercise this option and by acquiescence continued it; but Plaintiffs by insisting on "cancellation of goods" to be supplied by the defendants, had expressly dispensed with the performance by the latter such that no claim for damages could be brought against the any breach by latter.

Anticipatory Breach

Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as still subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

In case the contract is treated as still subsisting it would be for the benefit of both the parties and the party who had originally repudiated will not be deprived of:

(a) his right of performance on the due date in spite of his prior repudiation; or

(b) his rights to set up any defence for non-performance which might have actually arisen after the date of the prior repudiation.

Measure of Damages

The Act does not specifically provide for rules as regards the measure of damages except by stating that nothing in the Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law they are entitled to the same. The inference is that the rules laid down in Section 73 of the Indian Contract Act will apply.

CASE LAW

Suresh Kumar Rajendra Kumar v. K Assan Koya & sons (1990)[8]

The plaintiff sold, through the commission agents, the goods and claimed compensation from the buyer who had rejected them. While doing so the plaintiff had taken all the measures necessary to sell the goods urgently in the ordinary course of business. In the absence of any records to show that the sale was conducted in an improper manner, it was held by the court that the plaintiff was entitled to claim the difference between the price at which the rice was supposed to be sold to the defendants, and the price at which it was finally sold.

UNPAID SELLER (SECTIONS 45-54)

***Who is an unpaid seller?* (Section 45)**

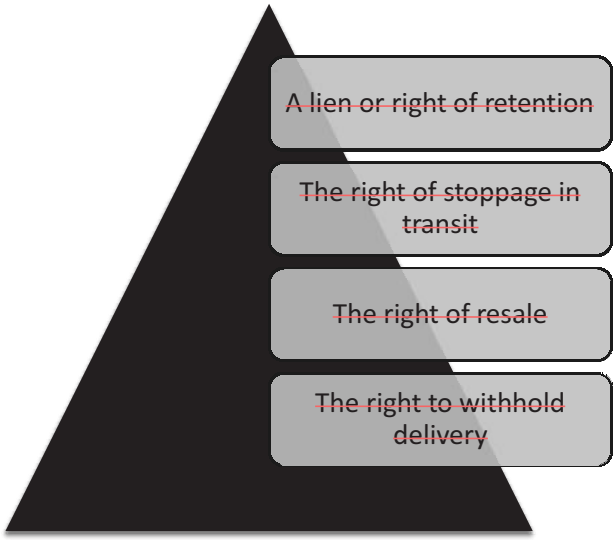
The seller of goods is deemed to be unpaid seller:

(a) When the whole of the price has not been paid or tendered; or

(b) When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonoured.

Rights of an Unpaid Seller against the Goods

An unpaid seller's right against the goods are:



***(a) Right of Lien* (Sections 47-49 and 54):** An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfilment or tender of the price in cases where:

(i) the goods have been sold without stipulation as to credit; or

(ii) the goods have been sold on credit, but the term of credit has expired; or

(iii) the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is *possessory lien,* so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

A lien is lost –

(i) When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

(ii) When the buyer or his agent lawfully obtains possession of the goods;

(iii) By waiver of his lien by the unpaid seller.

(b) ***Stoppage in transit*** **(Sections 50-52):** The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price.

The right to stop goods is available to an unpaid seller

(i) when the buyer becomes insolvent; and

(ii) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehousekeeper for the purpose of transmission to the buyer and until the buyer takes delivery of them. The transit comes to an end in the following cases:

(i) If the buyer obtains delivery before the arrival of the goods at their destination;

(ii) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;

(iii) If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the redelivery.

The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

(c) ***Right of re-sale*** **(Section 54):** The unpaid seller may re-sell:

(i) where the goods are perishable;

(ii) where the right is expressly reserved in the contract;

(iii) where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.

If on a re-sale, there is a deficiency between the price due and amount realised, he is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer profit, if any, on the resale.

(d) ***Rights to withhold delivery:*** If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

Rights of an unpaid seller against the buyer (Sections 55 and 56)

An unpaid seller may sue the buyer for the price of the goods in case of breach of contract where the property in the goods has passed to the buyer or he has wrongfully refused to pay the price according to the terms of the contract.

The seller may sue the buyer even if the property in the goods has not passed where the price is payable on a certain day.

Under Section 56, the seller may sue the buyer for damages or breach of contract where the buyer wrongfully neglects or refuses to accept and pay for the goods.

Thus an unpaid sellers rights against the buyer personally are:

(a) a suit for the price.

(b) a suit for damages.

Auction Sales (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 complete for the purchase of property by successive offer of advancing sums.

Section 64 lays down the rules regulating auction sales. 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. 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.

Trading Contracts Involving Rail or Sea Transit

In the case of a contract for the sale of goods which are to be shipped by sea a number of conditions are attached by the parties or by custom and practice of merchants. Some of the important types of such contracts are given below:

(a) **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.

(b) F.O.R. (Free on Rail): Similar position prevails in these contracts as in the case of F.O.B. contracts.

(c) 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.

In such types of contracts, the seller not only bears all the expenses of putting the goods on board the ship as in an F.O.B. contract, but also to bear the 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.

(d) 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 them.

LESSON ROUND-UP

- In a sale, the property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.
- Where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.
- The subject matter of the contract of sale is essentially goods. According to Section 2(7) of the Sale of Goods Act, "goods" means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Goods may be (a) existing, (b) future, or (c) contingent. The existing goods may be (i) specific or generic, (ii) ascertained or unascertained.
- The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer.
- It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer to accept the goods and pay for them in accordance with the contract of sale.
- Unless otherwise agreed, payment of the price and the delivery of the goods and concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.
- Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic.
- 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 complete for the purchase of property by successive offer of advancing sums.

GLOSSARY

Goods: It means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Future Goods: It means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

Specific Goods: It means goods identified and agreed upon at the time a contract of sale is made; and expressions used but not defined in this Act and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings assigned to them in that Act.

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Define contract of sale of goods and distinguish between sale and agreement to sell and hire purchase agreement.
2. Write short notes on:
   (i) Existing goods
   (ii) Future goods.
3. Why it is important to know the time of passing of property?
4. What are the rights of an unpaid seller against the goods and against the buyer?
5. Explain Doctrine of Caveat emptor.
6. Write a note on Transfer of Title by Person not the Owner along with the General Exceptions and related case laws.
7. What is covered in the "Goods" in accordance with the provisions of Sale of Goods Act, 1930?

LIST OF FURTHER READINGS

- Bare Act of Sale of Goods Act, 1930
- Sale of Goods Act, 1930 (Lawmann's) - Lawmann
- Lexis Nexis The Sale of Goods Act & The Indian Partnership Act by Sir Dinshaw Fardunji Mulla & K Kannan Edition 2022

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/2390/1/193003.pdf

Law relating to Negotiable Instruments

Lesson 18

KEY CONCEPTS

■ Negotiable Instrument ■ Bouncing of Cheques ■ Dishonour of Cheques ■ Instruments

Learning Objectives

To understand:

- What are Negotiable Instruments?
- Characteristics of Negotiable Instruments
- Parties to the different Negotiable Instruments
- Effect of Negotiability
- Kinds of Negotiable Instruments
- Crossing and Bouncing of Cheques
- Dishonour of Cheques & its Remedies
- Presumption of Law as to Negotiable Instruments

Lesson Outline

- Definition of a Negotiable Instrument
- Important Characterstics of Negotiable Instruments
- Kinds of Negotiable Instruments
- Dishonour and its remedies
- Noting and Protest
- Presumption of Law
- National Electronic Funds Transfer (NEFT)
- Real Time Gross Settlement (RTGS)
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- Negotiable Instruments Act, 1881

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" (*Willis—The Law of Negotiable Securities, Page 6*).

According to this definition the following are the conditions of negotiability:

(i) The instrument should be freely transferable. An instrument cannot be negotiable unless it is such and in such state that the true owner could transfer by simple delivery or endorsement and delivery.

(ii) The person who takes it for value and in good faith is not affected by the defect in the title of the transferor.

(iii) Such a person can sue upon the instrument in his own name.

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:

1. The instrument should be freely transferable by the custom of trade. Transferability may be by
   (i) delivery or
   (ii) endorsement and delivery.
2. 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.
3. 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.

The term "negotiable instrument" means a document transferable from one person to another. However the Act has not defined the term. It merely says that "A negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer. [Section 13(1)]

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 *(nemodat quad 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.

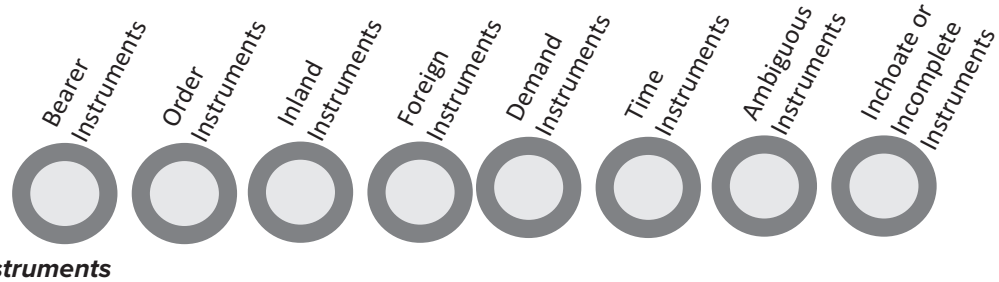
IMPORTANT CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

Following are the important characteristics of negotiable instruments:

- The holder of the instruments is presumed to be the owner of the property contained in it
- They are freely transfereable
- The holder of the instruments is presumed to be the owner of the property contained in it
- The holder in due course is entitled to sue on the instrument in his own name
- The instrument is transferable till maturity and in case of cheques till it become stale
- Certain equal presumed are applicable to all negotiable instruments unless the connrary is proved

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, or (ii) the only or last endorsement on the instrument is an endorsement in blank. A person who is a holder of a bearer instrument can obtain the payment of the instrument.

Example:

A bearer cheque that may be encashed from a bank the person in possession is a bearer Instrument.

2. Order Instruments

A promissory note, bill of exchange or cheque is payable to order (i) which is expressed to be so payable; or (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; or

(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.

Example:

A blank cheque is an inchoate instrument. It comes with the option of writing the amount by the first holder.

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)

Parties to a Promissory Note:

A promissory note has the following parties:

(a) The maker: the person who makes or executes the note promising to pay the amount stated therein.

(b) The payee: one to whom the note is payable.

(c) The holder: is either the payee or some other person to whom he may have endorsed the note.

(d) The endorser.

(e) The endorsee.

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.

Question

X made a promissory note for Rs. 50,000/- to be paid to Y on 31st December, 2022. Y endorse the bill Z.

Find out who is maker, payee, holder, endorser and endorsee.

Note : A promissory note cannot be made payable or issued to bearer, no matter whether it is payable on demand or after a certain time (Section 31 of the RBI Act, 1934).

(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.

Essentials of a Bill of Exchange:

(1) It must be in writing.

(2) It must contain an unconditional order to pay money only and not merely a request.

(3) It must be signed by the drawer.

(4) The parties must be certain.

(5) The sum payable must also be certain.

(6) It must comply with other formalities e.g. stamps, date, etc.

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.

How Bill of Exchange Originates—Forms of Bills of Exchange

Bills of exchange were originally used for payment of debts by traders residing in one country to another country with a view to avoid transmission of coin. Now-a-days they are used more as trade bills both in connection with domestic trade and foreign trade and are called inland bills and foreign bills respectively.

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.

Example

A bill drawn in India, payable in USA, upon a person resident in India is an inland instrument. A bill drawn in India and payable in India but drawn on a person in USA is also an inland instrument.

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.

Example :

A sells goods worth Rs. 1,000 to B and allows him 90 days time to pay the price, A will draw a bill of exchange on B, on the following terms: "Ninety days after date pay A or order, the sum of one thousand rupees only for value received". A will sign the bill and then present it to B for acceptance. This is necessary because, until a bill is accepted by the drawee, nobody has either rights or obligations. If B agrees to obey the order of A, he will accept the bill by writing across its face the word "accepted" and signing his name underneath and then delivering the bill to the holder. B, the drawee, now becomes the acceptor of the bill and liable to its holders. Such a bill is a genuine trade bill.

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".

B.

To

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.

Example:

After this amendment, the banks may send the electronic copy of the cheque to another for releasing the Payment. This amendment has reduced the time for clearing of cheques.

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. (***Explanation I***).

The expression 'clearing house' means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India. (***Explanation II***).

'Explanation III. – For the purposes of this section, the expressions "asymmetric crypto system", "computer resource", "digital signature", "electronic form" and "electronic signature" shall have the same meanings respectively assigned to them in the Information Technology Act, 2000.'

Simply stated, a cheque is a bill of exchange drawn on a bank payable always on demand. Thus, a cheque is a bill of exchange with two additional qualifications, namely: (i) it is always drawn on a banker, and (ii) it is always payable on demand. A cheque being a species of a bill of exchange, must satisfy all the requirements of a bill; it does not, however, require acceptance.

Note: By virtue of Section 31 of the Reserve Bank of India Act, no bill of exchange or hundi can be made payable to bearer on demand and no promissory note or a bank draft can be made payable to bearer at all, whether on demand or after a specified time. Only a cheque can be payable to bearer on demand.

Parties to a cheque

The following are the parties to a cheque:

- The drawer: The person who draws the cheque.
- The drawee: The banker of the drawer on whom the cheque is drawn.
- The payee, holder, endorser and endorsee: same as in the case of a bill.

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.

Distinction between Cheques and Bills of Exchange

As a general rule, the provisions applicable to bills payable on demand apply to cheques, yet there are few points of distinction between the two, namely:

(a) A cheque is a bill of exchange and always drawn on a banker, while a bill may be drawn on any one, including banker.

(b) A cheque can only be drawn payable on demand, a bill may be drawn payable on demand, or on the expiry of a specified period after sight or date.

(c) A bill payable after sight must be accepted before payment can be demanded, a cheque does not require acceptance and is intended for immediate payment.

(d) A grace of 3 days is allowed in the case of time bills, while no grace is given in the case of a cheque, for payment.

(e) The drawer of a bill is discharged, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presentment for payment.

(f) Notice of the dishonour of a bill is necessary, but not in the case of a cheque.

(g) The cheque being a revocable mandate, the authority may be revoked by countermanding payment, and is determined by notice of the customer's death or insolvency. This is not so in the case of bill.

(h) A cheque may be crossed, but not a bill.

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. /-

No..... Sd/-

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.

Example

A issued an account payee cheque in the name of B on 30th October, 2022. The date on cheque was 30th November, 2022. The cheque presented for payment on 29th November, 2022. In this case, The bank may deny to make the payment to B.

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.

A payment will be a payment in due course if:

(a) it is in accordance with the apparent tenor of the instrument, i.e., according to what appears on the face of the instrument to be the intention of the parties;

(b) it is made in good faith and without negligence, and under circumstances which do not afford a ground for believing that the person to whom it is made is not entitled to receive the amount;

(c) it is made to the person in possession of the instrument who is entitled as holder to receive payment;

(d) payment is made under circumstances which do not afford a reasonable ground believing that he is notentitled to receive payment of the amount mentioned in the instrument; and

(e) payment is made in money and money only.

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 customer's title to the cheque which the banker has collected has been questioned. It reads as follows:

> "A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason of only having received such payment.
>
> Explanation: A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

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. *(Explanation II)*

The requisites of claiming protection under Section 131 are as follows:

(i) 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.

(ii) The banker should have collected a crossed cheque, i.e., the cheque should have been crossed before it came to him for collection.

(iii) The proceeds should have been collected for a customer, i.e., a person who has an account with him.

(iv) 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.

Example:

'A' endorses and delivers a cheque to B, and B keeps it for an unreasonable length of time, and then endorses and delivers it to C. C presents it for payment within a reasonable time after its receipt by him, and it is dishonoured. C can enforce payment against B but not against A, as *qua* A, the cheque has become stale.

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.

Crossing of Cheques

A cheque is either "open" or "crossed". An open cheque can be presented by the payee to the paying banker and is paid over the counter. A crossed cheque cannot be paid across the counter but must be collected through a banker.

A crossing is a direction to the paying banker to pay the money generally to a banker or to a particular banker, and not to pay otherwise. The object of crossing is to secure payment to a banker so that it could be traced to the person receiving the amount of the cheque. Crossing is a direction to the paying banker that the cheque should be paid only to a banker or a specified banker. To restrain negotiability, addition of words "Not Negotiable" or "Account Payee Only" is necessary. A crossed bearer cheque can be negotiated by delivery and crossed order cheque by endorsement and delivery. Crossing affords security and protection to the holder of the cheque.

Modes of Crossing (Sections 123-131A)

There are two types of crossing which may be used on cheque, namely: (i) General, and (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 it's 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

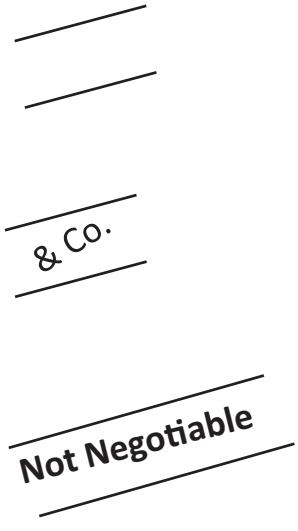
A cheque may be crossed not negotiable by writing across the face of the cheque the words "Not Negotiable" within two transverse parallel lines in the case of a general crossing or alongwith the name of a banker in the case of a special crossing. Section 130 of the Negotiable Instruments Act provides "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.

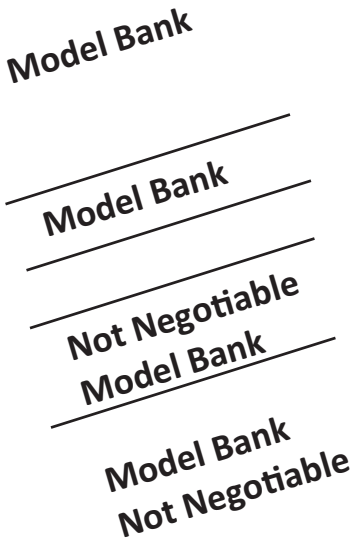
"Not negotiable" restricts the negotiability of the cheque and in case of transfer, the transferee will not get a better title than that of a transferor.

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.

Specimen of a general crossing



Specimen of a special crossing



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.

Maturity is the date on which the payment of an instrument falls due. Every 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 non-acceptance. 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.

In order to be a holder in due course, a person must satisfy the following conditions:

(i) He must be the holder of the instrument.

(ii) He should have obtained the instrument for value or consideration.

(iii) He must have obtained the negotiable instrument before maturity.

(iv) The instrument should be complete and regular on the face of it.

(v) The holder should take the instrument in good faith.

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, and (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.

As a cheque is a bill of exchange, drawn on a specified banker, the drawee of a cheque must always be a banker. The banker, therefore, is bound to pay the cheque of the drawer, i.e., customer, if the following conditions are satisfied:

(i) The banker has sufficient funds to the credit of customer's account.

(ii) The funds are properly applicable to the payment of such cheque, e.g., the funds are not under any kind of lien etc.

(iii) The cheque is duly required to be paid, during banking hours and on or after the date on which it is made payable.

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; and (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:

(i) Where it is made so payable, or

(ii) Where it is originally made payable to order but the only or the last endorsement is in blank.

(ii) 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, (b) Special or Full, (c) Restrictive, or (d) Partial, and (e) Conditional or Qualified.

(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.

Example

A bill is payable to Lokesh. Lokesh endorses the bill by simply affixing his signature. This is endorsement in blank by Lokesh.

(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".

Example:

X being the payee, transfers the instrument to Z, by an endorsement "without recourse" and Z endorses it to Y, who endorses it to X. X does not only has his former rights back, but has the rights of an endorsee against Y and Z.

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".

Example

A, the holder of a bill endorses it to B, B endorses to C, and C to D, and endorses it again to A. A, being a holder in due course of the bill by second endorsement by D, can recover the amount thereof from B, C, or D and himself being a prior party is liable to all of them. Therefore, A having been relegated by the second endorsement to his original position, cannot sue B, C and D.

Example

A is the payee of a negotiable instrument. He endorses the instrument 'sans recourse' to B, B endorses to C, C to D, and D again endorses it to A. In this case, A is not only reinstated in his former rights but has the right of an endorsee against B, C and D.

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.*

Example

A bill is endorsed, "Pay A or order". A endorses it in blank, and it comes into the hands of B, who simply delivers it to C, C forges B's endorsement and transfer it to D. Here, D, as the holder does not derive his title through the forged endorsement of B, but through the genuine endorsement of A and can claim payment from any of the parties to the instrument in spite of the intervening forged endorsement.

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) A bill payable after sight. Presentment is necessary in order to fix maturity of the bills; and

(b) 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 following are the persons to whom a bill of exchange should be presented:

(i) The drawee or his duly authorised agent.

(ii) If there are many drawees, bill must be presented to all of them.

(iii) The legal representatives of the drawee if drawee is dead.

(iv) The official receiver or assignee of insolvent drawee.

(v) To a drawee in case of need, if there is any. This is necessary when the original drawee refuses to accept the bill.

(vi) The acceptor for honour. In case the bill is not accepted and is noted or protested for non-acceptance, the bill may be accepted by the acceptor for honour. He is a person who comes forward to accept the bill when it is dishonoured by non-acceptance.

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:

(a) Where the drawee cannot be found after reasonable search.

(b) Where drawee is a fictitious person or one incapable of contracting.

(c) 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 by Non-Acceptance

Section 91 provides that a bill is said to be dishonoured by non-acceptance:

(a) When the drawee does not accept it within 48 hours from the time of presentment for acceptance.

(b) When presentment for acceptance is excused and the bill remains unaccepted.

(c) When the drawee is incompetent to contract.

(d) When the drawee is a fictitious person or after reasonable search can not be found.

(e) Where the acceptance is a qualified one.

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 endorsers 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.

Notice of Dishonour Unnecessary

No notice of dishonour is necessary:

(a) When it is dispensed with or waived by the party entitled thereto, e.g., where an endorser writes on the instrument such words as “notice of dishonour waived”.

(b) When the drawer has countermanded payment.

(c) When the party charged would not suffer damage for want of notice.

(d) When the party entitled to notice cannot after due search be found.

(e) When the omission to give notice is caused by unavoidable circumstances, e.g., death or serious illness of the holder.

(f) Where the acceptor is also a drawer, e.g., where a firm draws on its branch.

(g) Where the promissory note is not negotiable. Such a note cannot be endorsed.

(h) Where the party entitled to notice promises to pay unconditionally.

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 (i) discharge of the instrument or (ii) discharge of one or more parties to the instrument from liability.

Discharge of the Instrument

A negotiable instrument is discharged:

(a) by payment in due course;

(b) when the principal debtor becomes the holder;

(c) by an act that would discharge simple contract;

(d) by renunciation; and

(e) 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 :

(a) By cancellation by the holder of the name of any party to it with the intention of discharging him.

(b) By release, when the holder releases any party to the instrument

(c) Discharge of secondary parties, i.e., endorsers.

(d) By the operation of the law, i.e., by insolvency of the debtor.

(e) By allowing drawee more than 48 hours to accept the bill, all previous parties are discharged. (f) B y non-presentment of cheque promptly the drawer is discharged.

(g) By taking qualified acceptance, all the previous parties are discharged.

(h) 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.

Examples of material alteration are :

Alteration (i) of the date of the instrument (ii) of the sum payable, (iii) in the time of payment, (iv) of the place of payment,(v) of the rate of interest, (vi) by addition of a new party, (vii) tearing the instrument in a material part.

There is no material alteration and the instrument is not vitiated in the following cases:

(i) correction of a mistake, (ii) to carry out the common intention of the parties, (iii) an alteration made before the instrument is issued and made with the consent of the parties, (iv) crossing a cheque, (v) addition of the words “on demand” in an instrument where no time of payment is stated.

Section 89 affords protection to a person who pays an altered note bill or cheque. However, in order to be able to claim the protection, the following conditions must be fulfilled:

(i) the alteration should not be apparent;

(ii) the payment must be made in due course; and

(ii) the payment must be by a person or banker liable to pay.

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 vague.

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:

(1) Every negotiable instrument was made or drawn for consideration irrespective of the consideration mentioned in the instrument or not.

(2) Every negotiable instrument having a date was made on such date.

(3) Every accepted bill of exchange was accepted within a reasonable time before its maturity.

(4) Every negotiable instrument was transferred before its maturity.

(5) The instruments were endorsed in the order in which they appear on it.

(6) A lost or destroyed instrument was duly signed and stamped.

(7) The holder of the instrument is a holder in due course.

(8) In a suit upon an instrument which has been dishonoured, the Court shall presume the fact of dishonour, or proof of the protest.

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

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.

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.

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.

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.

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the paymentof the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as thecase may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Example

Naresh draws a cheque of Rs 25,000 on his own account payable to Mukesh but only has Rs. 20,000 in his account. Mukesh presents the same to the bank with in the time allowed under section 138 of the Negotiable Instruments Act, 1881. Cheques bounces due to insufficient funds in Naresh's account.

Naresh is liable under section 138 of the Act. However, compliance with the proviso to section 138 is necessary.

CASE LAW

Dayawati vs. Yogesh Kumar Gosain (17.10.2017 - DEL. HC) : 2017 SCC Online Del 11032.

In this case, whether an offence under section 138 of Negotiable Instruments Act can be referred for amicable settlement through mediation. Court stated that

"even though an express statutory provision enabling the criminal court to refer the complainant and accused persons to alternate dispute redressal mechanisms has not been specifically provided by the Legislature, however, the Cr.P.C. does permit and recognize settlement without stipulating or restricting the process by which it may be reached. There is thus no bar to utilizing the alternate dispute mechanisms including arbitration, mediation, conciliation (recognized under Section 89 of CPC) for the purposes of settling disputes which are the subject matter of offences covered under Section 320 of the Cr.P.C."

Meters and Instruments Private Limited and Ors. vs. Kanchan Mehta (05.10.2017 - SC) : AIR 2017 SC 4594

In this case, *inter alia* the aspect "that though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the Accused" is emerged. The court stated that:

"*Nature of offence Under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable. The offence was also described as 'regulatory offence'. The burden of proof was on the Accused in view of presumption Under Section 139 and the standard of proof was of "preponderance of probabilities". The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation.*

The court has to balance the rights of the complainant and the Accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the Court in exercise of its inherent power Under Section 143 of the Act which is different from compounding by consent of parties."

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

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.

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.

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.

Explanation: For the purposes of section 141 (a) "company" means anybody corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

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.

CASE LAWS

A.R. Radha Krishna vs. Dasari Deepthi and Ors. (28.02.2019 - SC) : AIR 2019 SC 2518

In this case, the question was when can a cheque bounce complain against a director of the company be quashed. Supreme Court opined that -

"....The High Court, in deciding a quashing petition Under Section 482, Code of Criminal Procedure, must consider whether the averment made in the complaint is sufficient or if some unimpeachable evidence has been brought on record which leads to the conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time. While the role of a Director in a company is ultimately a question of fact, and no fixed formula can be fixed for the same, the High Court must exercise its power Under Section 482, Code of Criminal Procedure when it is convinced, from the material on record, that allowing the proceedings to continue would be an abuse of process of the Court....."

Susela Padmavathy Amma v. M/s Bharti Airtel Limited, 2024 INSC 206 decided by Supreme Court on 15.03.2024

In this case the, Hon'ble Apex Court has laid down that in the case of S.M.S. Pharmaceuticals Ltd., this Court was considering the question as to whether it was sufficient to make the person liable for being a director of a company under Section 141 of the Negotiable Instruments Act, 1881. This Court considered the definition of the word "director" as defined in Section 2(13) of the Companies Act, 1956. This Court observed thus:

"8. ..... There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a

company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. ....."

It was held that merely because a person is a director of a company, it is not necessary that he is aware about the day-today functioning of the company. This Court held that there is no universal rule that a director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company. This Court, however, clarified that the position of a managing director or a joint managing director in a company may be different. This Court further held that these persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. To escape liability, they will have to prove that when the offence was committed, they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

.... clearly be seen that this Court has held that merely reproducing the words of the section without a clear statement of fact as to how and in what manner a director of the company was responsible for the conduct of the business of the company, would not ipso facto make the director vicariously liable.

Cognizance of Offences

As per Section 142(1) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) 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;

(b) 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;

(c) 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 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; or

(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.

Explanation: For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

Validation for Transfer of Pending Cases

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.

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.

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

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.

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.

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 .

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.

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—

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) 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 sub-section (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.

CASE LAW

G.J. Raja vs. Tejraj Surana (30.07.2019 - SC) : (2019) 19 SCC 469

In this case, the question that arises therefore is whether Section 143A of the Act is retrospective in operation and can be invoked in cases where the offences punishable Under Section 138 of the Act were committed much prior to the introduction of Section 143A. It was held by the court that -

"In our view, the applicability of Section 143A of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an Accused to pay such interim compensation.

Rakesh Ranjan Shrivastava v. The State of Jharkhand & Anr. 2024 INSC 205 decided by Supreme Court on 15.03.2024

In this case the Hon'ble Supreme Court has laid down the broad parameters for exercising the discretion under Section 143A of the Negotiable Instruments Act, 1881. These are as follows:

i. The Court will have to *prima facie* evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application. The financial distress of the accused can also be a consideration.

ii. A direction to pay interim compensation can be issued, only if the complainant makes out a *prima facie* case.

iii. If the defence of the accused is found to be *prima facie* plausible, the Court may exercise discretion in refusing to grant interim compensation.

iv. If the Court concludes that a case is made out to grant interim compensation, it will also have to apply its mind to the quantum of interim compensation to be granted. While doing so, the Court will have to consider several factors such as the nature of the transaction, the relationship, if any, between the accused and the complainant, etc.

v. There could be several other relevant factors in the peculiar facts of a given case, which cannot be exhaustively stated. The parameters stated above are not exhaustive.

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 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.

The amount payable shall be in addition to any interim compensation paid by the appellant under section 143A.

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.

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:

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.

CASE LAWS

Surinder Singh Deswal and Ors. vs. Virender Gandhi (29.05.2019 - SC) : AIR 2019 SC 2956

In this case, Supreme Court held that Section 148 of the Act which was also introduced by the Amendment Act 20 of 2018 from 01.09.2018 is retrospective in operation. Court observed

"....considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence Under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence Under Section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018....

...therefore the amendment so brought in the Act by insertion of Section 148 of the N.I. Act is purely procedural in nature and not substantive and does not affect the vested rights of the Appellants, as such, the same can have a retrospective effect and can be applied in the present case also....."

***Jamboo Bhandari vs. M.P. State Industrial Development Corporation Ltd. & Ors.* decided by Supreme Court on 04th September, 2023**

The appellants in these two appeals were the accused before the learned Judicial Magistrate who tried them on a complaint filed by the respondent No. 1 under Section 138 of the Negotiable Instruments Act, 1881 ("N.I. Act"). The learned Magistrate convicted the appellants and directed them to pay the cheque amount with interest thereon @ 9% per annum. An appeal was preferred by the appellants before the Sessions Court. Relying upon Section 148 of the N.I. Act, the Sessions Court granted relief under Section 389 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") subject to condition of appellants depositing 20% of the amount of compensation.

High Court also confirmed the order of the Sessions Court.

In appeal, the Supreme Court held that a purposive interpretation should be made of Section 148 of the N.I. Act. Hence, normally, Appellate Court will be justified in imposing the condition of deposit as provided in Section 148. However, in a case where the Appellate Court is satisfied that the condition of deposit of 20% will be unjust or imposing such a condition will amount to deprivation of the right of appeal of the appellant, exception can be made for the reasons specifically recorded.

Therefore, when Appellate Court considers the prayer under Section 389 of the Cr.P.C. of an accused who has been convicted for offence under Section 138 of the N.I. Act, it is always open for the Appellate Court to consider whether it is an exceptional case which warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount....

National Electronic Funds Transfer (NEFT) and Real Time Gross Settlement (RTGS)

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.

NEFT is an electronic fund transfer system that operates on a Deferred Net Settlement (DNS) basis which settles transactions in batches. In DNS, the settlement takes place with all transactions received till the particular cut-off 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.

The acronym 'RTGS' stands for Real Time Gross Settlement, which can be defined as the continuous (real-time) 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.

[1]Advantages of NEFT

- Round the clock availability on all days of the year.
- Near-real-time funds transfer to the beneficiary account and settlement in a secure manner.
- Pan-India coverage through large network of branches of all types of banks.
- 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.
- Positive confirmation to the remitter by SMS / e-mail on credit to beneficiary account.
- Penal interest provision for delay in credit or return of transactions.
- No levy of charges by RBI from banks.
- No charges to savings bank account customers for online NEFT transactions.
- The transaction charges have been capped by RBI.
- 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.
- The transaction has legal backing.

Benefits of RTGS[2]

- It is a safe and secure system for funds transfer.
- RTGS transactions / transfers have no amount cap set by RBI.
- The system is available on all days on 24x7x365 basis. There is real time transfer of funds to the beneficiary account.
- The remitter need not use a physical cheque or a demand draft.
- The beneficiary need not visit a bank branch for depositing the paper instruments.
- The beneficiary need not be apprehensive about loss / theft of physical instruments or the likelihood of fraudulent encashment thereof.
- Remitter can initiate the remittances from his / her home / place of work using internet banking, if his / her bank offers such service.
- The transaction charges have been capped by RBI.
- The transaction has legal backing.

1. https://m.rbi.org.in/Scripts/faqview.aspx?Id=60
2. https://m.rbi.org.in/scripts/FAQView.aspx?Id=65

LESSON ROUND-UP

- 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 term "negotiable instrument" means a document transferable from one person to another.
- A "promissory note" is an instrument in writing 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.
- 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 orto the bearer of the instrument.
- Bills of exchange were originally used for payment of debts by traders residing in one country to another country with a view to avoid transmission of coin. Now-a-days they are used more as trade bills both in connection with domestic trade and foreign trade and are called inland bills and foreign bills respectively.
- 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.
- NEFT is an electronic fund transfer system that operates on a Deferred Net Settlement (DNS) basis which settles transactions in batches. In DNS, the settlement takes place with all transactions received till the particular cut- off time. These transactions are netted (payable and receivables) in NEFT whereas in RTGS the transactions are settled individually.

GLOSSARY

Inland instrument : 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.

Holder in Due Course : 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.

Hundi : 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.

TEST YOURSELF

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Define negotiable instrument. Make a distinction between a Bill and a Cheque.
2. What is crossing of a cheque?
3. What is hundi? Describe some of the important hundis.

4. What are certain presumptions of law a negotiable instrument is subject to?
5. Write a short note on endorsements.
6. Explain the types of Negotiable Instruments?
7. Define “Holder in due course”.

LIST OF FURTHER READINGS

- Bare Act on the Negotiable Instruments Act, 1881
- The Negotiable Instruments Act - Universal Law Series

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/2189/1/a1881-26.pdf
- https://m.rbi.org.in/Scripts/faqview.aspx?Id=60
- https://m.rbi.org.in/scripts/FAQView.aspx?Id=65

WARNING

Regulation 27 of the Company Secretaries Regulations, 1982

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo-moto or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as a student, or debar him from re-registration as a student, or take such action as may be deemed fit.

It may be noted that according to regulation 2(ia) of the Company Secretaries Regulations, 1982, 'misconduct' in relation to a registered student or a candidate enrolled for any examination conducted by the Institute means behaviour in disorderly manner in relation to the Institute or in or around an examination centre or premises, or breach of any provision of the Act, rule, regulation, notification, condition, guideline, direction, advisory, circular of the Institute, or adoption of malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with writing of any examination conducted by the Institute, or tampering with the Institute's record or database, writing or sharing information about the Institute on public forums, social networking or any print or electronic media which is defamatory or any other act which may harm, damage, hamper or challenge the secrecy, decorum or sanctity of examination or training or any policy of the Institute.

EXECUTIVE PROGRAMME
JURISPRUDENCE, INTERPRETATION & GENERAL LAWS
GROUP 1 • PAPER 1

(This test paper is for practice and self study only and not to be sent to the Institute)

Time allowed: 3 hours *Maximum Mark: 100*

NOTE: Answer ALL Questions

Question No. 1

(a) Article 13 of the Constitution of India inter alia provides that all laws in force in the territory of India immediately before the commencement of Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void.

Further, the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the contravention, be void.

As per the definition provided under the Constitution of India,"law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law and "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

In lights of the above details and relevant law, answer the below mentioned questions with reasons:

(i) An Authority which comes under the definition of State under Article 12 of the Constitution of India made a regulation which is against Article 38 of the Constitution of India. Is the regulation made by the Authority Void by virtue of Article 13?

(ii) Does the meaning of "State" for the purpose of Article 13 is only restricted to State Governments only and not extended to the Central Government?

(iii) Whether legislature of State is competent for the purpose of making Laws under List I of Seventh Schedule to the Constitution of India?

(iv) A Public Limited Company made certain rules for the Conduct of its Employees which are against Right to Equality as provided under Article 14 of the Constitution of India. Can these rules be challenged by virtue of Article 13 to the Constitution of India?

(v) Whether High Courts are competent to provide the remedy for violation of the rights provided under part III of the Constitution of India?

(2 marks each)

(b) Section 3 of the Bharatiya Sakshya Adhiniyam, 2023 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. Section 3 provides that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Further occasion, cause, effect and opportunity are also made as relevant by virtue of section 5 of the Bharatiya Sakshya Adhiniyam, 2023. It states that Facts which are the occasion, cause or effect, immediate or otherwise, 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. Also, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Section 7 of Bharatiya Sakshya Adhiniyam, 2023 makes facts necessary to explain or introduce relevant facts. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or a relevant fact, or which establish the identity of anything, or person whose identity, is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or 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.

In view of the above details and relevant law, answer the below mentioned questions with reasons:

(i) Whether the concepts of relevancy and admissibility of Evidences are used Inter-changeably under the Bharatiya Sakshya Adhiniyam, 2023?

(ii) Soon after the commission of the crime at Delhi, Anika absconded from his house. He intend to give evidence that he went to attend an urgent meeting in Kerela. Does this fact as provided by Anika relevant for the purpose of adducing evidence as per Bharatiya Sakshya Adhiniyam, 2023 in the above mentioned circumstances?

(iii) Whether condition of Binay's (one person) health before the symptoms ascribed to poison, and habits of Binay, known to Anika (Binay's neighbour), which did not afforded an opportunity for the administration of poison, are relevant facts for the purpose of adducing evidence as per Bharatiya Sakshya Adhiniyam, 2023?

(iv) Whether section 6 of the Bharatiya Sakshya Adhiniyam, 2023 is related to relevancy of evidences for the purpose of adducing evidences before the courts? Explain.

(v) "Evidence can be given of facts in issue and not of relevant facts". Is this statement valid?

(2 marks each)

Question No. 2

(a) "Law is the command of the sovereign". Explain the school of law to which the given statement is related.

(b) Mr. P applied for passport to the concerned Authorities but his request was refused without informing any reason. Which constitutional right of Mr. P has been violated? Also explain the remedy available to Mr. P under the Constitution of India?

(c) Mr. X filed a complaint to Police officer that Mr. Y has committed dacoity. The police officer after preliminary inquiry issued the notice of appearance to Mr. Y instead of arresting. Comment on the validity of the Act of Police Officer as per the law in force.

(5 marks each)

Question No. 3

(a) Elaborate the provision relating to examination and impounding of instruments under Indian Stamp Act, 1899.

(b) A Lease Deed was executed by Mr. X and Mr. Y which was required to be registered compulsorily. Mr. X wrote a note on the Lease deed as "to be registered" with an intent to get it registered later. Clerk working in the office of Mr. X saw it and presented for registration. It was also mistakenly registered by the Registrar. Is there any provision or timelines for re-registration under the Indian Stamp Act, 1899? Explain the relevant provision also.

(c) Mr. X (Seller) and Mr. Y(Buyer) entered into an Agreement to Sell for goods which are in transit from Sri Lanka to India on 18.10.2022. On 19.10.2022, the ship was destroyed by the tides in the Ocean. Who is owner at the time of Destruction of Goods? Is there difference between Contract of Sale and Agreement to Sell? Explain.

(5 marks each)

Attempt all parts of either Q. No. 4 or Q. No. 4A

Question No. 4

(a) Explain Justice, Equity and Good Conscience as a Source of Indian Law.

(5 marks)

(b) Explain the provision relating to right of Purchaser against person with no title or imperfect title.

(5 marks)

(c) Mention the Limitation Period for the below mentioned description of suits:

(i) Against a factor for an account.

(ii) For an account and a share of the profits of a dissolved partnership.

(iii) For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which Limitation Act, 1963 extends.

(iv) To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.

(v) For money lent under an agreement that it shall be payable on demand.

(1 mark each)

OR (Alternate question to Q. No. 4)

Question No. 4A

(i) Mr. S files a civil suit against Mr. T in the District Court of Dwarka in New Delhi on 20.07.2023. Mr. T filed the suit on same cause of action in civil court in Jaipur on 15.10.2023. The matter is such that both the courts have Jurisdiction over the matter. What should be correct course of action by civil court situated in Jaipur? Explain with the help of relevant provision of Code of Civil Procedure, 1908.

(ii) Mr. X entered into a Contract with Mr. Y for providing 1000 laptops imported from a foreign country. Mr. X is ready to deliver 980 Laptops to Mr. Y. The government prohibited the import of Laptop from that country and consequently Mr. X is not able to procure the other 20 Laptops. Mr. Y denied to take the delivery.

Mr. X intends to file a suit for specific performance of contract against Mr. Y. Can he succeed? Advice Mr. X citing the relevant provisions applicable in above mentioned circumstances.

(iii) Elaborate the provisions relating to Interim Measures by Courts and Arbitral Tribunal under Arbitration and Conciliation Act, 1996.

(5 marks each)

Question No. 5

(a) Distinguish between Reference, Review and Revision in Civil Cases.

(b) Mr. X committed a crime and went to one Member of Legislative Assembly and confessed his crime. Later, he denied making that confession. Can this extra-judicial confession is capable of sustaining a conviction? Justify your answer with the help of a decided case law.

(c) An award has been passed in the matter of Mr. X and Mr. Y by an Arbitrator. The Arbitrator intended to mention Rs. 10,00,000/- (Ten Lakh) in the award. However, due to clerical error it was mentioned as Rs. 1,00,000/- (One Lakh). Mr. X intends to correct this clerical error. Explain the recourse available to Mr. X in this matter.

(5 marks each)

Attempt all parts of either Q. No. 6 or Q. No. 6A

Question No. 6

(a) X prepared and signed a cheque of Rs. 5,00,000/- relating to a Bank Account belonging to Mr. Y and gave it to Mr. Z. Explain the offence that is committed by X by preparing that cheque and punishment provided for this offence.

(b) Explain the doctrine of Res Gestae.

(c) An award has been passed by an Arbitral Tribunal in the matter of Mr. X and Mr. Y. The time for making an application to set aside the arbitral award under section 34 of Arbitration and Conciliation Act, 1996 has been expired. Mr. X has contended that the award can now be enforced like an Agreement made under the Indian Contract Act, 1872. Is the contention of Mr. X correct? Advise Mr. Y quoting relevant provision.

(d) Mr. X had taken a Loan of Rs. 5 Cr from Mr. Y in 2018. After 5 years in 2023 Mr. X, being unable to repay the debt, transferred his Gurgaon Villa to Mr. Y in consideration of full and final settlement of debt. Mr. X is of the view, since it is settlement of debt only, the Stamp Duty is not payable on this transaction. Advice Mr. X quoting relevant provision(s).

(5 marks each)

OR (Alternate question to Q. No. 6)

Question No. 6A

(i) Explain the Doctrine of Part Performance.

(ii) An enactment provides that the information of employees of the company is to be maintained in written form. The manager of the company has maintained it in electronic form. Can the manager maintain such information in electronic mode? Advise citing relevant provision.

(iii) Write short note on legal maxim “quantum meruit”.

(iv) Mr. X issued a Cheque to Mr. Y towards payment for the goods purchased. The cheque is returned by the Bank due to insufficient funds in the Account of Mr. X. What are the pre-requisites provided in the proviso of section 138 of Negotiable Instruments Act, 1881 before filing the suit for recovery of the amount?

(5 marks each)

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