

22th REVISED EDITION..

DRAFTING, PLEADINGS AND APPEARANCES

CS ANOOP JAIN

THE CORPORATE LAW WIZARD

ABOUT THE AUTHOR

- CS ANOOP JAIN is expert and renowned faculty for CS professional CR, CD, CF, DD AND DRAFTING paper having teaching experience of more than 15 years.
- He is author of many popular and best selling law books.
- In industry he is popularly known as the CORPORATE LAWS WIZARD.
- He is also winner of best MSOP participant award by ICSI (NIRC).
- For the benefits of students he has opened his own publication house (under name and style of AJ EDUCATION AND PUBLICATION LLP) for providing good CS books at affordable price.
- He is also owner of website (csanoopjain.in a website only for cs students) from where students can get all corporate laws updates, academy99.in (an online book store) And ajpublication.in
- He is also founder of inter-lege professionals private limited (a legal consultancy firm) interlegeprofessionals.com

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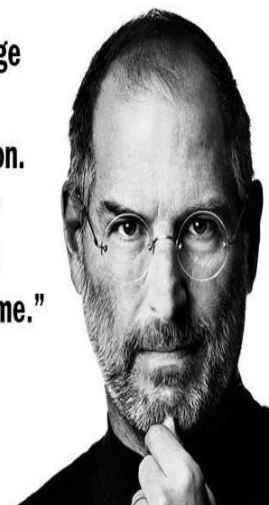


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**"Have the courage
to follow your
heart and intuition.
They somehow
know what you
truly want to become."**

- Steve Jobs



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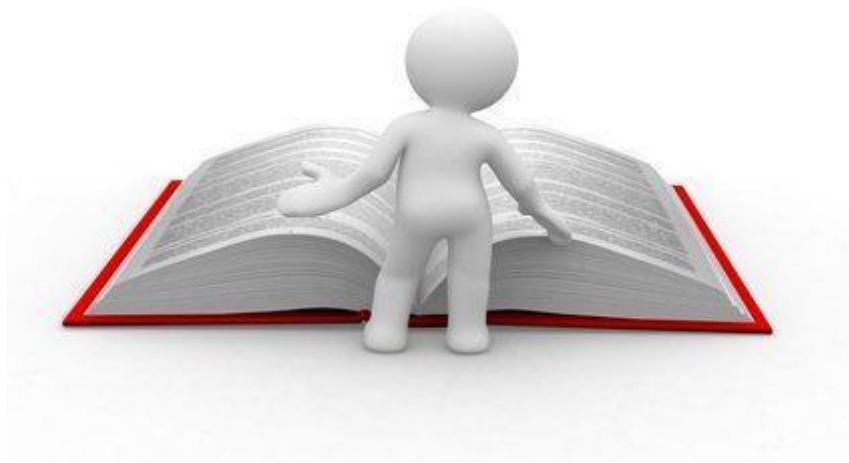
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BASIC CONCEPTS

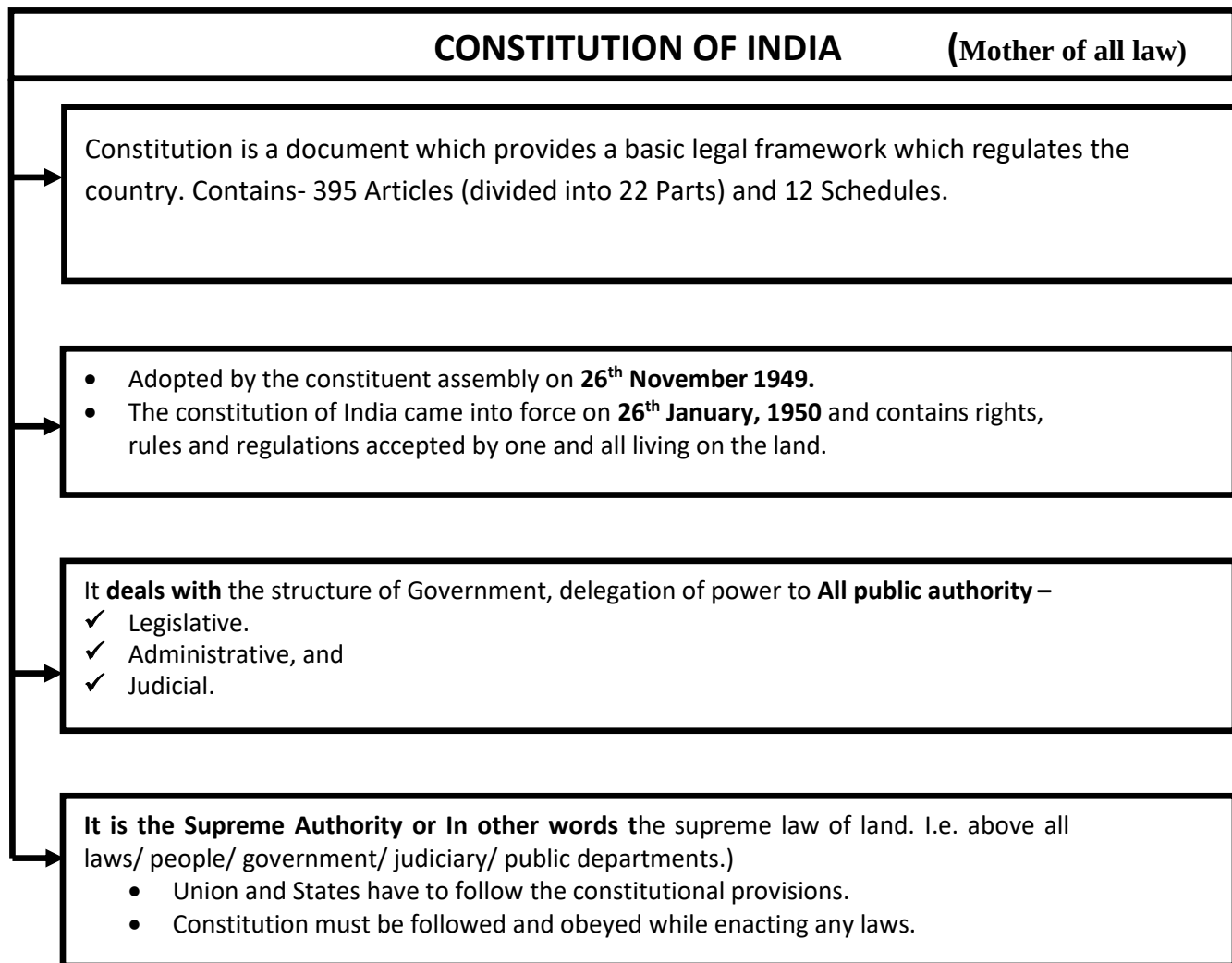


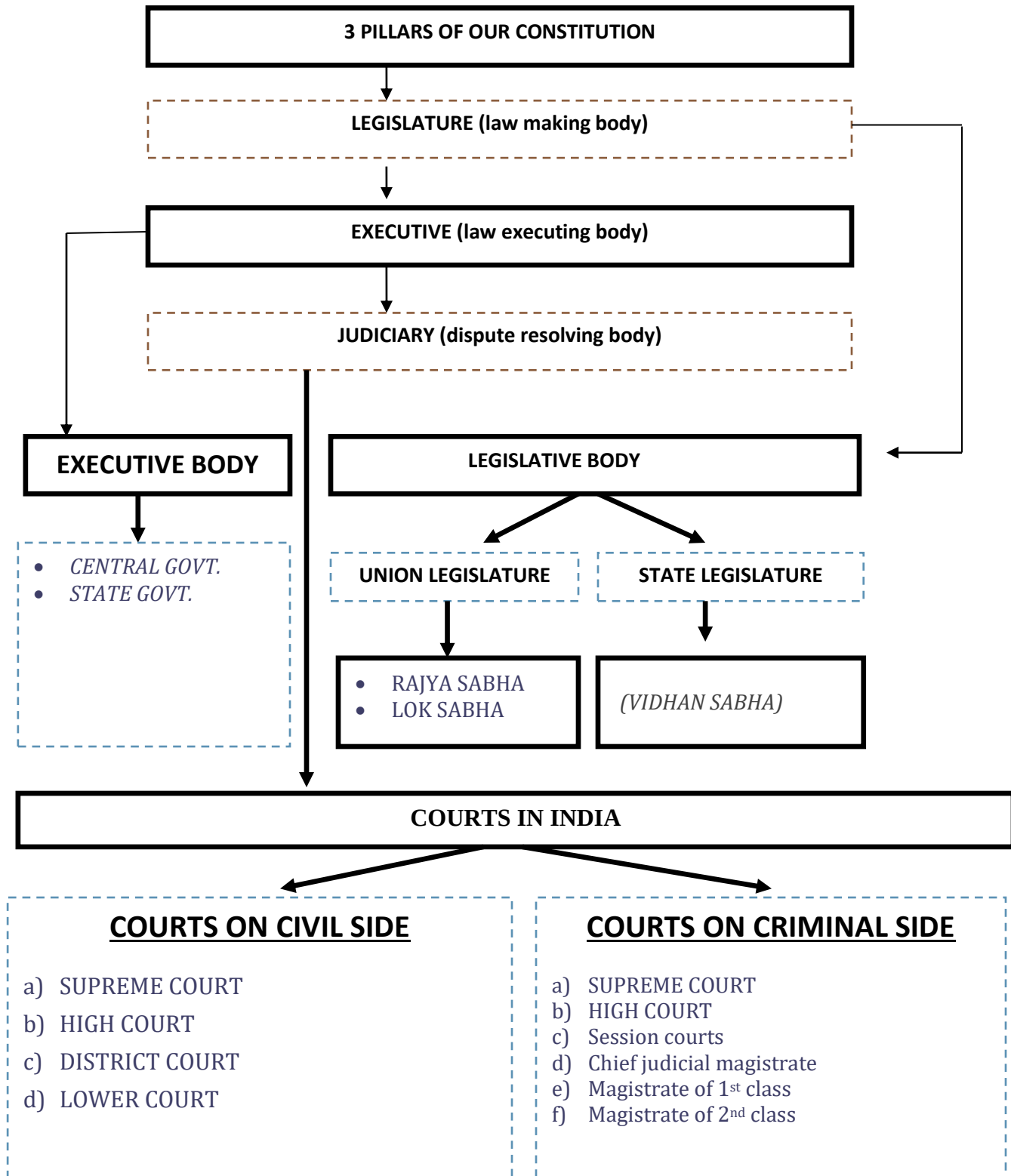
CHAPTER-1 JUDICIAL AND ADMINISTRATIVE FRAMEWORK

INTRODUCTION

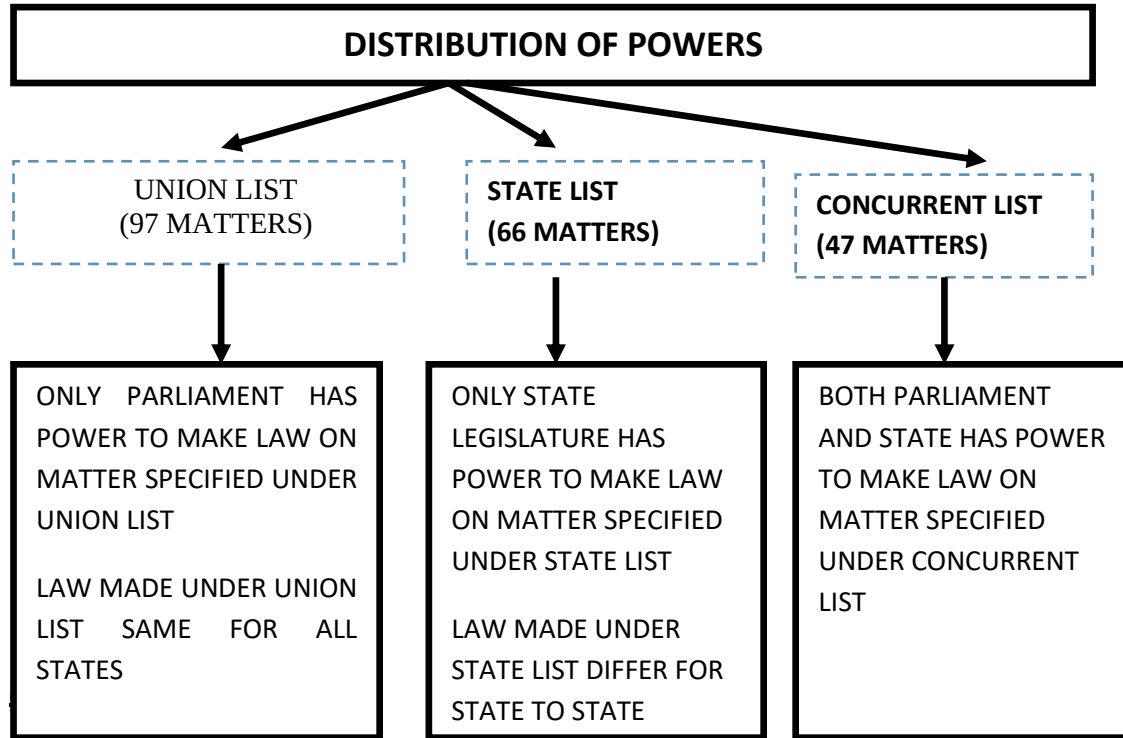
The Constitution of India came into force on **January 26, 1950**. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules.

Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens. It is considered all supreme and has **overriding effect** over all the laws. All the laws have their **origin** in the Constitution, so it is known as **mother of all laws**. All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

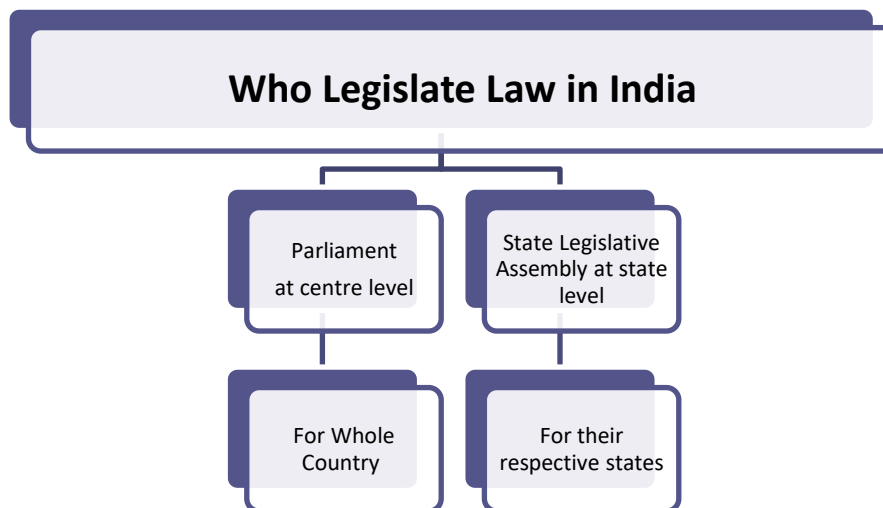


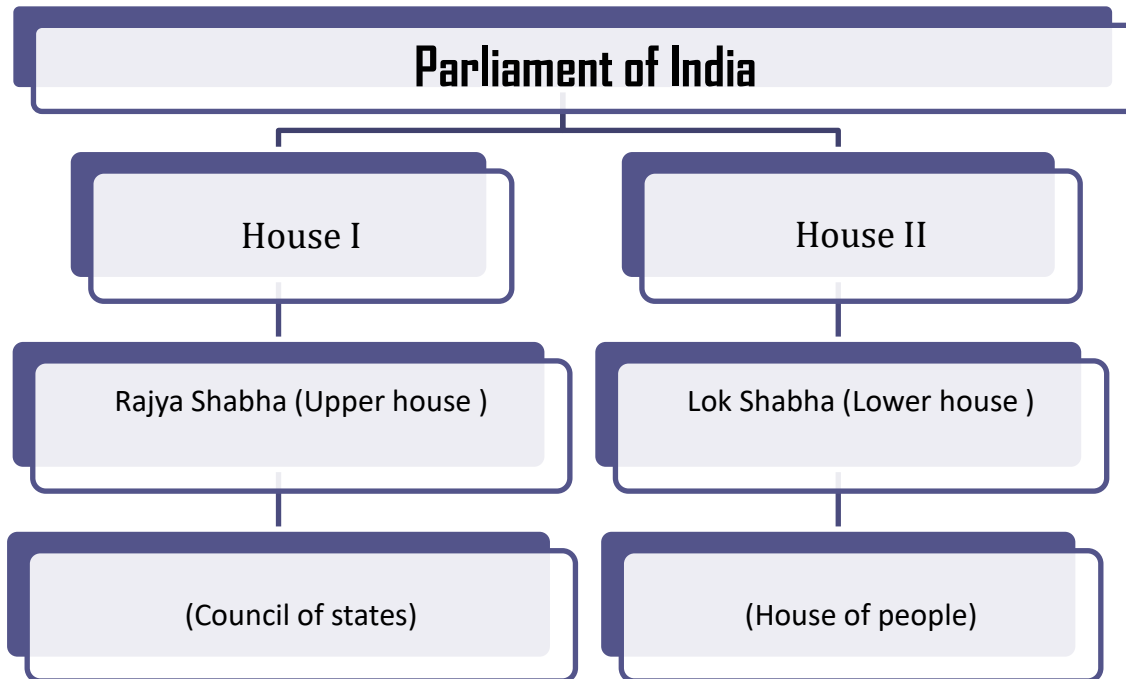
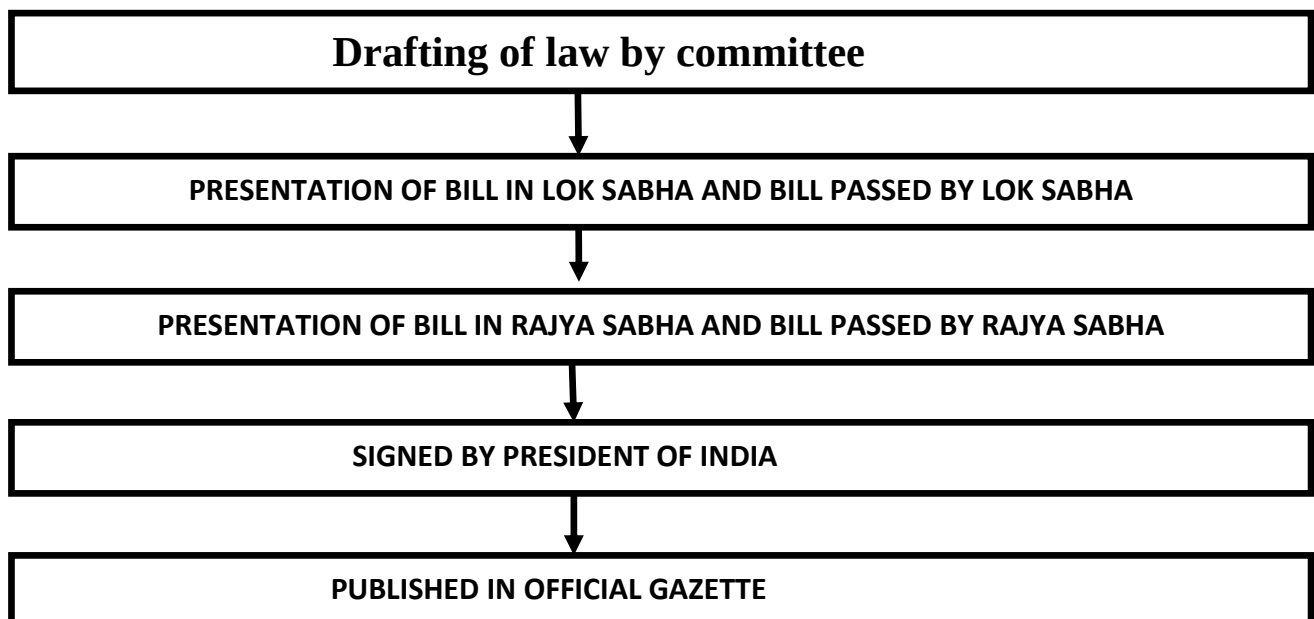
3 PILLARS OF OUR CONSTITUTION

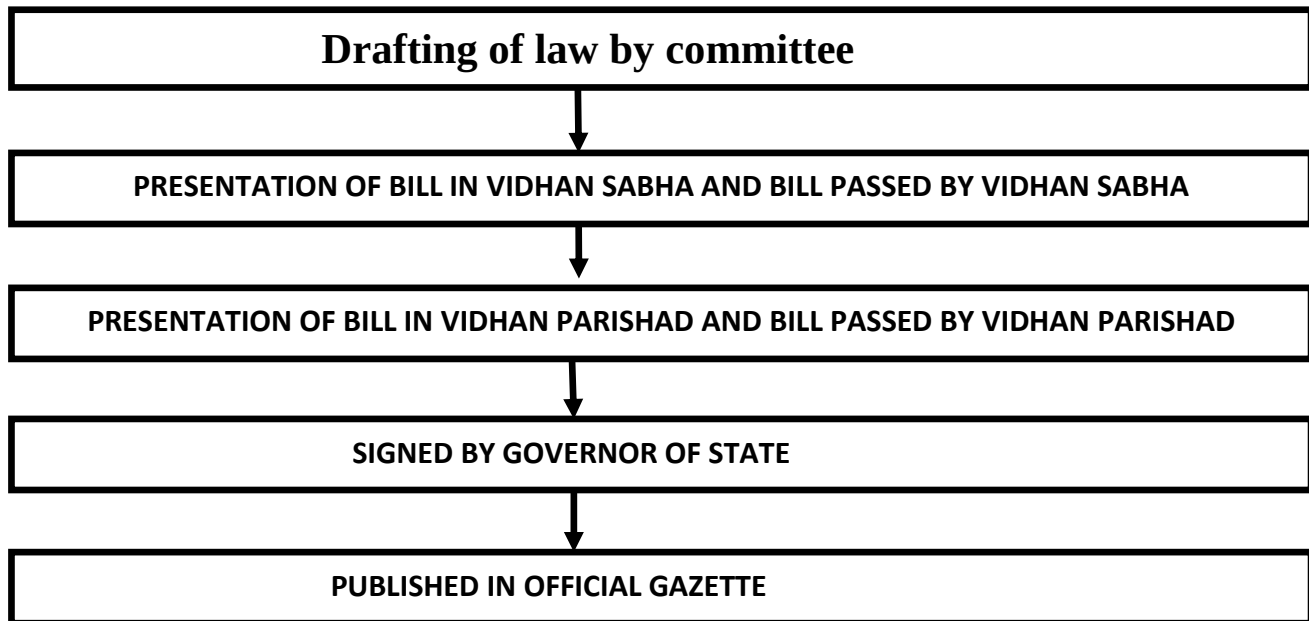
DISTRIBUTION OF POWERS



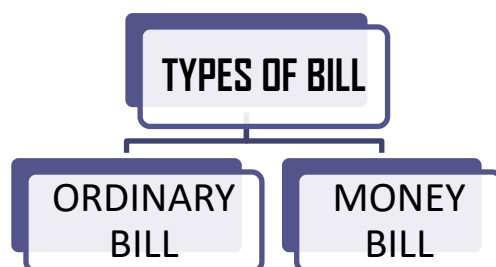
WHO LEGISLATE LAW IN INDIA



PARLIAMENT OF INDIA**LAW MAKING PROCESS IN INDIA AT****CENTRE LEVEL**

LAW MAKING PROCESS IN INDIA AT**STATE LEVEL****MEANING OF BILL**

LAW proposals are brought before either house of the [Parliament of India](http://www.academy99.in) in the form of a bill. A bill is the draft of a legislative proposal, which, when passed by both houses of Parliament and assented to by the [President](http://www.academy99.in), becomes an ACT. As soon as the bill has been framed, it has to be published in the news papers and the general public is asked to comment in a democratic manner. The bill may then be amended to incorporate the public opinion in a constructive manner and then may be introduced in the Parliament by [ministers](http://www.academy99.in) or private members.

TYPES OF BILL**ORDINARY BILL**

- 1) Articles 107 and 108 deal with ordinary bills.
- 2) An Ordinary Bill can be introduced in any of the Houses of Parliament
- 3) An Ordinary Bill can be introduced without the recommendation of the President.
- 4) When a Bill is passes in one House, and it is sent to the other House for passing, the other House may keep that Bill for 6 months with it.



MONEY BILLS

- 1) Articles 109 and 110 deal with Money Bills.
- 2) A Money Bill can only be introduced in the Lok Sabha. It cannot be introduced in Rajya Sabha. The Money Bill can be introduced only with the recommendation of the President.
- 3) A Money Bill is passed by Lok Sabha. Thereafter it is sent to Rajya Sabha for recommendations. Rajya Sabha must return it within 14 days, with or without recommendations.
- 4) Lok Sabha may consider or may not consider the recommendations of the Rajya Sabha pertaining to Money Bills

JURISDICTION

The word jurisdiction is used in various contexts. It means legal authority, extent of power and limitation on such powers. In the case of **Sukhlal v. Tara Chand**. It was stated that jurisdiction may be defined to be the power of Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The objective of the study lesson is to make the students understand the judicial and administrative framework.

LEGISLATIVE FUNCTIONS OF ADMINISTRATION

In view of the multifarious activities of a welfare state, the legislature cannot work out all the details to fit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. Therefore, one of the most significant developments of the present century is the growth in the legislative powers of the executives.

There is no such general power granted to the executive to make law, it only supplements the law under the authority of legislature. This supplementary legislation is known as 'delegated legislation' or 'subordinate legislation'.

NECESSITY AND CONSTITUTIONALITY

The Parliament cannot supply the necessary quantity and quality legislation for effectively running the country. Some of the limitation of the law-making role of the Parliament are:

• The Parliament sits only for a limited period of time whereas the complexity of modern administration requires that there must be a law-making body available on tap.
• The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters.
• Certain matters covered by delegated legislation are of technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter.
• Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution.
• The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly.



CONSTITUTIONALITY

Under the Constitution of India, Articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The power of Legislature to delegate its legislative power is not prohibited in the Constitution.

There are number of **judicial pronouncements** by the courts where they have justified delegated legislation.

Vasantlal Magan Bhai v. State of Bombay

Avtar Singh v. State of Jammu and Kashmir

Arvinder Singh v. State of Punjab: While commenting on indispensability of delegated legislation Justice Krishna Iyer observed in the case of **Arvinder Singh v. State of Punjab**, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization. Delegation of some part of legislative power becomes a compulsive necessity for viability

There are risks inherent in the process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may

• not lay down any policy at all;
• declare its policy in vague and general terms;
• not set down any standard for the guidance of the executive;
• confer an arbitrary power to the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation.

VARIOUS TYPES OF DELEGATION OF LEGISLATIVE POWER

Skeleton delegation: In this type of delegation of legislative power, the enabling statutes set out broad principles and empowers the executive authority to make rules for carrying out the purposes of the Act. A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.

Machinery type: This is the most common type of delegation of legislative power, in which the Act is supplemented by machinery provisions, that is, the power is conferred on the concerned department of the Government to prescribe -

- The kind of forms
- The method of publication
- The manner of making returns, and
- Other administrative details

REQUIREMENTS

The following requirements are made necessary for the exercise of the delegated authority under different statutes:

1. Prior consultation of interests likely to be affected by proposed delegated legislation.

Legislatures while delegating powers abstain from laying down elaborate procedure to be followed by the delegates but certain Acts do however provide that interested bodies must be consulted before the formulation and application of rules and regulations.



2. **To make representation for consideration of the rule-making authority.** The rules of publication provide that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper.
3. **Publication of Delegated Legislation** - Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons.
4. **Laying:** After delegation is sanctioned in an Act, the exercise of this power by the authority concerned receives the attention of the House of the Parliament. Indeed, it is this later stage of parliamentary scrutiny of the delegated authority and the rules as framed in its exercise that is more important.

Modes of control over delegated legislation

The control of delegated legislation may be one or more of the following types: -

- Procedural;
- Parliamentary; and
- Judicial

PROCEDURAL

Control of delegated legislation by procedure - The Acts of Parliament delegating legislative powers to other bodies or authorities often provide certain procedural requirements to be complied with by such authorities while making rules and regulations etc. These formalities may consist of consultation with interested bodies, publication of draft rules and regulations, hearing of objections, considerations of representations etc.

Parliamentary

Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated. In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.

Judicial

Judicial control over delegated legislature can be exercised at the following two levels

- | |
|--|
| <ul style="list-style-type: none"> • Delegation may be challenged as unconstitutional; that is the delegation can be challenged in the courts of law as being unconstitutional, excessive or arbitrary or |
| <ul style="list-style-type: none"> • That the Statutory power has been improperly exercised. |

TRIBUNALS

Tribunals in India are a part of the Executive branch of the Government which are assigned with the powers and duties to act in judicial capacity for settlement of disputes.

Constitution of India makes provisions for establishment and functioning of the Tribunals in India. They are quasi-judicial bodies that are less formal, less expensive and enable speedy disposal of cases.



SOME OF THE IMPORTANT TRIBUNALS ARE AS FOLLOWS:

S.NO	TRIBUNAL	FEATURES
1	Debt Recovery Tribunal (DRT)	The Debt Recovery Tribunals have been constituted under Section 3 of the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993. The original aim of the Debts Recovery Tribunal was to receive claim applications from Banks and Financial Institutions against their defaulting borrowers. (DRT) was established for expeditious adjudication and recovery of debts due to banks and financial institutions in order to reduce the non-performing assets of the Banks and Financial Institutions
2	National Company Law Tribunal	National Company Law Tribunal (NCLT) is a quasi-judicial body exercising equitable jurisdiction, which was earlier being exercised by the High Court or the Central Government. It has been established by the Central government under section 408 of the Companies Act, 2013 with effect from 1 st June 2016. The Tribunal has powers to regulate its own procedures.
3	CONSUMER FORUM	To protect the rights of the consumers in India and establish a mechanism for settlement of consumer disputes, a three-tier redressal forum containing District, State and National level consumer forums has been set up. The District Consumer Forum deals with consumer disputes involving a value of up to Rupees twenty lakh. State Commission has jurisdiction in consumer disputes having a value of up to Rs.1 crore. The National Commission deals in consumer disputes above Rs.1 crores, in respect of defects in goods and or deficiency in service.
4	Motor Accident Claims Tribunal (MACT)	The Motor Accidents Claims Tribunal deals with matters related to compensation of motor accidents victims or their next of kin. Victims of motor accident or legal heirs of motor accident victims or a representing Advocate can file claims relating to loss of life/property and injury cases resulting from Motor Accidents. Motor Accident Claims Tribunal are presided over by Judicial Officers from the State Higher Judicial Service and are under direct supervision of the Hon'ble High Court of the respective state.
5	Central Administrative Tribunal (CAT)	An administrative Tribunal is a multimember body to hear on cases filed by the staff members alleging non-observation of their terms of service or any other related matters and to pass judgments on those cases. For adjudication of disputes with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or other local authorities within the territory of India or under the control of Government of India and for matters connected therewith or incidental thereto. This was done in pursuance of the amendment of Constitution of India by Articles 323A.
6	National Green Tribunal (NGT)	National Green Tribunal was established for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation of damages to persons and property and for related matters.



CHAPTER-2

BASICS OF DRAFTING AND CONVEYANCING

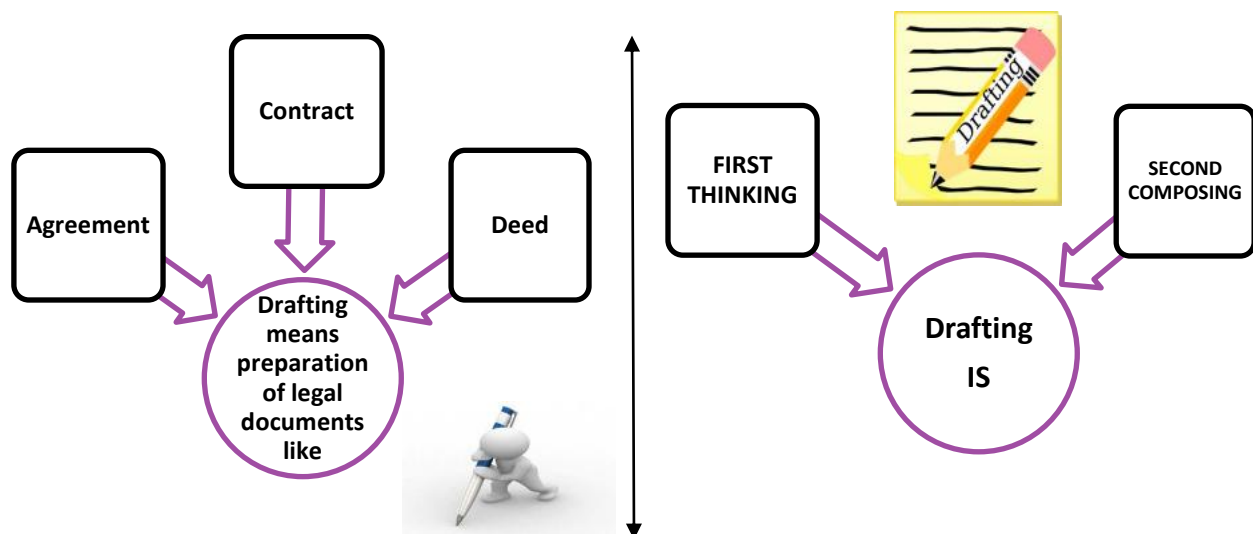
DRAFTING AN INTRODUCTION

Knowledge of drafting and conveyancing is very much required for a Company Secretary as the company has to enter into various types of agreements with different parties and have to execute various types of documents in favour of its clients, banks, financial institutions, employees and other constituents.

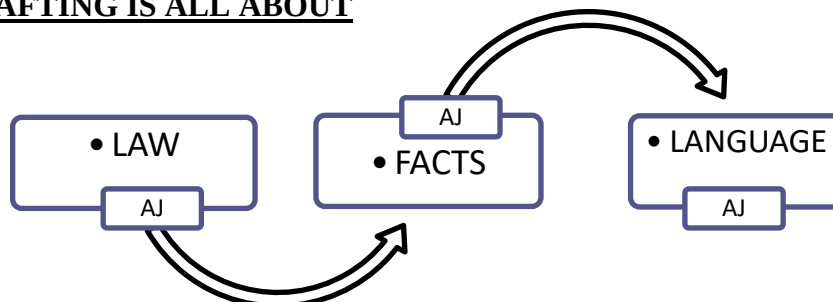
SOME IMPORTANT POINTS ON DRAFTING

1. Drafting is the collection and placing of all aspects of a matter in a logical manner in a simple lucid so that the contents of the documents can be understood without any ambiguity.
2. The essence of legal drafting is the law, the facts and the language.
3. Drafting is the collection and placing of all aspects of a matter in a logical manner in a simple lucid so that the contents of the documents can be understood without any ambiguity.
4. **IN INDIA**, in the absence of any legislation on drafting and conveyancing, it becomes imperative to have knowledge about the important rules of law of interpretation so as to put right language in the documents, give appropriate meaning to the words and phrases used therein.

MEANING OF DRAFTING



IN SHORT DRAFTING IS ALL ABOUT



KINDS OF DRAFTING

→ **STATUTORY DRAFTING**: Statutory Drafting Means drafting of Acts, Rules and Regulations etc. framed by parliament, state legislature and ministries.

→ **COMMERCIAL DRAFTING** Commercial Drafting is the art of drafting of deeds and documents whereby any movable or immovable property or any interest is transferred from one person to another person.

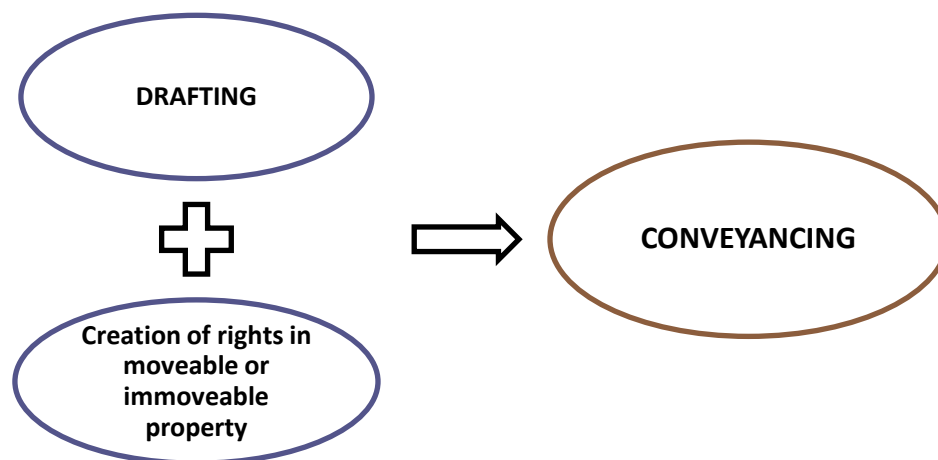
→ **JUDICIAL DRAFTING**: Normally it includes filing of suit, appeal and application in various courts. (Pleadings)

MEANING OF CONVEYANCE

Conveyancing is the art of drafting of deeds and documents whereby any movable or immovable property or any interest is transferred from one person to another person. Drafting includes Conveyancing.



DIGRAMATIC REPRESENTATION OF DIFFERENCE B/W DRAFTING AND CONVEYANCING



SPECIAL NOTE: With the help of this chart we can say

- **Drafting is wider term than Conveyancing**
- **All Conveyancing are drafting but all drafting are not Conveyancing**



FOR EXAMPLE:

- Sale deed is a drafting as well as Conveyancing.
- Application for Leave is drafting but not Conveyancing.

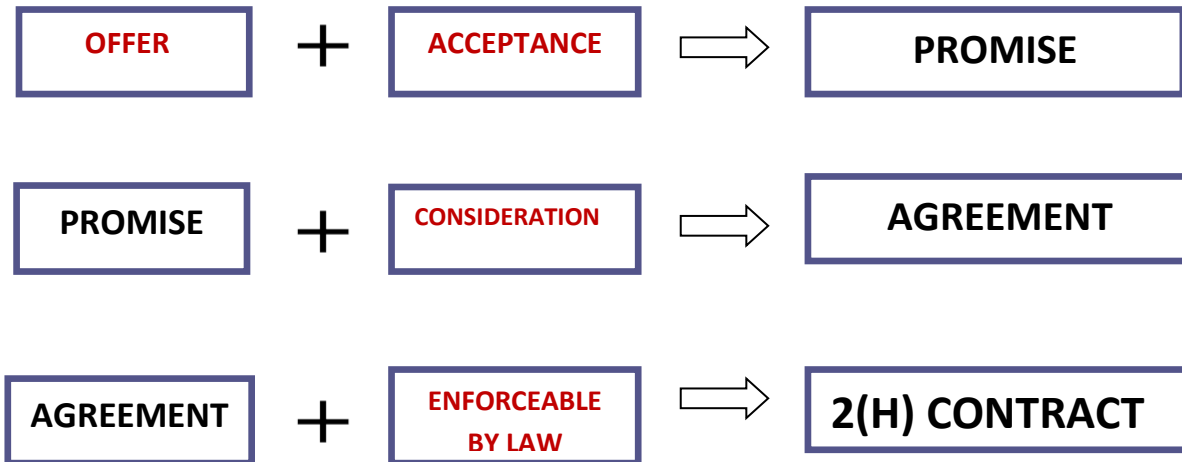
DIFFERENCE BETWEEN DRAFTING AND CONVEYANCING

S.NO	DRAFTING	CONVEYANCING
1	Drafting is the way and the manner of preparation of any document.	Conveyancing is the way and the manner of preparation of only those documents which are pertaining to the transfer of property. Thus, Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another.
2	The concept of drafting is wider than the concept of Conveyancing.	The concept of Conveyancing is narrower than the concept of drafting.
3	Drafting relates to every document as defined in different context such as General Clauses Act, 1897, Sale of Good Act, 1930, Companies Act, 2013	Conveyancing relates to the term conveyance as defined in the Indian stamp act, 1899.
4	E.g. Arbitration Agreement, Service Agreement, Receipt, etc.	E.g. Sale Deed, Mortgage Deed, etc.

DIFFERENCE BETWEEN CONTRACT AND CONVEYANCING

S.NO.	CONTRACT	CONVEYANCING
1	Contract is an agreement which is enforceable by law.	Conveyancing is the art of drafting of any documents by which of any documents by which transfer of property takes place.
2	Contract consists of reciprocal promises and each party to the contract is bound to perform the promise.	There is no such promise and title in respect of the property in question already passes in favour of the vendee.
3	Contract creates a right of action in favor of the parties. Thus, in case of breach of contract, the aggrieved party may claim number of remedies such as compensation, specific performance act. Against the defaulting party.	It does not create any right of action but at the same time, it alters but at the time , it alters the existing rights
4	Contract is governed by the provisions of Indian Contract Act, 1872.	It is governed by the provisions of Transfer of property Act, 1882.



CONCEPT OF AGREEMENT AND CONTRACT ACCORDING TO INDIAN CONTRACT ACT 1872

SPECIAL NOTE: With the help of this chart we can say

- Agreement is wider term than Contract
- All Contract are Agreement but all Agreement are not Contract
- This is the difference as per Indian Contract Act 1872. But for the purpose of drafting we are using both the terms interchangeably.

GENERAL PRINCIPAL OF DRAFTING AND CONVEYNCING

1. The most important duty of a draftsman is to have a clear conception of what the intention of the parties are and then to examine how far their wishes can be carried out without contravening the provisions of law.
2. A legal draftsman must first ascertain the names, description of the parties to the subject matter of the document and should know the matters to be covered.
3. It is also essential for a good draftsman to know whether the parties to a document are free to contract in the capacity in which they intend to contract. For instance a minor cannot contract except through a guardian.
4. It is always desirable to make an outline of the documents before taking up the drafting.
5. Verbosity i.e. use of unnecessary synonyms and incorporation of unnecessary matters should be avoided because it renders the document unintelligible, lengthily and disagreeable.
6. A skilled draftsman should always use the positive statements rather than using the negative statements.
7. When a company is one of the parties or where both the parties are companies, the legal draftsman must satisfy himself that each company has power under the Object clause of its Memorandum of association to execute such documents.



Q. KISS IS A BASIC RULE OF DRAFTING COMMENT?**ANSWER=** Kiss stand for**K=** Keep**I=** It**S=** Short &**S=** Simple

KISS:
Keep it short
and simple!

FOWLER'S RULES OF DRAFTING

1. Use familiar word rather than farfetched word .
2. Use the concrete word rather than abstract word .
3. Use the single word rather than the synonyms .
4. Use the short word rather than the long word .
5. Use the Saxon word rather than the roman .
6. Use the active voice rather than the passive voice .

DO'S AND DON'TS WHILE DRAFTING OR CONVEYANCING A DOCUMENT**SOME DO'S**

1. Reduce the group of words to single word
2. Avoid- Round about construction
3. Avoid unnecessary repetition
4. Write shorter sentences
5. Express the ideas in fewer words
6. Prefer the active to the passive voice sentences
7. Choose the right word.
8. Know exactly the meaning of the words and sentences you are writing
9. Put yourself in the place of reader, read the documents and satisfy yourself about the content, interpretation and the sense it carries.

SOME DONT'S

The following things should be avoided while drafting the documents.

1. Avoid the use of words of same sound. For example, the words "employer" and "Employee".
2. Negative in successive would be very carefully employed.
3. Draftsman should avoid the use of words less than or more than
4. If the draftsman want to authorise two person regarding some work he should clear the position between the two.



IN WRITING AND TYPING THE FOLLOWING MISTAKES ALWAYS OCCUR WHICH SHOULD BE AVOIDED

1. AND / OR
2. ANY / NOW
3. KNOW / NOW
4. PRESENT/ PAST TENSE.
5. MAY / SHALL

**USAGE OF “AT”, “NEAR”, “ON”:**

“AT”, “NEAR”, “ON”, “in the vicinity” and the like: In construing a description, the word “at” when applied to a place, is less definite in meaning than “in” or “on”. Primarily, “at” signifies nearness, and is thus a relative term. When used in describing the location of real estate the word “near” signifies relativity in a greater or less degree. It may be equivalent to “at” or it may import the sense of “at” or “along” as in the expression “along the sea shore”.

The word “on” when used in describing the location of the land with reference to some geographical feature may mean, “in the vicinity of”. The phrase “in the vicinity” imports nearness to the place designated but not adjoining or abutting on it. The word “immediate” when used to qualify the word “vicinity” may signify adjoining.

Usage of “Adjoining”, “Adjacent” or “Contiguous”

In the absence of anything to the contrary indicated by the deed itself words descriptive of the land conveyed are construed according to their proper and most generally known signification, rather than according to their technical sense with the view of giving effect to the probable intention of the parties. Nevertheless, specific terms of description may be regarded as having a technical meaning unless controlled by something else in the deed.

The word “adjoining” does not necessarily import that the boundary of the land conveyed is conterminous with the boundary of the adjoining land, for all that the word implies is contiguity, and hence it is equally applicable where one boundary is shorter than the other. It has been held that a common corner will make two tracts of land “contiguous”.

The term “adjacent” is not synonymous and “abutting”. It may imply contiguity but the term is more often a relative one depending for its meaning on the circumstances of the case.

Therefore, it is pertinent that the correct word with intended meaning is used while drafting.



USAGE OF LOT

“LOT”: The term “lot” is sometimes used in restrictive sense as a wood lot, a house lot, or a store lot, but where the term is used unqualifiedly, especially if it refers to a lot in a certain range or right, it is almost uniformly used in a technical sense and means a lot in a township as duly laid out by the original proprietors. Lots from lands which have been surveyed and laid out in ranges and townships which are numbered in regular sequence may be sold and described by number and range without a more particular description. In the absence of qualifying words, the designation of the number of a lot will be taken to refer to the original place of the city or town. Generally speaking, in a conveyance of fractional part of a designated lot, the word “lot” refers to that portion of the premises set aside for private use, and hence does not include the right to occupancy of any part of a street on which it abuts.

USAGE OF “AND”, “OR”

As used in deeds, the word “and” ordinarily implies the conjunctive, while “or” ordinarily implies the alternative or is used as a disjunctive to indicate substitution. There is a presumption that when the word “or” is used in the habendum of deed, the grantor intended it to express its ordinary meaning as disjunctive, and that he did not intend to use the word “and” which will be read “or” and “or” will be read “and” but such construction is never resorted to for the purpose of supplying an intention not otherwise appearing.

USAGE OF “SUBJECT TO”

The words “subject to” in a deed conveying an interest in real property are words of qualification of the estate granted. Even though the words “Subject to” mentioned in the phrase “subject to a specified encumbrance” bear the obvious meaning that only the equity of redemption belonging to the grantor passes by a deed, such words may, under the circumstances of the particular case, be ambiguous. To ascertain the intention in such an ambiguous case, all the circumstances are taken into consideration, and the primary meaning of the words “subject to” will be departed from, if necessary, in order to effectuate what seems best to accord with intention of the parties. Of course, the rights of an earlier grantee to which a later grant is expressed to be subject are neither abridged nor enlarged by the later grant.

USE OF THE TERMS “EXCEPTING”, “RESERVING” AND THE LIKE

While there is a well defined distinction between a “reservation” and an “exception” in deed, the use, in the instrument of conveyance, of one or the other of these terms is by no means conclusive of the nature of the provisions. In fact, it may be said that since these two terms are commonly used interchangeably little weight is given to the fact, that the grantor used one or the other. The use of the technical word “exception” or “reservation” will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the



entire instrument, and when their intention is determined it will be given effect, provided no settled rules of law are thereby violated. In cases of doubt, the question will be determined in the light of the subject matter and circumstances of the case, and the deed will be construed, where possible, so as to give it validity.

USAGE OF “MORE OR LESS”, “ABOUT”, “ESTIMATED” AND THE LIKE

The words “more or less” when related to the description of the property in a deed, are generally construed with reference to the particular circumstances involved. In relation to the quantity of land conveyed, the description is not rendered indefinite by the addition of the words “more or less” to the specified area. Such words are used as words of precaution and safety and are intended to cover unimportant inaccuracies. They and other words of like import regarding the quantity of acres intended to be conveyed are regarded as matters of description of the land, and not of essence of the contract, and the buyer as a general rule takes the risk of quantity in the absence of any element of fraud. But in case of a considerable and material discrepancy in quantity, relief may be had after the conveyance. Accordingly, where the deed purports to convey the whole of a designated tract, described whatever may be its acreage, the grant is not defeated by a discrepancy between the recited and the actual area. When used with reference to the quantity of land conveyed, the words “estimated” and “about” are synonymous with the phrase “more or less”

WORDS INDICATING COMPASS POINTS

The words “north”, “south”, etc. indicating points of the compass, may, no doubt, be controlled or qualified in their meaning by other words of description used in connection with them, but unless qualified or controlled by other words, they mean “due north”, “due south” etc. Moreover, the words “Easterly”, “Westerly”, etc. when used alone in the description of land, will be construed to mean “due East”, “due West”, etc. unless other words are used to qualify their meaning. Where, however, the land is described as being the “West half” of a city lot and a North to South line will divide the lot almost diagonally, it has been held that parol evidence can be introduced on the theory that such evidence neither enlarges nor diminishes the grant, but merely identifies the land.



INTERPRETATION OF THE IMPORTANT TERMS

NOTWITHSTANDING

A provision containing the words 'notwithstanding' is generally termed as 'non obstante clause'. The provision containing the word 'notwithstanding' has an over-riding effect on the other provision, i.e. such provision shall prevail over the other provision, In other words, if there is any inconsistency or departure between the non obstante clause and another provision, it is the non obstante clause which will prevail.

SUBJECT TO

A provision containing the word 'subject to' gives an overriding effect to the other provision, i.e., other provision shall prevail over such provision in case of any inconsistency. Thus, the effect of a provision containing the word 'notwithstanding' is opposite to a provision containing the words 'subject to'.

WITHOUT PREJUDICE

An expression containing the words 'without prejudice to the generality of' indicates that anything contained in the provision following such words is not intended to cut down the generality of the meaning of the preceding provision.

GUIDELINES FOR USE OF PARTICULAR WORDS AND PHRASES FOR DRAFTING AND CONVEYANCING

1. For general words refer to ordinary dictionary for ascertaining the meaning of the words
2. For legal terms refer to legal dictionary
3. As far as possible current meaning of the words should be used and if necessary, case law, where such words or phrases have been discussed, could be quoted in reference.
4. Technical words may be used after ascertaining their full meaning, import of the sense and appropriate use warranted by the circumstances for deriving a technical or special meaning with reference to the context.
5. The choice of the words and phrases should be made to convey the intention of the executor to the readers in the same sense he wishes to do.



Drafting may be defined as the synthesis of law and fact in a language form.

Drafting may be defined as the synthesis of law and fact in language form.

- All three characteristics rank equally in importance.
- Legal drafting is the crystallization and expression in definitive form of a legal right, privilege function, duty or status.
- Legal instrument such as constitution, status, regulations, ordinances, contract. Wills conveyances, trusts and leases.

NOTE: the process of drafting operates in two planes, the conceptual and verbal besides seeking the right words, drafting therefore, is first thinking and second composing.

LEGAL IMPLICATIONS OF DRAFTING

The legal implications of drafting, therefore, may be observed as under

- (a) Double and doubtful meaning of the intentions given shape in the document.
- (b) Inherent ambiguity and difficulties in interpretation of the documents.
- (c) Difficulties in implementation of the objectives desired in the documents.
- (d) Increased litigation and loss of time, money and human resources.
- (e) Misinterpretation of facts leading to wrongful judgement.
- (f) Causing harm to innocent persons.

The above implications could be avoided if drafting principles are fully adhered to by the draftsman.

TIPS TO IMPROVE DRAFTING OF LEGAL DOCUMENTS

1. Keep Readers In Mind: What you write should resonate with what the recipients or readers want. For figuring out the exactness, you should get deep with their expectations. The tone & intent of the document should be based on the requirement of the audience.

2. Jot Points Prior Writing: Every legal document should be optimally organized. It is a key to its success. For it, create a layout by jotting all contextual points. Take those points as a guide for the effective legal document writing.

3. Avoid Formal & Technical Terms: The formal and technical terms is called Legalese in legal writing. These can be typical legal phrases and jargon. The inclusion of words like aforementioned, herein, wherein, and hereto etc. can make your writing offbeat, forced and detached. So, replace them with more concise, clear and simple words.

4. Keep Writing To The Point: Your every word should be comprehensively brief. Keep your sentences short and concise, contributing to the entire case. Avoid extraneous words. Complex sentences have a great scope for redundancies. So, try to make them short and simple.



5. Active Voice Brings Clarity on Subject: Passive voice creates confusion. It turns out more complicated when there is no mention of the subject of any doing. On the flip side, active voice makes it crystal clear who the doer or subject is. So, instead of writing “People were terminated”, say, “XYZ terminated people”.

6. Be Careful When You Edit: Impeccable writing needs merciless editing. Keep your heart aside when it comes to omitting unnecessary words. Don’t hesitate to rewrite where the documents need more clarity on a specific point. Legal writing needs careful proofreading. You may lose your credibility as a legal professional if your documents are full of grammatical & punctuation errors or spelling mistakes. Even, your client may underrate your work.





PREVIOUS YEAR QUESTIONS AND ANSWERS

- 1. In India, there is no law on Conveyancing or interpretation of documents. Explain how disputed ambiguous formal deeds can be judicially decided then.**

PRINCIPLES OF INTERPRETATION OF DEEDS AND DOCUMENTS ARE:

FORMAL AGREEMENTS

1. Under Section 91 of the Evidence Act provides that a deed constitute the primary evidence of the terms of a Contract, or of a grant or of any other disposition of property.
2. The cardinal rule is that clear and unambiguous words prevail over any hypothetical consideration.
3. The court must interpret the words in their popular, natural and ordinary sense, subject to certain exceptions as,
 - Where the contract affords an interpretation different from the ordinary meaning of the words; or
 - Where the conventional meanings are not the same with their legal sense.
4. All mercantile documents should receive a liberal construction.
5. The ordinary grammatical interpretation is not to be followed, if it is in repugnant to the general context.

INFORMAL AGREEMENTS

In interpretation of informal agreements the rule to be applied is that of reasonable expectation; that is to say the agreements is to be interpreted in the sense in which the party who used the words in question should reasonably have apprehended that the other party may apprehend them.

- 2. Write short notes on the Fowler's five rules of drafting.**

ANSWER: Refer chapter 2

- 3. Distinguish between 'contract' and 'conveyance'.**

ANSWER: Refer chapter 2

- 4. Drafting of document is a skilled man's job. "Explain this statement with some important do's and don'ts in drafting.**

ANSWER: Refer chapter 2

- 5. What are the important principles which a draftsman should keep in mind in drafting and conveyancing?**

ANSWER: Refer chapter 2

- 6. Explain in detail the general principles of drafting and conveyancing and other writings.**

ANSWER: Refer chapter 2



CHAPTER -3

DOCUMENT, INSTRUMENT AND DEED

DOCUMENT

1. A document is a paper or other material thing providing information proof or evidence of anything.
2. Ordinarily the word "document" denotes a TEXTUAL RECORD.



MEANING OF DOCUMENT

Section 3 of the Indian Evidence Act, 1872 states that a "Document" means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter.

Section 3 (18) of the General Clauses Act, 1897 states that a "Document" shall include any matter written, expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, which is intended to be used or which may be used for the purpose of recording that matter. E. g. minutes of a meeting.

EXAMPLES

- A. Writing is a document.
- B. Words printed, lithographed or photographed are documents.
- C. A map is a document.
- D. An inscription on a metal plate or stone is a document.
- E. A CARICATURE is a document.
- F. Thus document is a paper or other material thing affording information, proof or evidence of anything.

(Caricature)



Thus the word "Document" has been used in a wide sense, and it includes instruments, deeds, agreements etc.

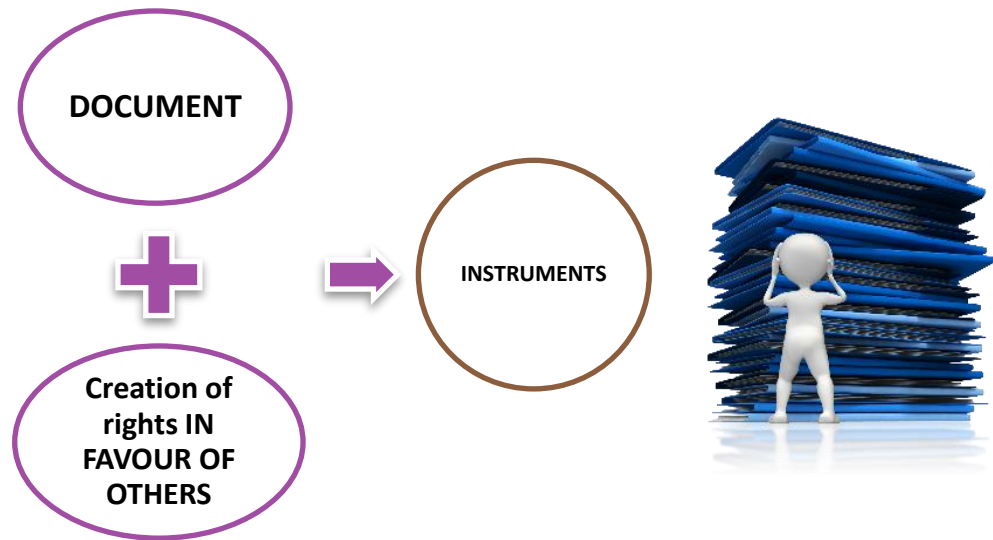
INSTRUMENT

1. Section 2(14) of the Indian Stamp Act, 1899 defines **instrument** as including every document by which any right or liability is or purported to be created, transferred, limited, extinguished or recorded E.g. promissory Note.
2. It may be noted that all instruments are documents but all documents need not be instruments.
3. Stamp duty is payable on every instrument but it is not so in the case of a document.



CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	V.P. Sugar Works v. C.I. of Stamps U.P.	Instrument” does not include Acts of Parliament unless there is a statutory definition to that effect in any Act
2	Bishun v. Suraj Mukhi	A will is an instrument
3	Savitribai v. Radhakishna	The word “instrument” in Section 1 of the Interest Act is wide enough to cover a decree

DIGRAMATIC REPRESENTATION OF DIFFERENCE B/W DOCUMENT AND INSTRUMENT

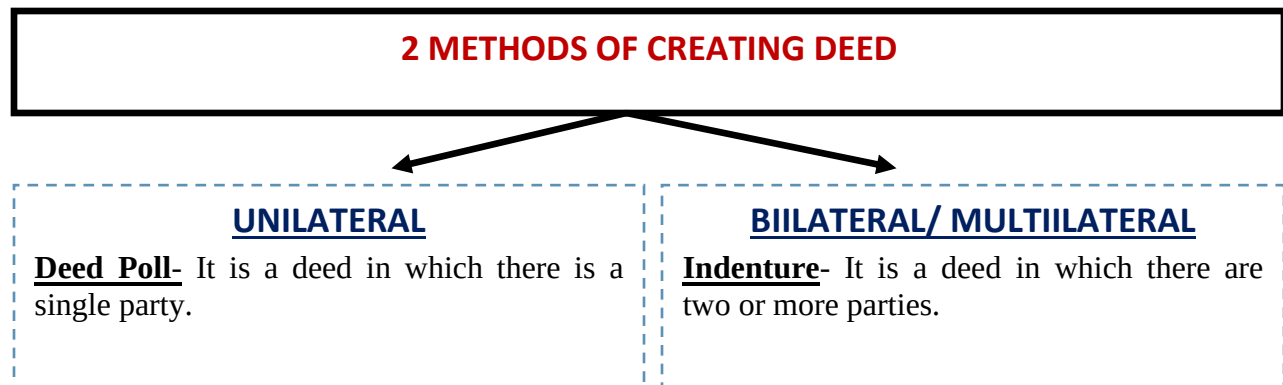
SPECIAL NOTE: With the help of this chart we can say

- **Document is wider term than Instruments**
- **All Instruments are Document but all document are not Instruments**

CONCEPT OF DEED

1. The term deed is normally used to describe all instruments by which two or more persons agree to affect any right or liability. Ex. Sale deed, gift deed, deed of settlement Etc.
2. A deed is present grant rather than a promise to be performed in future.
3. It may be noted that all deeds are instruments but all instruments need not be deeds.
4. Further, instruments may be bilateral like a lease deed and multi-lateral like a partition deed among 3 or more persons.
5. Thus, it seems that there is no clear cut distinction between instrument and deed and hence, these terms are used interchangeably.





VARIOUS KINDS OF DEEDS

S.NO.	PARTICULARS	PROVISIONS
1	Latent deed	A latent deed is a deed kept for twenty years or more in man's strong box.
2	Lawful deed	A lawful deed is a deed conveying a good or lawful title.
3	Pretended deed	A pretended deed is a deed apparently or prima facie valid.
4	Warranty deed	A warranty deed is a deed containing a covenant of warranty.
5	A special warranty deed	A special warranty deed which is in terms a general warranty deed, but warrants title only against those claiming by, through, or under the grantor, conveys the described land itself, and the limited warranty does not, of itself, carry notice of title defects.
6	Good deed	A good deed is one which conveys a good title, not one which is good merely in form. A good and sufficient deed is marketable deed; one that will pass a good title to the land it purports to convey.
7	Inclusive deed	An inclusive deed is one which contains within the designated boundaries lands which are expected from the operation of the deed.
8	Voluntary deed	A voluntary deed is one given without any "valuable consideration", as that term is defined by law, one founded merely on a "good", as distinguished from a "valuable", consideration on motives of generosity and affection, rather than a benefit received by the donor, or, detriment, trouble or prejudice to the grantee.



DIFFERENCE BETWEEN DEEDS, AGREEMENTS AND CONTRACTS

	Deeds	Agreements	Contracts
Meaning	Deed is the term normally used to describe all the instruments by which two or more persons agree to effect any right or liability	Every promise and every set of promises, forming the consideration for each other, is an agreement	An agreement enforceable by law is a contract
Mode	Preferable in writing	It may be oral or in writing	Preferable in writing
Purpose	Effecting a Right or Liability	Agreement on certain Act or Omission	Enforceability of agreements according to Law
Creation of records	Yes	Not necessary	Yes
Relation	Deed may be agreements and contracts	Agreements are not necessarily Deeds or Contracts	It succeeds Agreement
Example	Sale Deed, Lease Deed etc	Non-Disclosure Agreements, Joint Venture Agreements	Agreements reduced into writing and enforceable under any law

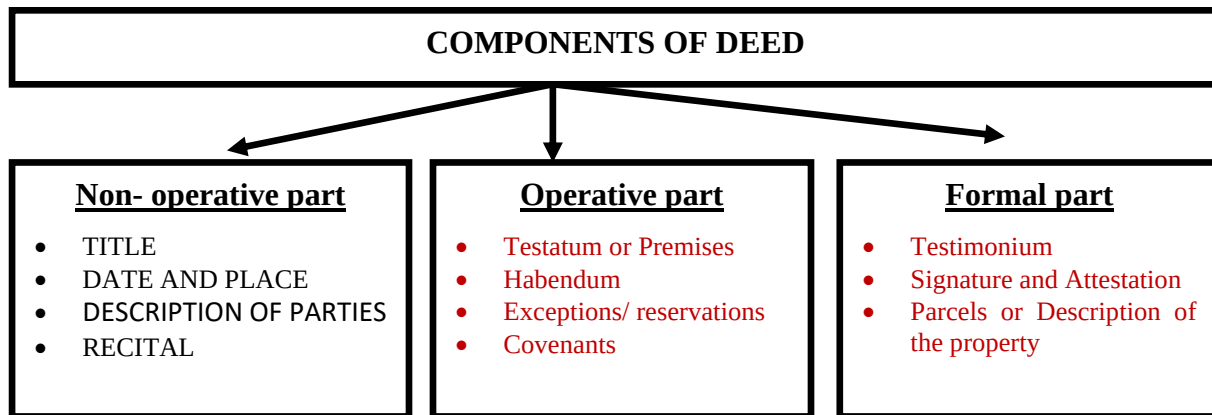
IMPORTANT POINTS RELATING TO DEED

1. **Deed Pool**- Deed Pool is a Deed between two or more parties where as many copies are made as there are parties, so that each party may be in the possession of a copy of the deed. This arrangement is known as deed pool.
2. **Deed Escrow**- A deed is called deed Escrow up to the stage, when it has been signed by only one party & not by other party or parties.

CYROGRAPHUM

1. This was another type of indenture in olden times. The word "**Cyrographum**" was written between two or more copies of the documents and the parchment was cut in a jugged line through this word.
2. The idea was that the difficulty of so cutting another piece of parchment that it would fit exactly into this cutting and writing constituted a safeguard against the fraudulent substitution of a different writing for the parts of the original.
3. This practice of indenting deed also has ceased long ago and indentures are really now obsolete but the practice of calling a deed executed by more than one party as an "indenture" still continues in England.



COMPONENTS OF DEED**NON –OPERATIVE PART****DEED TITLE**

The deed should contain the correct title such as “This Deed of Sale”, “This Deed of Mortgage”, “This Deed of Lease”, “This Deed of Gift” etc. These words should be written in capital letters in the beginning of document. Where it is difficult to locate the complete transaction out of number of transactions covered under the deed, it may not be possible to give single name to the deed like ‘Deed of Gift’ and as such it would be better to describe the deed as “This Deed” written in capital letters like “THIS DEED”. This part hints the nature of the deed and gives a signal to the reader about the contents of the Deed.

Date and Place of the execution of the Deed

The date on which the document is executed comes immediately after the description of the deed. For example, “This Deed of Mortgage made on the first day of January, 1986”. It is the date of execution which is material in a document for the purpose of application of law of limitation, maturity of period, registration of the document and passing on the title to the property as described in the document. Thus, the “date” of the document is important. Date of execution of document is inscribed on the deed. The date is not strictly speaking an essential part of the deed. A deed is perfectly valid if it is undated or the date given is an impossible one, e.g. 30th day of February.

Description of Parties

The basic rule is that all the proper parties to the deed including inter-parties should be properly described in the document because inter-parties are pleaded as they take benefit under the same instrument. While describing the parties, the transferor should be mentioned first and then the transferee. Full description of the parties should be given to prevent difficulty in identification. Description must be given in the following order. Name comes first, then the surname and thereafter the address followed by other description such as s/o, w/o, d/o, etc.



Description must be given in the following order

S.NO	PARTICULARS	DESCRIPTION
1	In case of male individual	MR. RAM S/O----- R/O-----
2	In case of female unmarried	MISS GITA D/O-----R/O-----
3	In case of female married	MRS. BABITA W/O-----R/O-----
4	In case of artificial person	ABC LTD. HAVING REGISTERED OFFICE-----
5	In case of minor, lunatic	Mohan, a minor, acting through his father Ramdev as guardian appointed by Civil Judge Class I, Delhi by order on

Recitals

They brief history or in short from the motive for making the deed. Recitals begin with the familiar words, such as “whereas the parties are desirous of or have agreed on some particular course of action, etc

RECITALS ARE OF TWO KINDS:-

1. **Narrative recital:** - it relates to the past history of the property transferred and set out the facts and instruments necessary to show the title.
2. **Introductory recital:** -it explains the motive for the preparation and execution of the deed. Where the operative part of a deed is unambiguous, the recitals have no effect on the construction of the deed. However, if the operative part is ambiguous, the recitals govern the construction of the deed.

OPERATIVE PART

After the recitals, the operative part of the deed generally begins with the words: “**NOW THIS DEED WITNESSES THAT**

Testatum or Premises

This part gives effect to the intention of the parties and sets out in detail the transaction between the parties. It sets out the capacity in which the parties are acting and the payment and receipt of the consideration.

HABENDUM

Habendum is a part of deed which states the interest, the purchaser is to take in the property. Habendum clause starts with the words “THE HAVE AND TO HOLD”. Formerly in England if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property, the equitable estate wherein remained with the transferor as a resulting trust for him.

It was therefore, necessary to indicate in the deed that it was being transferred for the use of the transferee if it was intended to confer an equitable estate in him. It was for that reason that the habendum commenced with the words: “to have to hold to the use of.....”. Now it is not necessary to express it so. In the modern deeds, however, the expression “to have and” are omitted.



The habendum limits the estate mentioned in the parcels. The transferee is mentioned again in the habendum for whose use the estate is conveyed. Whatever precedes the habendum is called the premises. The parcels or the description of the property usually again included in the premises. If the property conveyed is encumbered, reference thereto should be made in the habendum.

If the parties to transfer enter into covenants, they should be entered after the habendum. In India such phrases as “to have and to hold” or such an expression as “to the use of the purchaser” can very well be avoided as in cases except those of voluntary transfers such an expression is superfluous

Exceptions and reservations

In this part all the exceptions and reservations which are intended to be attached to the transfer should be clearly stated. For e.g. , where in a transaction of a piece of land, if the lesser desires to retain the right to extract the minerals there from, then it should be specifically provided under the lease Deed

Covenants

Every deed must contain the terms and condition by which the parties bind themselves. However, it is not necessary to mention such covenants which are implied by law, but if any special terms and conditions are desired which are at variance with the implied covenants, then these must be clearly stated. For instance, a lease under the Transfer of property Act implies the right to sub-let but the parties may impose conditions against sub-letting.

FORMAL PART

Testimonium

This clause sets forth the fact that the parties have signed the deed. It usually begins with the words: **“IN WITNESS WHEREOF**, the parties aforesaid, namely, have on the day and year just above mentioned put their signatures in the presence of the witnesses.

Signature and Attestation

Immediately after the Testimonial, the parties put their signatures. Thereafter the witnesses put their signatures.

Where a deed requires attestation, then the executants must sign in the presence of the witnesses and the witnesses must sign in the presence of the executants. In such a case, after the signatures of the executants, the following words are written:

“Signed by the above named parties in our presence and we have signed in their presence.” Then following the signatures of the witnesses.

E.g. Gift Deed pertaining to an immovable property requires mandatory attestation.

Where a document consists of more than one page, the parties and witnesses must sign on each page.



Parcels or Description of the property

The property is described in detail accurately and correctly in this part either by way of a footnote or by way of a Schedule. The object of the description is to make the property easily that there should be a parcel or description of the property in the document.

ENDORSEMENTS

1. Endorsement means to write on the back or on the face of a document wherein it is necessary in relation to the contents of that document or instrument.
2. The term “endorsement” is used with reference to negotiable documents like cheques, bill of exchange etc.
3. Endorsement is used to give legal significance to a particular document with reference to new facts to be added in it.
4. Thus, endorsement is an act or process of endorsing something that is written in the process of endorsing when a provision is added to a document altering its, scope or application.

SUPPLEMENTAL DEED

1. It is a document which is entered into between the parties on the same subject on which there is a prior document existing and operative for adding new facts to the document on which the parties to the document have agreed which otherwise cannot be done by way of endorsement.
2. Thus, supplemental deed is executed to give effect to the new facts in the deed.

DIFFERENCE BETWEEN ENDORSEMENTS AND SUPPLEMENTAL DEED

When a deed or document is required to be supplemented by new facts in pursuance of or in relation to a prior deed this can be affected by either endorsement on the prior deed when short writing would be sufficient, or by executing a separate deed described as supplemental deed when long writing is required.

FOR EXAMPLE

If lessee transfers his right in the lease to another person such transfer may be done by way of endorsement. On the other hand, if the terms of the lease document are to be altered then it becomes necessary to give effect to such alteration through a supplementary deed.

ENGROSSMENT AND STAMPING OF A DEED

1. The draft of document is required to be approved by the parties.
2. The document after approval is engrossed i.e. copied fair on the non-judicial stamp-paper of appropriate value as may be chargeable as per Stamp Act.
3. If a document is not properly stamped, it is rendered inadmissible in evidence nor it will be registered with Registrar of Assurances.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write notes on the Habendum and Reddendum.

HABENDUM

1. Habendum is a part of deed which states the interest; the purchaser is to take in the property. The Habendum clause starts with the words. "THE HAVE AND THE HOLDS"
2. Formerly in England, if there was a gratuitous transfer, the transferee was not deemed to be the owner of the beneficial estate in the property.
3. The Habendum limits the estate mentioned in the parcels.
4. In India, such Phrases as "to have and to hold" or such an expression as "to the use of the purchaser" can very well be avoided as in cases except those of voluntary transfers, such an expression is superfluous.

REDDENDUM

This is peculiar to a deed of lease. Here is mentioned this mode and time fixed for payment. It begins with the word "rendering or paying" with reference to the reserved rent is payable during the terms of the lease. Place where payable and installment where mentioned. It there is apportionment of rent that is also mentioned.

2. Whether an unburnt fresh hard disk in a computer is a 'document' within the meaning of section 3 read with section 65B of the Indian Evidence Act, 1872? Discuss with reference to case law.

The issue whether hard disc of a computer is a document within the meaning of sections 3 and 65B of the Evidence Act, 1872 was decided in the case **DHARAMVIR V. CBI**

In this case it was held that hard disc is a document. The court held that as long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if it does not at present contain any accessible information.

3. Discuss how section 8 of the Transfer of Property Act, 1882 regarding operation of transfer has simplified 'parcels clause' in a deed.

According to Section 8, operation of transfer-unless a different intention is expressed or necessarily implied, a transfer of property passes immediately to the transferee, all the interest which the transferor is Capable of passing in the property and in the legal incidence, thereof.



Such incidence includes-

1. Where the property is land, the easements annexed there to the rents and profits thereof occurring after the transfer and all things attached to the earth.
2. Where the property is machinery attached to the earth, the movable parts thereof.
3. Where the property is house, the Easements annexed thereto, the rent thereof accruing after the transfer and the locks, keys, doors windows, etc.
4. Where the property is a debt or other actionable claim, the securities there of but not arrears of interest accrued before the transfer.

4. Explain the Parcels clause as a component of a deed.**Parcels Clause**

This is a technical expression meaning methodical description of the property. It is necessary that in case of non-testamentary document containing a map or plan of the property shall not be accepted unless it is accompanied by the True Copy. Usually the Parcel Clause starts with the words. All Those..... And further or description covers as per the type of property subjected to transfer under the deed.

5. In the light of judicial pronouncements, discuss testamentary disposition is personal; it cannot be delegated to any other person.

Testamentary disposition is the disposition or transfer of property that takes effect upon the death of the person making it. The testator retains almost entire control of the property until death. In short, it is the gift or property which takes effect at the time of the death of the person making the disposition. The transfer can be made by deed, by an inter vivos transaction, or by will. All instruments used to make testamentary dispositions must comply with the requirements of the statute of wills.

Testamentary disposition also used to refer to the process of dead persons' will being complied with by announcing the division of the assets of the dead person amongst the people whose name has been mentioned in the will. Section 59 of the Indian Succession Act, provides for the persons capable of making wills. Accordingly, every person of sound mind not being a minor may dispose of his property by will.

The testamentary capacity is recognized only in a sound disposing state of mind. Soundness of mind denotes the mental capacity of the testator as to what he is doing, his capability of understanding his extent of his property, the person who is the object of his bounty and the persons who are thereby excluded. Testamentary disposition is personal, it cannot be delegated to any other person. A testator cannot confide to another the right to make a will for him.

6. Write short notes on following:

- **Testimonium clause**
- **Habendum.**

ANSWER: Refer chapter 3



7. Explain Reasons for drafting recitals in a deed with due caution.

ANSWER: Refer chapter 3

Recital defines the purpose of making the agreement or deed. It defines for what purpose parties are entering in to contract. It also defines the past history of property.

8. Write brief notes on deed escrow?

ANSWER: Refer chapter 3

9. Distinguish between 'Deed' and 'instrument'

ANSWER: Refer chapter 3

10. Define 'deed'. What are the components of a deed in general?

ANSWER: Refer chapter 3

11. Write a short note on 'covenants and undertakings'

Covenants and undertakings: The term "covenant" is defined as an agreement under seal, which stipulates for the truth of certain facts. In Whasten's Law Lexicon, a covenant has been explained as an agreement or consideration or promise by the parties, by deed in writing, signed, sealed and delivered, by which either of the parties, pledged himself to the other than something is either done or shall be done for stipulating the truth of certain facts, Covenant clause includes undertakings also. Usually, covenant is stated first. In some instances the covenants and "undertaking" are mixed, i.e. cannot be separated in that case, they are joint together, words put for this as "The Parties aforesaid hereto hereby mutually agree with each other as follows. Such covenants may be expressed or implied.



CHAPTER -4 IMPORTANT PROVISIONS OF REGISTRATION

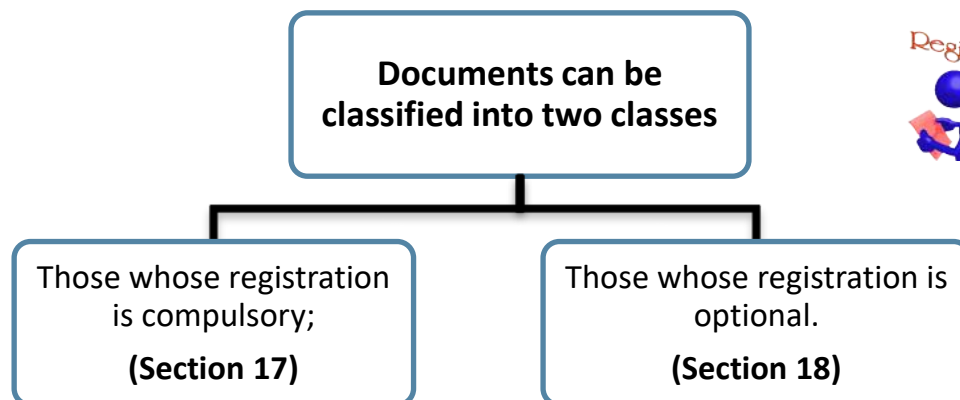
THE REGISTRATION ACT, 1908 CAME IN TO FORCE ON 1ST DAY OF JANUARY, 1908

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 is the law relating to registration of documents.

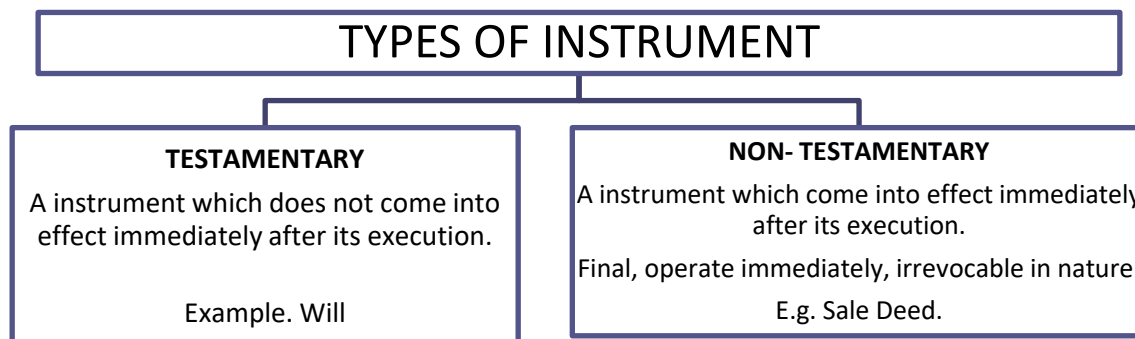
THE OBJECT AND PURPOSE OF THE ACT AMONG OTHER THINGS:-

- is to **give information to people** regarding legal rights and obligations arising or affecting a particular property,
- Is to perpetuate documents which may afterwards be of **legal importance**
- Is to **prevent fraud**.

Section 3(18) of General clauses Act 1897	The term document means any matter, written, expressed, or described upon any substance by means of letter, figures which is intended to be used for the purpose of recording that matter.



INSTRUMENT as per section 2(14) of Indian stamp Act, 1899 define instrument as including every document by which any right or liability is or purported to be created, transferred, limited, extinguished or recorded. E.g. Promissory Note.



DOCUMENTS WHOSE REGISTRATION IS COMPULSORY (SECTION 17)

According to **Section 17** of the Registration Act, 1908, documents whose registration is compulsory are the following:-

Gift 	Instruments of gift of immovable property. Section 17(1)(a) 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 in <u>Kalyana Sundram v. Karuppa</u>, 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, <i>the former has done everything in his power to complete the donation and to make it effective</i>. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. <i>Neither death nor the express revocation by the donor, is a ground for refusing registration</i>, provided other conditions are complied with.
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, of the value of one hundred rupees and upwards, in immovable property. Section 17(1)(b)
Acknowledge 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 an interest of the value of Rs. 100 or upwards in immovable property. Section 17(1)(c)
lease of immovable property	A lease of immovable property is compulsory registrable: • If it is from year to year; or • If it is for a term exceeding one year; or • If it reserves a yearly rent. Section 17(1)(d)
Decree of court or award of arbitrator	Non testamentary instruments transferring or assigning any decree or order of a court or any award, when such decree, order or award purports to create, declare, assign, limit or extinguish; whether in present or in future, any right, title or interest, whether vested or contingent of value of one hundred and upwards in immovable property, Section 17(1)(e)
Authority to Adopt	an Authority to Adopt son which is not conferred by will. 17(3)

EXCEPTIONS TO SECTION 17(1), [SECTION 17(2)]

Document which are covered under Sec 17 (1) and also covered under Sec 17 (2) then they are optionally Registerable. Some of few examples are:-

(a) any instrument relating to shares in Joint Stock Company
(b) any debentures issued by any such Company



(c) Any grant of immovable property by the Government etc.
(d) Composition deed (i.e., every deed the essence of which is composition
(e) any endorsement upon or transfer of any debenture

DOCUMENTS OF WHICH REGISTRATION IS OPTIONAL (SECTION 18)

Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:

1. Instruments 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, in immovable property;
2. Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any right, title or interest of value less than one hundred rupees, in immovable property;
3. Leases of immovable property for any term not exceeding one year.
4. Wills
5. Other documents not required by Section 17(2) to be registered.

WHO CAN PRESENT THE DOCUMENTS FOR REGISTRATION

- Some Person Executing or Claiming Under the Document.
- The agent of such person.
- The representative or assign of such person.



TIME LIMIT FOR PRESENTATION

DOCUMENTS EXECUTED IN INDIA

Section 23 provides that a document other than a will must be presented within **four months** of its execution.

In cases of **urgent necessity** or an unavoidable accident etc. the registrar may **extend** the period by maximum **4 months**, on payment of higher fees.

DOCUMENTS EXECUTED OUT OF INDIA

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.



PLACE OF REGISTRATION

Documents Affecting Immovable Property

Section 28 provides that documents affecting **immovable property** 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**.

ANY OTHER DOCUMENT

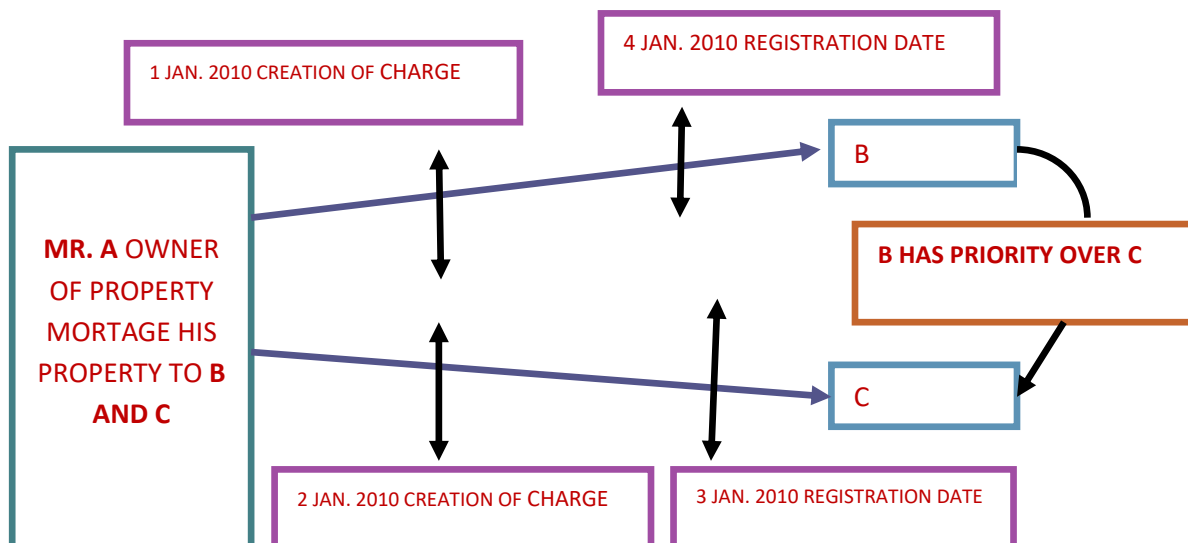
Any **Other Document** may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was **executed or** in the office of any other Sub-Registrar under the **State Government** at which all the persons executing desire the document to be registered.

REGISTERED DOCUMENT WHEN OPERATIVE SECTION-47

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.

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	K.J. Nathan v. S.V. Maruthi Rai,	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



CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Mahaliram v. Upendra Nath	If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied
2	Kishore Chandra Singh v. Ganesh Prashad Singh	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

SOME IMPORTANT TOPICS (SECTION 48 – 49)

Registered documents relating to property when to take effect against oral agreement (section 48)	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.
Effect of non-registration of documents (section 49) 	Section 49 of the Act provides that document required by Section 17 if not registered shall not: • Take effect against any immovable property comprised therein • Confer any power to adopt • Be received as evidence of any transaction affecting such property or conferring such power. However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for part performance under Section 53A of the Transfer of Property Act, 1882.
Certificate of registration	After all the applicable provisions 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. The certificate of registration in respect of a document is prima facie evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law.



CHAPTER -5 IMPORTANT PROVISIONS OF STAMPING

- Indian Stamp Act gets into force on 1st July 1899.
- Under this act stamp duty is livable on an instrument and not on transaction.
- Primacy object of this act is to raise revenue for the state.



Levy of stamp duty is a state object, but in certain cases parliament has the power to fix the rates of duty. For example – Bills of Exchange, Promissory notes, transfer of shares are such instruments.

INSTRUMENTS CHARGEABLE WITH THE STAMP DUTY

Following instruments shall be chargeable with the amount of duty integrated in the schedule.

- Instruments mentioned in schedule 1 which not having been previously executed in India.
- Instruments executed out of India are chargeable to duty if they relate to some property situated in India or some matter or thing done or to be done in India.
- Bills of Exchange and promissory notes

Exception: - Bills exchange payable on demand is not chargeable to stamp duty.

Instruments Exempted from Duty

- Instruments in favour of government these include instruments executed by or on behalf of or in favour of government.
- Bills of exchange and promissory notes executed outside India and acted upon outside India.
- Instruments for the sale transfer or other disposition of any ship.

SEVERAL INSTRUMENTS IN SINGLE TRANSACTION SECTION 4

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**.

INSTRUMENTS RELATING TO SEVERAL DISTINCT MATTERS SECTION 5

This is the reverse of the situation governed by Section 4. 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.

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**.

Section 6 is subject to the provisions of Section 5. Section 6 covers cases where the instrument does **not cover distinct matters**. Section 6 applies only where the instrument contains only one matter, but falls within two or more items in the Schedule.

For Example: -Where the deed fulfill the dual character of the mortgage and a bond .it will be chargeable to the highest of the duties by virtue of section 6.

ANALYSIS OF SECTION 4, 5 AND 6

<u>(Sec. 4)</u> <u>Single Transaction effected by</u> <u>several Instruments</u>	<u>Sec.5</u> <u>Multifarious Instruments</u>	<u>Sec.6</u> <u>multidiscrption Instruments</u>
1 =Transaction 2=Instruments DUTY ONLY ON PRINCIPAL INSTRUMENT	1 = Instruments 2= Transaction DUTY ON BOTH TRANSACTIONS	1 = Instruments FALLS UNDER THE 2 HEADS HIGHEST OF DUTY PAID

PERSONS LIABLE TO PAY DUTY

In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne

1.	In the case of any BOE, P-notes, mortgage by the person drawing, making or executing such instrument;
2.	In the case of a insurance insurer.
3.	In the case of a lease by the lessee
4.	In the case of sale – by the purchaser
5.	In the case of an instrument of partition – by the parties thereto in proportion to their respective shares in the whole property partitioned.



METHODS OF STAMPING

There are two types of stamping, namely

ADHESIVE STAMPING,

Example: Revenue Stamp, Postal Stamp

**IMPRESSED STAMPING.**

Example: Stamp Papers

**TIME OF STAMPING OF INSTRUMENTS****Sec.17 Instruments executed in India**

Stamped before or at the time of Execution

Sec.18 Executed out of India

Within 3 months of its receipt in India

Sec.19 Bills of exchange and promissory notes drawn out of India

By first holder in India before presentation for acceptance or payment or endorsement in India



INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES

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.

INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE

Section 35 stipulates that no instrument chargeable with duty shall be

- (1) 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
- (2) Shall be acted upon; or
- (3) Registered; or

Unless such instrument is duly stamped.

An insufficiently stamped instrument is **not an invalid document** and it can be admitted in evidence on payment of penalty.

CASES WHERE UNSTAMPED INSTRUMENT CAN BE ADMITTED IN EVIDENCE

The proviso to Section 35 provides **exception to section 35** as under

1.	any instrument 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 ten times the amount of the proper duty or deficient portion, whichever is higher.
2.	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;
3.	Any instrument can be admitted in evidence in any proceeding in a criminal Court.
4.	When such instrument has been executed by or on behalf of the Government, it is admissible.

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)**CASE LAW**

S.NO.	CASE NAME	PROVISIONS
1	GUNI RAM V. KODAR	Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not be questioned at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.



CHAPTER-6 **SPECIFIC RELIEF ACT, 1963**

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 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.



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.

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.

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.
- (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.

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.



Non-enforcement except with variation

Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:–

- (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;
- (b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;
- (c) where the parties have, subsequently to the execution of the contract, varied its terms.

Relief against parties and persons claiming under them by subsequent title

Section 19 lays down that specific performance of a contract may be enforced against–

- (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;
- (e) 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 nonperformance 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 subsection (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.

Expedition 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.

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.



Discretion of court as to declaration of status or right

Section 34 lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

It may be noted that court shall not make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Effect of declaration

According to Section 35 of the Act, a declaration made is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.



DRAFTING OF COMMERCIAL **CONTRACTS AND DEEDS**



CHAPTER -7

DRAFTING OF AGREEMENT AND CONTRACT

Point to be noted: For drafting of agreement and contracts we are using both terms interchangeably.

MEANING OF AGREEMENT

An agreement between the parties is an instrument whereby the parties, with free consent, agree to perform certain acts or agree to refrain from doing certain acts. The purpose of the instrument is to bind them to the terms and conditions agreed upon.



IMPORTANT POINTS TO BE KEPT IN MIND WHILE DRAFTING AN AGREEMENT

1. The intention of the parties should be clear.
2. The agreement must be legal and enforceable.
3. Any agreement contravening the India Contract Act, 1872 will be void.
4. Agreement should be execute in duplicate so that each party should have a copy of the agreement.
5. The opening words of an agreement should be “An Agreement” or “This Agreement.”

MEMORANDUM OF UNDERSTANDING (MOU)

1. Memorandum of Understanding is a written documents executed by the parties establishing policies or procedures of mutual concern.
2. It is less formal than a contract.
3. It is step prior to an agreement.
4. An MOU is not governed by the provisions of law.

MEANING OF FOREIGN COLLABORATION AGREEMENTS

When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and / or managerial services, they are said to be collaboration in a desired venture, the word “COLLABORATION” has, however, acquired a specific meaning, which refers to co-operation between a party within India and a party abroad. The agreements drawn and executed between such collaboration parties are known as “Foreign Collaboration Agreements



Foreign collaboration is an agreement or contract between two or more companies from different countries for mutual benefit. Foreign collaboration is now recognized as an important driver of growth in the country. Foreign collaboration requires Government approval, as the collaboration involves partnership between two countries.

As no country in the world is self sufficient in itself. All countries need to be dependent on each other to meet out the requirements. Interdependence among countries is a common phenomenon



these days. Foreign collaboration is very useful in meeting out the deficiencies of the resources and in getting advanced technology with competitive price.

GUIDELINES FOR ENTERING INTO FOREIGN COLLABORATION AGREEMENTS

S.NO.	PARTICULARS	PROVISIONS
1	Investment	Where in a foreign collaboration agreement, equity participation is involved the value of the shares to be acquired about be brought in cash.
2	Lump sum payment 	The amount agreed to be paid by an Indian party to a foreign collaborator for technology transfer should be paid in three installments as follows: • One –third to be paid after the agreement has been approved by the Central Government; • One –third on transfer of the technical documents; and • One – third on the commencement of commercial production.
3	Duration of agreement	Normal period of a foreign collaboration agreement is 8 year subject to maximum of 10 years. The period is approved by the Government usually for 5 year from the date of the agreement in the first instanced or 5 years from the date of commencement of commercial production
4	Renewal or extension of agreement	The Central Government may consider an application for renewal of a foreign collaboration agreement or for extension of its period on merit.
5	Remittances:	Remittances to foreign collaborations are allowed only on basis of prevailing exchange rates.
6	Sub-licensing	An agreement shall not normally impose any restriction on the sub-licensing of the technical know- how to other India parties. The terms of such-licensing will be as mutually agreed to between all the concerned parties including the foreign collaborator. Sub-licensing is, however subject to the Central Government's approval.
7	Brand Name	There should be no insistence on the use of foreign brand names on products for sale in India.
8	Applicable Law	It should always be provided that which law will be applicable for resolving the disputes, which may arise.
9	Approval of Central Government:	Every foreign collaboration agreement shall be approved by the Central Government.



SPECIMEN OF FOREIGN COLLABORATION AGREEMENT**FOREIGN COLLABORATION AGREEMENT**

The agreement executed at this day of between M/s.....a Foreign Company incorporated in the united Kingdom and having its registered office at..... Hereinafter called the U.K. Company of the ONE PART.

AND

M/s a company incorporated in India and having its resisted office at hereinafter called the Indian company of the OTHER PART:

WHEREAS the Indian company has been incorporated having for its object the manufacture and production of

WHEREAS the Indian company has already constructed factory building installed plant and machinery and commenced manufacture and production of.....

WHEREAS the Indian company with a view to improve still further the quality of the commodities manufactured and to increase production are desirous of procuring the latest technique and know-haw relates to the manufacture of the advised commodities.

WHEREAS the Indian company therefore approached the U.K. company who have considerable experience in the line of manufacture engaged in by Indian company, and requested them to extend to them necessary technical assistance in that behalf

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

In consideration of the remuneration paid by the Indian company to the U.K. Company as described hereinafter the U.K. Company shall supply to the Indian company:

1. Technical advice and know-how for the purpose of improving or adding to the existing factories and installing additional plant and machineries if necessary for manufacture of.....
2. Render advice in the matter of purchase of the further plant and machinery suitable and necessary for the factory
3. Lend the services of their technicians to assist the Indian company in carrying out the improvement to the factories and for installing additional plants and machinery
4. Provide technicians from their own staff to attend at the Indian company's factory in India whenever necessary



5. Impart technical training to selected Indian personnel at their work in England or in their associated companies, to enable them to operate the machinery and plant to be installed and to exploit the imported technical know-how to the best advantage
6. For technical know-how and supplies by the U.K. company to the Indian company as above, the Indian shall make a lump sum payment of Rs..... to the U.K. company phased as follows
 - One-third on approval of the agreement by the Central Government:
 - One- third, on the U.K. company supplying company necessary charts, plans, engineering drawing, documentation and other technical data and know- how, which shall be done within 15 days from the date of approval, of this agreement by the Central Government ;
 - The balance one-third in three equal annual installments thereafter commencement of production.
7. This Agreement shall be in force for a period of 5 years at the first instance, subject to extension for a further period of 5 years by mutual agreement and subject to approval by the Central Government.
8. The Indian company may but not bound to use foreign brand names on their products for internal sale or on products to be exported.
9. There shall be no restriction on the Indian company exporting their products to foreign countries.
10. The Indian company shall not during the continuance of the Agreement refer any technical or manufacturing problems or difficulties to anyone other than the U.K. company but shall regard and use the U.K. company as its sole technical consultant.

IN WITNESS WHEREOF the parties hereto have signed this Agreement this..... day of.....2015 in the presence of the following:

WITNESS:

- 1.
- 2.

INDIAN COMPANY

U.K. COMPANY

MEANING OF JOINT VENTURE

1. Joint venture is a venture in which an enterprise is formed with participation in the ownership, control and management of minimum of two parties.
2. In joint venture, a business enterprise is formed for profit in which parties of joint venture share responsibilities in an agreed manner, by providing risk capital, technology, trade mark & access to market, etc.
3. **EXAMPLE** UNITECH and TELNOR by joint venture make a new company called UNINOR.



SPECIMEN JOINT VENTURE AGREEMENT (JOINT VENTURE WITH FOREIGN COMPANY)

THIS AGREEMENT IS MADE on this day of 2013 BETWEEN **AMCO INC.** Incorporated under the appropriate laws of the United States of America having its office at 5 Seventh Street, New York of the ONE PART **and INCO LTD.** a Company registered under the Companies Act, 2013 having its office at 99 Chowring Road Calcutta 700071 of the OTHER PART.

WHEREAS AMCO INC. (hereinafter referred to as **AMCO**) carries on business as manufacturer of and dealer and exporter in Computers, Computer Hardware's and Softwares and has worldwide market and intends to extend its market here in India and elsewhere.

WHEREAS INCO LTD. (hereinafter referred to as **INCO**) carries on business as manufacturer of, dealer in and exporter of Computer Softwares and intends to expand its business in India and abroad. Whereas **AMCO** and **INCO** intend to co-operate in manufacturing/dealing in and exporting Computers, Hardware's and Softwares in India and abroad for mutual benefit by setting up a new company.

NOW THIS AGREEMENT IS WITNESSED AS FOLLOWS

1. A Joint-stock company would be formed under the name and style of Indo-American Company Pvt. Ltd. under the Companies Act 2013 having its Registered Office at 99 Chowringhee Road, Calcutta 700 071.
2. AMCO and three of its nominees and INCO and three of its nominees would be the subscribers to the Memorandum and Articles of Association of the said company to be incorporated.
3. The shareholding in the Share Capital of the said company to be incorporated would be in equal proportions between AMCO and INCO.
4. AMCO will be allotted shares in the said new company partly in cash and partly towards the cost of plant, machinery and equipment to be supplied by AMCO to the new company and in consideration for assignments by AMCO of its Patent Rights, Trade Marks, Trade Names and Licences in favour of the new company to be incorporated.
5. The shares that would be allotted by the new company should not be transferred by either AMCO or INCO within a period of five years from the date of allotment and thereafter if any of the parties intends to transfer any share then the same shall be offered first to the other party at a price to be determined by a Valuer to be appointed by mutual agreement and in absence by application to the Indian Chamber of Commerce.
6. The new company will manufacture Computers, Hardwares and Softwares and allied accessories and products and the same would be marketed in India and exported to other countries under the Trade name or Brand name made available by AMCO and by any other



name and shall obtain new Trade Mark and obtain Patents for further and better manufacturing, selling and exporting the new company's products.

7. Neither party shall carry on their own business in a manner which will directly adversely affect the business and profitability of the new company.
8. The expenses for the setting up and promotion of the new company would be shared equally by AMCO and INCO.
9. Any disputes or differences arising in relation to this agreement, its construction, validity, performance, breach or any other question shall be referred to the Indian Chamber of Commerce for settlement by Arbitration or Conciliation in Calcutta and the decision of the said Arbitrator shall be final and binding on both the parties.
10. This agreement is made subject to obtaining approvals of the Indian Government and other concerned authorities.

IN WITNESS WHERE OF the parties hereto have signed, this agreement on the----- day, ----- month and -----year first above-written.

Witness

For and on behalf of AMCO Inc.
Mr. A director of company

Witness

For and on behalf of AMCO Inc.
Mr. b director of company

MEANING OF COMMERCIAL CONTRACT

A commercial contract refers to a legally binding agreement between parties in which they are obligated to do or restrain from doing particular things.

Commercial contract can include all aspects of a business, such as hiring, wages, leases, loans etc. A breach of commercial contract takes place when a contracting party fails to live up to the agreements.



POINTS TO BE PROVIDED FOR IN COMMERCIAL CONTRACTS

- | |
|--|
| 1. The parties to the contract must be described by their name, father's name age, address, etc. |
| 2. The responsibility to obtain license and permits by the concerned party should be clearly spelt out. |
| 3. The responsibility of the party to the contract for payment of tax and other charges should be specified. |



4. The contract should incorporate the provision relating to quality quantity, packing and inspection of goods
5. Provision in relation to the insurance of goods should be incorporated.
6. Provision relating to the guarantee and warranty should be incorporated.
7. The time of the property and the passing of the risk should be incorporated
8. The provision in relation in relation to the total price of the good and mode and payment of currency should be provided.
9. The provision relating to Force Majeure should be incorporated which means that what are the circumstances under which a party will be excused for his non-performance. This provision defines as to what particular circumstances or events beyond the control of the seller would entitle him to delay or refuse the performance of the contract, without incurring liability for damage.
10. In case any dispute arises between the parties relating to the present contract in any manner, such dispute shall be referred to Mr. _____, who will act as an arbitrator and will decide the disputes as a Sole Arbitrator under the Arbitration and Conciliation Act, 1996 and the award given by the Arbitrator shall be binding on the parties.

BUILDING CONTRACTS

Building contracts, being legal documents, have to be drawn in accordance with the provisions of the Indian Contract Act. Such an agreement or contract must be drawn in accordance with the provisions of the **Indian Contract Act, 1872**.



All the essential ingredients of a contract, such as, a proposal, its acceptance, its due communication to the proposer, lawful consideration, lawful purpose and competence of parties to the contract etc. must be duly satisfied and ensured while drafting such contracts.

SPECIMEN OF A BUILDING CONTRACT

This agreement is made this..... day of 2013 between ABC Ltd., a company incorporated under the Companies Act, 2013, having its Registered Office at acting through Shri, its Company Secretary, hereinafter called “the builder” of the one part and Shri son of Shri resident of hereinafter called “the owner” of the other part.

WHEREAS the owner has a plot of land measuring sq. meters situated at (as specified in Schedule I) duly registered in his own name with the rights, title and interest therein absolutely vesting in him

WHEREAS the owner has requested the builder to build a bungalow on the said piece of land according to the plan approved by the Municipal authorities, of the area

WHEREAS the builder, has agreed to build the desired bungalow.



NOW THIS CONTRACT IS WITNESS AS FOLLOWS

1. The builder will build and complete the bungalow within six months from the date of execution hereof in a thorough manner and with the best material and work as specified in Schedule II hereof on the plot of land belonging to the owner, which is more clearly and precisely described in Schedule I hereof.
2. Subject to the conditions hereinafter contained, the owner will pay to the builder a sum of Rs..... as cost of labour for construction and all other type of labour, cost of materials, electrical and sanitary fittings, wood work, doors and windows, white-washing, painting and polishing etc., as per specifications of the architect of the owner
3. The owner shall pay to the builder a sum of Rupees twenty thousand only immediately on execution of this Agreement in the form of earnest money, immediately on receipt whereof, the builder shall procure building materials and start construction work. The said sum of Rupees twenty thousand shall be adjusted by the owner from the last installment payable to the builder.
4. It is expressly, agreed between the owner and the builder that in respect of the aforesaid payments and in respect of the construction of the bungalow, time is the essence of this agreement.
5. The owner will not be entitled to take possession of the bungalow until the entire amount is paid within the time stipulated hereinabove.
6. It is agreed by the owner that any amount that will be due and payable to the builder as mentioned in this agreement shall be treated as a charge on the bungalow till such time the same is paid in full.

IN WITNESS WHEREOF the parties hereto have signed this Agreement this..... day of.....200 in the presence of the following:

WITNESS:

- 1.
- 2.

BUILDER

OWNER

HIRE-PURCHASE DEEDS

1. A contract of hire is a contract of bailment and is governed by the provisions of Chapter IX of the Indian Contract Act, 1872.
2. In a hire-purchase agreement, the owner hires goods to the hirer with an option to purchase the goods when he has made the payment of a certain sum.
3. By this system, the purchaser who is unable to pay the full price of the asset at one lump sum, gets facilities to acquire an asset and after making the payment of an initial amount called premium, the purchaser pays the balance consideration money in installments
4. After the payment of all the installments, the property in the goods passes to the hirer.



5. The hirer has an option to return the goods during the period of hire. In a hire-purchase agreement, the hirer has the right to terminate the agreement for hire at his pleasure and is not bound to pay the value of the goods.
6. The hirer may elect to purchase the goods and when he does so, after he fulfills all the conditions prescribed in the agreement, the title to the goods will pass to him. But he may elect not to do so, and in that event he is entitled to return the goods and terminate the agreement in the manner provided therein.

JOINT DEVELOPMENT RIGHTS AGREEMENT

In a Joint Development Agreement (JDA), a landowner contributes his land for the construction of a real estate project and the developer undertakes the responsibility for the development of property, obtaining approvals, launching, and marketing the project.

This agreement should be registered in the court of law under Section 53A of the Transfer of Property Act.

The agreement bounds the landowner and the developer in an agreement for the construction of new projects. In return for the land provided by the former, the latter agrees to provide to some provisions.

The developer agrees to provide lump sum consideration, percentage of sales revenue, or a certain percentage of the newly constructed project on the said piece of land. This depends on the terms and conditions, mutually agreed upon by the parties.

A Joint development agreement is also called a strategic alliance agreement.

POINTS TO BE KEPT IN MIND WHILE DRAFTING OF JOINT DEVELOPMENT AGREEMENT

1. In what manner and at what point of time, ownership rights of the land are transferred by the land owner to the developer so as to decide the capital gain tax liability in the hands of the land owner.
2. Whether possession of the land is handed over to the developer in a manner so as to grant license to enter upon and possess land only for the development or the developer enjoys the possession of the land beyond that. Whether there is transfer of ownership/beneficial rights in the land in terms of the provisions of the Transfer of Property Act, 1882.
3. Whether exclusive rights to sell the developed real estate units and enter into buyers' agreement with the customer are granted to the developer under Joint Development agreement or as per other document executed between the land owner and the developer.
4. In what manner sale consideration of the land is determined and paid by the developer to the land owner. Whether sale consideration is determined in monetary terms or in kind or as



combination of both and how the timing of the payment of the consideration is settled between them.
5. Whether rights and authority to mortgage the land is granted to the developer to avail the credit facilities from the banks against the security of the land.
6. In what manner and at what point of time, legal title or ownership right of the developed unit is acquired by the customers.
7. Along with the JDA, what kind of other documents, e.g. Power of Attorney, Supplementary Agreement, Memorandum of Understanding, etc. are required to be executed between the land owner and the developer determining or altering their rights & obligations and tax liability under the Income-tax Act and various other laws.
8. Whether the terms provided in Joint Development Agreement may result into creation of a separate legal entity or joint venture in the form of Association of Persons (AOP) or otherwise.
9. Whether any kind of principal-agent relationship or partners' relationship is created between the parties so that the action of one party may affect the rights and obligations of the other party.
10. Applicability and planning of liability under other tax laws, e.g. GST, Service Tax, VAT, Stamp Duty etc.
11. Whether the terms of Joint Development Agreement result into conversion of the land in the hands of the land owner from capital asset to business asset which may alter the chargeability of tax liability in his hands altogether.
12. Whether there are adequate terms in Joint Development Agreement providing dispute resolution mechanism and exit route to both the parties in case the real estate project does not take off in the desired manner.



Specimen Format of Joint Development Agreement

This Joint Development Agreement is made on this _____ day of _____, 20____ at

BETWEEN

..... through
 its.....s/o

_____, r/o _____,
 hereinafter

called the Owner, the First Party

AND

M/S _____ acting through its Director

_____,
 _____s/o _____ r/o _____

_____, hereinafter called the Developers, Second Party.

(The expression of the terms Owner and the Developers, whenever they occur in the body of this Agreement shall mean and include their respective heirs, executors, administrators and assign unless and until is repugnant to the context or meaning thereof.)

Whereas the Owner is the recorded Owner and is in possession of plot No. _____

_____, admeasuring _____ sq. yards, the leasehold plot which

was registered as Document No. _____ Book No. _____ Vol No. _____ on
 pages

from _____ to _____ dated _____. The property bounded as under:
 EAST

_____ Plot No. _____ WEST _____ Plot No. _____ SOUTH

Road NORTH _____



AND Whereas the Owner is desirous of erection of a super structure comprising of the basement, ground floor, first floor, second floor and terrace, according to the plans which may be got sanctioned from competent Authority in this regard but is not fully equipped to do so and has therefore approached the Developer which on being assured by the Owner that the said property is free from all sorts of encumbrances, attachments, charges, legal flaws, claims, demands, dues, notices, religious or family disputes, etc., and that the said property is selfacquired property, has agreed to cooperate with the Owner for construction of a super structure on the land beneath the said property, on the terms and conditions that are set forth hereinafter.

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. That the Developers have agreed to pay a sum of Rs. _____ (Rupees _____ only) as security for due performance of the terms of this agreement and success-full completion of the project. However, this security amount shall be adjusted against the consideration on completion of the building. The Developer has agreed to raise the superstructure of basement, ground floor, first floor, second floor and terrace on the land beneath the said property according to the building plans mutually agreed upon between the Owner and the Developers which may be sanctioned from the competent authority

The said sum shall be paid in the following manner:

(a) THAT Rs. _____ (Rupees _____ only) shall be paid at the time of signing the agreement vide Chq No. _____ dated _____ drawn on _____ Bank _____

Branch.

(b) THAT the further sum of Rs. _____ (Rupees _____ only) shall be paid to the Owner by the Developer at the time of handing over the physical possession of the said property after the Developer has got sanction of plans or before _____, whichever is earlier for the limited purpose of development and construction of the said project. The physical possession for the Developer's portion shall automatically vest with the Developer on completing of the building.

(c) That the Developer shall pay beside a sum of Rs. _____ (Rupees _____ only) already paid, a sum of Rs. _____ (Rupees

_____ only) to the Owner on completion of the building and at the time of signing of all necessary sale documents in regard to the first floor and second floor, to make the total consideration of Rs. _____ (Rupees _____ only



2. If the Developer defaults in payment of any payment on the due date, the Owner will be entitled to terminate the agreement and to forfeit all moneys paid hereunder. On such termination, the licence to develop the property will be revoked and the Developer shall take away and remove within one month of such termination, all buildings, structures and materials brought on the property and in default thereof, the same shall belong to and vest in the Owner absolutely and the Developer shall not be entitled to any compensation or damages in respect thereof.

Developer and extend the time for payment if the Developer pays interest at the rate of _____ % per annum on the defaulted installment provided that the Owner shall before terminating this agreement as aforesaid, make a demand in writing for payment of the said sum on the Developer. If the Developer pays the amount due to the Owner with interest within _____ days of receipt of such demand, then the Owner shall not be entitled to terminate the Agreement under this clause.

3. The Owner shall sign the necessary documents to enable the Developer to obtain all necessary permissions and sanctions as may be required.

4. That the Owner has executed attorney(s) by separate documents in favour of the Developer for submitting the applications, requisitions to the various authorities for obtaining permission, approvals, sanctions, allotment of building or other materials and concerning other matters required statutorily to be done and required in connection with the construction and completion of the said dwelling units/ floors on the said property. However, the Developers undertake not to cause to be done any act deed or thing which may in any way misuse, contravene any rule, law or regulation or to misuse the powers which may be conferred upon the Developers by the Owner to construct super structure as stated herein above on the land beneath the said building as per agreement.

5. That in the meantime till such sanctions and permissions are forthcoming, the Developers shall have the suitable plans prepared for the proposed residential building at their cost and the concurrence of the Owner shall be obtained with regards to final submission of plans.

6. That the entire cost of construction of the new building including cost of material, labour and the charges for time extension for construction from Delhi Development Authority on above said plot and expenses for clearance from Urban Land Act and fee of the architect and others charges shall be borne and paid by the Developer

7. That the construction shall be that of specifications, detailed and described in Annexure 1 attached hereto. That the Developers shall utilise the full F.A.R. available in respect of the property to be developed.



8. That the property tax till the execution of this deed shall be payable by the Owner. Any property tax payable thereafter shall be the liability of the Developer and shall be paid by the Developer till the flats are ready in all respects.

9. That the Owner gives licence and permission to the Developer to enter upon the said property with full right and authority to commence, carry on and complete development thereof, in accordance with the permission & terms herein mentioned. The said licence to develop the property will be personal to the Developer and under no circumstance the Developer will assign his title, right and interest to any other party, except with the prior written consent of the Owner. However, the Developer shall be entitled to enter into separate contracts in his own name with building contractor, architect and others for carrying out the development at his own risk and costs.

10. That the dwelling units proposed to be constructed by the Developer shall be owned and possessed by the parties exclusively as under:

(a) Owner shall own and possess basement and ground floor and two car parking and two servant quarters with attached toilet of the said property with rear terrace for exclusive use and exclusive complete Ownership right of construction on second floor terrace (i.e., third floor) and right to all future FSI/FAR and right of construction on third floor if permitted by the bye-laws in future, in that case the Owner construct the water tanks on third floor terrace at their/his own cost/fund with 50% undivided land rights of total plot measuring _____ Sq. Yds.

(b) The Developer shall own and possess first floor, second floor, two car parking and two servant quarters along with toilet and front terrace for exclusives use, in case of construction of third floor, the Developer/buyers have rights to use front terrace of third floor terrace with 50% undivided land rights of total plots measuring _____ Sq. Yds.

(c) It is hereby specifically mentioned that the parties hereto shall be free to sell transfer and/or mortgage, assign or part with the possession of their respective portions at their own risk and account without any objection from the other party and to receive, accept any consideration, money in regards to above property and to issue receipt of full or partial payment. Each party shall have rights to negotiate his respective portion with common facilities to any intending purchaser.

11. The Owner agrees to execute, sign and deliver the document which might be required for conveying first floor and second floor of the said property in favour of the intending purchaser or nominee of Developer as a confirming party when the construction has been completed by the Developer and full consideration has been paid to the Owner. It is hereby specifically mentioned and agreed that the Owner shall not claim any remuneration for execution of the aforesaid documents and all the expenses whatsoever for the transfer of the first floor and second floor of the said property shall be borne and paid by the Developer/his nominee(s)/intending purchaser(s).



12. That the building shall be completed and finished in all respects within _____ months and the first party's share of property will be handed over to them within _____ months from the date of sanctioning of plans/handing over the vacant possession of the plot for development, except for reasons beyond second party's control such as strikes, war, riots and natural calamities and due to any unforeseen circumstances like drastic changes in laws and hindrance caused by concerned authorities.

13. If the Developer fails to complete building and fails to deliver basement and ground floor within stipulated period of _____ months then Developer shall be liable to give a sum of Rs. _____ (Rupees _____ only) per month to the party as compensation penalty.

14. That except as herein before provided, the Owner shall not interfere with or obstruct in any manner with the construction of work for the said residential flats. However, the Owner or his nominee or nominees shall have free hand and unfettered access to the construction site at all reasonable time and he shall be free to point out to the Developer or their agents, subcontractors or administrators and the Developer shall rectify such defective construction, workmanship or use of inferior materials.

IN WITNESS WHEREOF, the parties hereto have set their respective hands on these presents on the date, month and year hereinabove first mentioned. In the presence of the following witnesses:

.....
.....

Signed by the Owner

Builder(Name,
(Name, Signature and Details)

Signature

and

Signed by the

Details)

Witnesses

1. _____

(Name, Signature and Details)

2. _____

(Name, Signature and Details)



FRANCHISE AGREEMENT

A franchise agreement is a legally enforceable contract between a franchisor and a franchisee. These agreements authorise a franchisee to open a franchise site while also granting the ability to use franchisespecific resources such as branding, business methods, and supplier sources. A franchise agreement, like any other contract, is intended to define precise conditions for the parties' relationship. These agreements provide safeguards and duties that benefit both parties. Franchise agreements define the limitations within which franchisees can operate and clarify any financial commitments they have to their franchisors. They also often provide greater safeguards to franchisors than to franchisees. Typically, these types of agreements are unilateral in nature. One of the primary goals of a franchise settlement is to protect the franchise system as a whole. This includes the brand, the integrity of the operating system, and the conduct of franchisees within the mix.

What should a standard franchise agreement include:

1. Basis of the agreement
2. Grant of a franchise
3. The agreement's duration
4. Fee for franchising
5. Operations management
6. Services provided by franchisor
7. Safety of Intellectual Property
8. Training 9. Advertising
10. Limitations relating to defaults and damages
11. Obligations upon expiration
12. Royalties
13. Quality assurance
14. Indemnification
15. Geographic restrictions
16. Insurance
17. Restrictions and non-compete covenants.



Difference between a Distributorship Agreement and a Franchise Agreement

Difference areas	Franchise Agreement	Distributorship Agreement
Distributorship Agreement	The franchisee is allowed and encouraged to use the franchisor's trademarks and brand name in ordinary business procedures under the terms of the franchise agreement. To aid the franchisee's success, the franchisor also gives advertising and training assistance. To retain the franchisor's brand identity, a franchisee must follow precise criteria while promoting and selling items.	A distributor is not allowed to use the company's trademarked name when distributing its items. Instead, the distributor does business under its own identity. It serves as a product reseller, but it does not conduct business on behalf of the firm that manufactures the things.
The degree of control	Franchisor has far more influence over the franchisee and the franchisee's management of the franchised firm. An excellent example is a franchisor maintaining continuous quality control over its franchisees, frequently through an operations manual, marketing strategies, inspections, and other processes to guarantee brand standards are maintained across the network	The supplier has less influence over the operations of a distributor.
Payments	A franchisee pays an initial fee and a continuing royalty to the franchisor in exchange for the right to operate the business under the franchisor's name.	A distributor pays for the items purchased from the supplier



Specimen of a Dealership Contract

THIS AGREEMENT is made on the _____ day of _____, 20____

BETWEEN

ABC Ltd. a company incorporated under the Companies Act, 2013 and having its Registered Office at _____ and its Manufacturing unit at _____ acting through its Company Secretary, (hereinafter called “the company”, which expression shall, unless the context admits otherwise, include its representatives) of the one part

AND

M/s _____ a partnership firm comprising Mr _____, Mr _____ and Mr _____ partners, having its main business place at _____ and branches at _____

_____ and _____ (hereinafter called “the firm” which expression shall unless the context admits otherwise, include the partners, their heirs, executors, administrators, representatives and assigns of the other part).

WHEREAS the company is manufacturing _____

AND WHEREAS the firm has its own marketing network and is selling goods of various branches and is desirous of selling the goods of the company at a new sales outlet recently taken on rent by it for the purpose and has communicated the same to the company;

AND WHEREAS the company, after having considered the proposal of the firm, has agreed to appoint the firm as its dealer on the terms and conditions as contained in this agreement.

NOW THIS AGREEMENT WITNESSETH AS UNDER:

1. That the company hereby appoints the firm as its dealer to sell its products, more specifically defined in the Schedule to this agreement, in the areas also clearly defined in the said Schedule.
2. The agreement shall remain in force for one year commencing from _____ and shall be renewable for similar periods on the agreed terms and conditions.
3. The firm shall keep a minimum stock of _____ pieces each of the company’s products to meet the demand of the ultimate users/consumers, which quantity shall be reviewed every quarter in the light of the sales during the previous quarter and the market trends



4. The company shall supply to the firm its products on fifteen days credit from the date of the invoice and if payments are not made within the credit period shall charge interest at the rate of _____ per cent per annum from the sixteenth day of the invoice till payment.
5. The company shall supply to the firm sufficient quantities of publicity and advertisement material for display at the firm's sales outlet and for distribution in its area of operation.
6. The company shall bear 50% of the cost of maintaining the sales outlet of the firm including rent thereof subject to a maximum of 5% of the invoice value of the firm of all the products of the company, which amount shall be credited to the firm's running account in the books of the company at the end of each quarter
7. The company and the firm shall settle their accounts every six months and the balance credit/debit shall be squared by making payment by the party owing to the other.
8. The firm shall make all efforts to promote the sale of the company's products and in the event of the company forming an opinion on the basis of sale records that the firm is not properly performing its duty as dealer, the company shall be at liberty to terminate this agreement by giving the firm one month's notice in writing and at the end of the notice period, this agreement shall stand terminated and the parties shall settle their accounts within seven days of such termination.
9. The company agrees and undertake to supply to the firm its products as per the firm's orders and in the event of the company failing to supply the ordered goods within fifteen days of receipt of each purchase order, the firm shall be entitled to terminate the agreement by giving the company one month's notice in writing and at the end of the notice period, this agreement shall stand terminated and the parties shall settle their accounts within seven days of such termination.
10. The firm shall not sell any product of the company at a price higher than the one indicated by the company from time to time.
11. The firm shall be at liberty to appoint sub-dealers, salesmen, commission agents or other sales personnel on salary, commission or any other basis, so long as they function in accordance with the provisions of this agreement and do not do anything which is detrimental to the interest of the company, or the firm and the collective interest of both.

Note: Any additional terms and conditions of the appointment may be incorporated.

NON-DISCLOSURE AGREEMENT

A non-disclosure agreement (NDA) which is sometimes also referred to as a "Confidentiality Agreement" is a legally binding contract that establishes a confidential relationship. The party or parties signing the agreement agree that confidential/sensitive information they may obtain will not be made available to any others. An NDA may also be referred to as a confidentiality



agreement. The NDA serves a purpose in a variety of situations e.g. NDAs are generally required when two companies enter into discussions about doing business together but want to protect their own interests and the details of any potential deal. In this case, the language of the NDA forbids all involved from releasing information regarding any business processes or plans of the other party or parties. The key elements of Non-Disclosure Agreements:

- Identification of the parties
- Definition of what is deemed to be confidential
- The scope of the confidentiality obligation by the receiving party
- The exclusions from confidential treatment
- The term of the agreement.

Specimen of Non-disclosure Agreement

THIS NON-DISCLOSURE AGREEMENT (Agreement) IS MADE AND ENTERED ON THIS THE _____ DAY OF _____, 20____

BY AND BETWEEN

(1) _____ a company incorporated under the Companies Act, 2013 with CIN _____ and having its registered office at _____ (hereinafter referred to as “Company”),

AND

(2) _____ a company incorporated under the Companies Act, 2013 with CIN _____ and having its registered office at _____ (hereinafter referred to as “Corporation”)

(**COMPANY** and **CORPORATION** shall hereinafter be referred to as such or collectively as “Parties” and individually as “Party”).

WHEREAS both the Parties herein wish to pursue discussions and negotiate with each other for the purpose of entering into a potential business arrangement in relation to _____ (“Proposed Transaction”)

AND WHEREAS the Parties contemplate that with respect to the Proposed Transaction, both the Parties may exchange certain information, material and documents relating to each other’s business, assets, financial condition, operations, plans and/or prospects of their businesses (hereinafter referred to as “Confidential Information”, more fully detailed in clause 1 herein below) that each Party regards as proprietary and confidential; and

AND WHEREAS, each Party wishes to review such Confidential Information of the other for the sole purpose of determining their mutual interest in engaging in the Proposed Transaction.



IN CONNECTION WITH THE ABOVE, THE PARTIES HEREBY AGREE AS FOLLOWS:

1. “Confidential and or proprietary Information” shall mean and include any information disclosed by one Party (Disclosing Party) to the other (Receiving Party) either directly or indirectly, in writing, orally, by inspection of tangible objects (including, without limitation, documents, prototypes, samples, media, documentation, discs and code). Confidential information shall include, without limitation, any materials, trade secrets, network information, configurations, trademarks, brand name, know-how, business and marketing plans, financial and operational information, and all other non-public information, material or data relating to the current and/ or future business and operations of the Disclosing Party and analysis, compilations, studies, summaries, extracts or other documentation prepared by the Disclosing Party. Confidential Information may also include information disclosed to the Receiving Party by third parties on behalf of the Disclosing Party.
2. The Receiving Party shall refrain from disclosing, reproducing, summarising and/or distributing Confidential Information and confidential materials of the Disclosing Party except in connection with the Proposed Transaction.
3. The Parties shall protect the confidentiality of each other’s Confidential Information in the same manner as they protect the confidentiality of their own proprietary and confidential information of similar nature. Each Party, while acknowledging the confidential and proprietary nature of the Confidential Information agrees to take all reasonable measures at its own expense to restrain its representatives from prohibited or unauthorised disclosure or use of the Confidential Information.
4. Confidential Information shall at all times remain the property of the Disclosing Party and may not be copied or reproduced by the Receiving Party without the Disclosing Party’s prior written consent.
5. Within seven (7) days of a written request by the Disclosing Party, the Receiving Party shall return/ destroy (as may be requested in writing by the Disclosing Party or upon expiry and or earlier termination) all originals, copies, reproductions and summaries of Confidential Information provided to the Receiving Party as Confidential Information. The Receiving Party shall certify to the Disclosing Party in writing that it has satisfied its obligations under this paragraph.
6. The Receiving Party may disclose the Confidential Information only to the Receiving Party’s employees and consultants on a need-to-know basis. The Receiving Party shall have executed or shall execute appropriate written agreements with third parties, in a form and manner sufficient to enable the Receiving Party to enforce all the provisions of this Agreement.
7. Confidential Information, however, shall not include any information which the Receiving Party can show:
 - i) is in or comes into the public domain otherwise than through a breach of this Agreement or the fault of the Receiving Party; or



- ii) was already in its possession free of any such restriction prior to receipt from the Disclosing Party; or
- iii) was independently developed by the Receiving Party without making use of the Confidential Information; or
- iv) has been approved for release or use (in either case without restriction) by written authorisation of the Disclosing Party.

8. In the event either Party receives a summons or other validly issued administrative or judicial process requiring the disclosure of Confidential Information of the other Party, the Receiving Party shall promptly notify the Disclosing Party. The Receiving Party may disclose Confidential Information to the extent such disclosure is required by law, rule, regulation or legal process; provided however, that, to the extent practicable, the Receiving Party shall give prompt written notice of any such request for such information to the Disclosing Party, and agrees to co-operate with the Disclosing Party, at the Disclosing Party's expense, to the extent permissible and practicable, to challenge the request or limit the scope thereof, as the Disclosing Party may reasonably deem appropriate.

9. Neither Party shall use the other's name, trademarks, proprietary words or symbols or disclose under this Agreement in any publication, press release, marketing material, or otherwise without the prior written approval of the other.

10. Each Party agrees that the conditions in this Agreement and the Confidential Information disclosed pursuant to this Agreement are of a special, unique, and extraordinary character and that an impending or existing violation of any provision of this Agreement would cause the other Party irreparable injury for which it would have no adequate remedy at law and further agrees that the other Party shall be entitled to obtain immediately injunctive relief prohibiting such violation, in addition to any other rights and remedies available to it at law or in equity.

11. The Receiving Party shall indemnify the Disclosing Party for all costs, expenses or damages that Disclosing Party incurs as a result of any violation of any provisions of this Agreement. This obligation shall include court, litigation expenses, and actual, reasonable attorney's fees. The Parties acknowledge that as damages may not be a sufficient remedy for any breach under this Agreement, the non-breaching party is entitled to seek specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach, in addition to any other remedies at law or in equity.

12. Neither Party shall be liable for any special, consequential, incidental or exemplary damages or loss (or any lost profits, savings or business opportunity) regardless of whether a Party was advised of the possibility of the damage or loss asserted.

13. Both the Parties agree that by virtue of the Parties entering into this Agreement neither Party is obligated to disclose all or any of the Confidential Information to the other as stated in this



Agreement. The Parties reserve the right to disclose only such information at its discretion and which it thinks, is necessary to disclose in relation to the Proposed Transaction.

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE EXECUTED THIS CONFIDENTIALITY AGREEMENT IN DUPLICATE BY AFFIXING THE SIGNATURE OF THE AUTHORISED REPRESENTATIVES AS OF THE DATE HEREIN ABOVE MENTIONED.

Disclosing Party

Receiving Party

Signature 1

Signature 1

ELECTRONIC CONTRACTS (E-CONTRACTS)

1. Due to the immoderate advancement of technology E-Commerce has become a part of human daily life. E-Commerce is the selling and purchasing of goods and services using technology.
2. E-Contracts are basically the contracts analyzed with E-Commerce and other transactions taking place in the digital environment.
3. E-contract (contract that is not paper based but rather in electronic form) is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.
4. In India Information Technology Act, 2000 governs the law relating to e-contracts substantially.



ESSENTIALS OF E-CONTRACT

1. An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement consensus-ad-idem.
2. An intention to create legal relations or an intent to have legal consequences.
3. The agreement is supported by lawful consideration.
4. The parties to contract are legally capable of contracting.
5. Genuine consent between the parties.
6. The object and consideration of the contract is legal and is not opposed to public policy.
7. The terms of the contract are certain.
8. The agreement is capable of being performed i.e., it is not impossible of being performed.



TYPES OF E-CONTRACTS

TYPES OF E-CONTRACTS

Click-wrap or Web-wrap Agreements

These are the agreements which we generally come across while surfing internet such as “**I AGREE**” to the terms or “**I DISAGREE**” to the above conditions. A click-wrap agreement is mostly found as part of the installation process of software packages. It is also called a “click through” agreement or click-wrap license.

The Shrink-wrap Agreements

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product like CD ROM of software. The terms and conditions are printed on the cover of CD ROM. Sometimes additional terms are imposed when in such licenses appear on the screen when the CD is downloaded to the computer. The user has right to return if the new terms and conditions are not to his liking.

Electronic Data Interchange or (EDI)

These contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgement of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork. Here unlike the other two there is exchange of information and completion of contracts between two computers and not an individual and a computer.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Hypothecation is an extended form of pledge.’ Explain the statement and make suggestion for improvement in the law of hypothecation citing case law(s).

Hypothecation of goods is nothing but an extended form of pledge and to pledge means to give the goods as security. Hypothecation means pledge of goods that is to give as security without possession.

Hypothecation agreement is a document by which legal property in goods passes to the person who lends money who lends money on them, but the possession does not pass.

In hypothecation, there must be an intention of the parties to create a security on the property on which the money has been lent of that intention can be established and equity gives effect to it.

Pledge has been codified by the Indian Contract Act, 1872 as per Section 172 and 176 provides that a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. The Pawnee can retain the goods pledged as security for payment of a debt and is also entitled to receive from the pawner of pledgor any extraordinary expenses he incurs for the preservation of the goods pledged with him.

According to Section 176 of the Indian Contract Act, provides that the rights of pawnee provides that in case of default by the pawner, the pawnee has right to sue upon the debt and to retain the goods as collateral security and to sell the goods after reasonable notice of the intended sale for pawner. After such sale, the pawner to redeem the good is extinguished.

However the Pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus if any for the pawner.

2. In a contract, if the material terms of the agreement are clear and specific, omission of minor or basic details will not invalidate the agreement.

An agreement between the parties is an instrument whereby the parties freely agree to perform certain acts or refrain from doing sometimes unilaterally or bilaterally. The purpose of the instrument is to bind the parties to the terms and conditions agreed upon. The agreement should, therefore, be drafted as deeds between the parties thereto.

While preparing agreements it is necessary and important that the intention of the parties should be set forth explicitly so as the leave no room for doubt or future controversy. The language should be simple and the words used should be definite and precise; the use of loose expression such as ‘proper’, ‘reasonable’, should, as far as possible, be avoided.

The provisions of the **Indian Contract Act, 1872** about the essential incident and legality of agreements (Sections 2 to 30) should be studied and nothing should be introduced or left out which would make the agreement void. But, if the material terms of an agreement are clear and specific, omission of certain details which can be worked out by consent of the parties or in its absence be settled by court will not invalidate the agreement **Ramchandra v. Chinnubhai, AIR.**



3. A Contract existed between Akram and Bikram. Bikram went to the court of law for non-performance of the contract by Akram. During the pendency, Akram and Bikram arrived at certain compromise and reduced the terms of compromise by signing a 'memorandum of understanding' (MOU). Whether such an MOU amounts to novation of the contract?

The MOU in the given problem does not amount to Novation. Novation is the substitution of existing contract for a new contract. In other words, when the parties to a contract agree to substitute the existing contract by a new contract. In the given problem no new contract has been substituted.

The parties have reduced the terms of compromise into MOU. MOU is a written document executed by the parties establishing policies or procedures of mutual concern. It is less formal than a contract. Besides, the parties have not intimated the court about the MOU. They ought to have filed a copy of MOU with the court and withdrawn the earlier contract. Such MOU is neither valid nor a novation.

4. Write notes on the Types of e-contracts?

ANSWER: Refer chapter 6

5. Mention important guidelines for entering into foreign collaboration agreements.

ANSWER: Refer chapter 6

6. What are the important points that should be taken into consideration while drafting commercial contracts?

ANSWER: Refer chapter 6

7. Ultra Vision Textiles Ltd. Is entering into a foreign collaboration with Omega Inc., USA for technical know-how and assistance for the proposed textiles machinery manufacturing project. Draft a suitable foreign collaboration agreement.

ANSWER: Refer chapter 6

8. Explain the Force majeure clause

ANSWER: Refer chapter 6



CHAPTER-8

CONTRACT MANAGEMENT

SOME IMPORTANT PROVISIONS FOR INDIAN CONTRACT ACT 1872

1. SCOPE, APPLICABILITY, MEANING AND NATURE OF CONTRACT

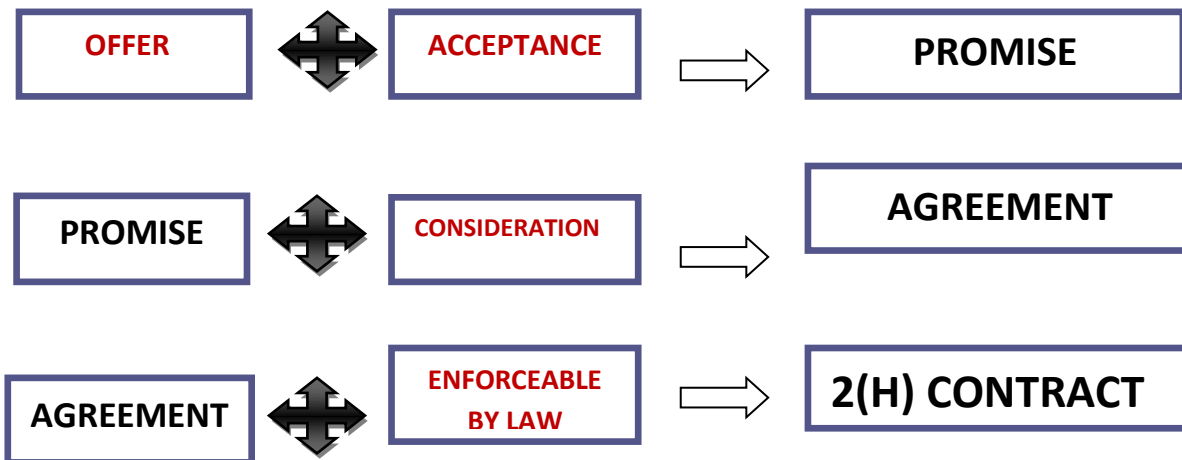
Scope	• The law of contract is contained in Indian Contract Act, 1872.
Applicability	• It came into force on 1 st September 1872.

CONCEPT OF AGREEMENT AND CONTRACT ACCORDING TO INDIAN CONTRACT ACT 1872

Meaning of Contract [Section 2(h)] An Agreement **enforceable** by law is a **Contract**.

Agreement [Section 2(e)] Every promise & every set of promises forming consideration to each other is an agreement.

Promise [Section 2(b)] When the person to whom the proposal is made signifies his assent thereto, proposal is said to be accepted. A proposal when accepted it becomes a promise.



SPECIAL NOTE: With the help of this chart we can say

- Agreement is wider term than Contract
- All Contract are Agreement but all Agreement are not Contract
- This is the difference as per Indian Contract Act 1872. But for the purpose of drafting we are using both the terms interchangeably



2. ESSENTIALS OF A VALID CONTRACT (SECTION 10)

Offer and Acceptance	✓ There must be lawful offer and lawful acceptance. ✓ Lawful implies that both must satisfy the requirements of Contract Act. Example Thus, where 'A' who owns 2 cars x and y wishes to sell car 'x' for Rs. 30,000. 'B', an acquaintance of 'A' does not know that 'A' owns car 'x' also. He thinks that 'A' owns only car 'y' and is offering to sell the same for the stated price. He gives his acceptance to buy the same. There is no contract because the contracting parties have not agreed on the same thing at the same time, 'A' offering to sell his car 'x' and 'B' agreeing to buy car 'y'. There is no consensus-ad-idem.
Intention to Create Legal Relations	✓ Agreement should be attached by legal consequences & create legal obligation. ✓ Duties and rights should be legal and not merely moral. Example A husband agreed to pay £30 to his wife every month while he was abroad. As he failed to pay the promised amount, his wife sued him for the recovery of the amount. <i>Held:</i> She could not recover as it was a social agreement and the parties did not intend to create any legal relations. [Balfour v. Balfour]
Lawful Consideration	✓ Price paid by one party for the promise of the other is known as consideration. ✓ It is referred to as "quid pro quo" means something in return.
Free Consent	There must be free consent of the parties to the contract. According to Sec. - 14. Consent is said to be free when it is not caused by (i) Coercion, (ii) Undue influence, (iii) Fraud, (iv) Misrepresentation, or (v) Mistake. Example: X threatens to kill Y if he does not sell his house to X. Y agrees to sell his house to X, In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.
Capacity of Parties	The parties to an agreement must be competent to contract. According to Sec. - 11 of Indian Contract Act, 1872, "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 is subject."
Lawful Object	The object of an agreement must be lawful. According to Sec. 23 "the object is considered lawful unless it is forbidden by law or is fraudulent or involves or implies injury to the person or property of person or is immoral or is opposed to public policy."
Certainty of Meaning	The terms of the agreement must be certain and unambiguous. According to Sec. - 29 of the Indian Contract Act, 1872 agreements the meaning of which is not certain or capable of being made certain are void.



3. OFFER, OFFERER (or 'PROMISOR') AND OFFEREE (or PROMISEE)

Offer	Meaning: An offer is starting point in the making of an agreement. An offer is also called 'proposal' According to Sec. 2(a) of The Indian Contract Act, 1872. "A person is said to have made the proposal when he signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that offer to such act or abstinence."
Meaning of Offer	The person making the proposal is called the 'offeror' or 'proposer'
Meaning of Offeree	The person to whom the proposal is made is called the 'offeree' or 'proposee'.

4. TYPES OF OFFER

Express Offer	An express offer is one, which is made by words spoken or written.
Implied Offer	An implied offer is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstances of the particular case.
Specific Offer	A specific offer is one, which is made to a definite person or particular group of persons. A specific offer can be accepted only by that definite person or that particular group of persons to whom it has been made.
General Offer	A general offer is one, which is not made to a definite person, but to the world at large or public in general. A general offer can be accepted by a person by fulfilling the terms of the offer. In case of general offer, the contract is made with person who having the knowledge of the offer comes forward and acts according to the conditions of the offer.
Cross Offers	Meaning: Two offers, which are similar in all respects made by two parties to each other, in ignorance of each other's offer are known as ' cross offers '. Effect: Cross offers do not amount to acceptance of one's offer by the other. Hence, no contract is entered into on cross offer.
Standing Offer/Open Offer/Continuing Offer	Meaning: An offer of a continuous nature is known as ' standing offer '. A standing offer is in the nature of a tender. It is the same thing as an invitation to an offer. A contract is said to have been entered into only when an order is placed on the basis of the tender.

5. LEGAL RULES FOR A VALID OFFER

An offer to be valid must fulfill the conditions discussed below:

Intention to Create Legal Relationship	An offer must intend to create legal relations. An offer must be such that when accepted, it will create legal relationship among the parties.
Certain and Unambiguous	The terms of the offer must be certain and unambiguous and not vague. If the terms of the offer are vague, no contract can be entered into because it is not



Terms	clear as to what exactly the parties intended to do.
Different from a Mere Declaration of Intention	The offer must be distinguished from a mere declaration of intention. Such statement or declaration merely indicates that an offer will be made or invited in future.
Different from an Invitation to an Offer	An offer must be distinguished from an invitation to offer. In case of an invitation to offer, the person making an invitation invites others to make an offer to him. It is prelude to an offer inviting negotiations or preliminary discussions.
Communication	An offer must be communicated to the person to whom it is made. An offer is complete only when it is communicated to the offeree. One can accept the offer only when he knows about it. Thus, an offer accepted without its knowledge does not confer any legal rights on the acceptor.

6. MEANING OF ACCEPTANCE

Acceptance	Acceptance means giving consent to the offer. It is an expression by the offeree of his willingness to be bound by terms of the offer. According to Sec. 2(b) of the Indian Contract Act, 1872, “A proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise”. Example: X offers to sell his car to Y for Rs.1 lakh. Y agrees to buy the car for Rs. 1 lakh. Y's act is an acceptance of X's offer.
Who Can Accept An Offer	In General, an offer can be accepted only by the person or persons to whom it is made. The Specific Answer to this question can be given with reference to type of offer as under: 1) In case of Specific Offer: An offer made to a definite person or particular group of persons (called specific offer) can be accepted only by that definite person or that particular group of persons to whom it has been made and none else. 2) In case of General Offer: General offer can be accepted by any person having knowledge of the offer by fulfilling the terms of the offer.
How To Make An Acceptance	1) Express Acceptance: An express acceptance is one, which is made by words spoken or written. 2) Implied Acceptance: An implied acceptance is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstances of the particular case.



7. LEGAL RULES FOR A VALID ACCEPTANCE

Absolute and Unqualified	According to Sec. 7(1) of the Indian Contract Act, 1872, “In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.” It means that an offer must be accepted as it is without any reservation, variation or conditions. A qualified and conditional acceptance amounts to making of a counter offer which puts an end to the original offer and it cannot be revived by acceptance.
Manner of Acceptance	According to Sec. 7(2) of the Indian Contract Act, 1872, the acceptance of an offer must be given in the following manner. a) If the proposal does not prescribe the manner in which it is to be accepted. The offer must be accepted in some usual and reasonable manner. b) If the proposal prescribes the manner in which it is to be accepted. The offer must be accepted in the prescribed manner.
Communication of Acceptance	The acceptance must be signified (i.e. Indicated or declared). In other words, the acceptance is complete only when it has been communicated to the offeror. A mere mental determination to acceptance in eyes of law unless there is some external manifestation of that determination by words or conduct.
By whom	Acceptance must be communicated by the offeree himself or by a person who has the authority to accept. In other words, if acceptance is communicated by an unauthorized person, it will not give rise to legal relations.
Time Limit	The acceptance must be given within the time prescribed (if any) or within reasonable time (if no time is prescribed). What is reasonable time depends upon the facts and circumstances of case.
Before Lapse of Offer	The acceptance must be given before the offer lapses or is withdrawn. In other words, if an acceptance is made after the lapse or withdrawal of the offer, it will not give rise to legal relation.

8. PROVISIONS RELATING TO COMMUNICATION OF OFFER AND ACCEPTANCE [SECTION 4]

The communication of offer and acceptance must complete so as to bind the concerned parties because as soon as the communication is complete the parties lose the right of withdrawal or revocation. The legal provisions relating to communication of offer and acceptance are as under:

When is Communication of Offer Complete?	The communication of offer is complete when it comes to knowledge of the person to whom it is made. In case an offer is made by post, its communication will complete when the letter containing the offer reaches the offeree. Example: X of Agra sends a letter by post to Y of Delhi offering to sell his car for Rs.1 lakh. The letter is posted on 1 st January and this letter reached on 7 th January. The communication of the offer is complete on 7 th January. Note: An offer accepted without its complete communication does not bind the offeror.



When is Communication of Acceptance Complete?	The communication of acceptance is complete at different times for the proposer and acceptor. The rules regarding the communication of acceptance are as under As against the proposer:- When it is put in a course of transmission to him, so as to be out of the power of the acceptor. In case of acceptance made by post, the proposer becomes bound by the acceptance as soon as the properly addressed and stamped letter of acceptance is duly posted even if such letter of acceptance is lost or delayed in post. As against the acceptor:- When it comes to the knowledge of the proposer. In case of acceptance made by post, the acceptor becomes bound by the acceptance only when the letter of acceptance is actually received by proposer.
Position of Contracts over telephone/telex/fax	A contract by telephone/telex/fax is treated on the same principle as an oral agreement made between two parties when they are face to face with other. In such case, the will complete only when the acceptance is received by the proposer and not when it is transmitted by the acceptor. Therefore, the acceptor must ensure that his acceptance is properly received by the proposer. Example: X made an offer to Y over telephone. While Y was conveying his acceptance, the line went dead and X could not hear anything. In this case, there was no contract at that merchant.

For example:-

Communication	When does the communication	Reason
a) Communication of offer.	7 th January	The letter containing the offer reaches the offeree on 7 th January.
b) Communication of acceptance as against the proposer	10 th January	The letter of acceptance is posted on 10 th January.
c) Communication of acceptance as against the acceptor	15 th January	The letter of acceptance is received by the proposer on 15 th January.

After posting the letter of acceptance on 10th January, Y can withdraw his acceptance by a speedier mode of communication so that the revocation notice reaches the proposer before the letter of acceptance.

9. LAPSE OF OFFER

An offer must be accepted before it lapses (i.e. comes to an end). An offer may come to an end in any of the following ways:



By Revocation	An offer lapses if the offeror revokes the offer before its acceptance by the offeree. According to Sec. - 5 of the Indian Contract Act, a proposal may be revoked at any time before the communication of acceptance is complete as against the proposer but not afterwards.
By Lapse of Time	An offer lapses if it is not accepted within the fixed time (if any prescribed in the offer) or within reasonable time (if no time is prescribed in the offer).
By Death or Insanity of the Offeror or Offeree	An offer lapses by the death or insanity of the offeror if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance. In other words, if the offer is accepted in ignorance of the death or insanity of the offeror, there will be a valid contract. It may be noted that in English law the death of the offeror terminates the offer even if acceptance is made in ignorance of the death.
By Failure of Accept condition Precedent	An offer lapses if it is accepted without fulfilling the conditions of the offer.
By Counter Offer	An offer lapses if the counter offer is made because a counter offer amounts to rejection of the original offer. Counter means making a fresh offer instead of accepting the original offer.

10. ACCEPTANCE IS TO OFFER WHAT A LIGHTED MATCH IS TO A TRAIN OF GUNPOWDER

The position relating to revocation of proposal and acceptance has been described by the following words

Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone.”

This statement primarily holds well under English law.

Here, **gunpowder = offer** and **lighted match = acceptance**.

An obligation which does not have its origin in an agreement does not give rise to a contract. Some of such obligations are

1. Torts or civil wrongs;
2. Quasi-contract;
3. Judgments of courts, i.e., Contracts of Records;
4. Relationship between husband and wife, trustee and beneficiary, i.e., status obligations.

These obligations are not contractual in nature, but are enforceable in a court of law. Thus, Salmond has rightly observed: “The law of Contracts is not the whole law of agreements nor is it the whole law of obligations. It is the law of those agreements which create obligations, and those obligations which have, their source in agreements.”



Law of Contracts creates **rights in personam** as distinguished from **rights in rem**.

RIGHTS IN REM	RIGHTS IN PERSONAM
Rights in rem are generally in regard to some property as for instance to recover land in an action of ejectment. Such rights are available against the whole world.	Rights in personam are against or in respect of a specific person and not against the world at large.
Examples A owns a plot of land. He has a right to have quiet possession and enjoyment of the same. In other words every member of the public is under obligation not to disturb his quiet possession and enjoyment. This right of A against the whole world is known as right in rem.	Examples A is indebted to B for Rs. 100. It is the right of B to recover the amount from A . This right of B against A is known as right in personam. It may be noted that no one else (except B) has a right to recover the amount from A . The law of contracts is concerned with rights in personam only and not with rights in rem.

CONSIDERATION

11. MEANING OF CONSIDERATION

Consideration is one of the essential elements of a valid Contract. The term 'Consideration' means something in return, i.e. quid-pro-quo.

[Sec. 2(d)] of the Indian Contract Act, 1872 defines consideration as under;

‘When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.’

11.1 ESSENTIAL ELEMENTS OF VALID CONSIDERATION

It must be given only at the Desire of the Promisor	An act constituting consideration must have been done at the desire or request of the promisor. Thus, an act done at the desire of a third party or without the desire of the promisor cannot constitute a valid consideration.
It may Move from any Person	An Act constituting consideration may be done by the promisee himself or any other person (i.e. stranger to consideration). Thus, it is immaterial who furnishes the consideration and therefore, may move from the promisee or any other person. (CHINNAYA V/S RAMIYA CASE) .
It may be Past or Present or Future	The consideration may be past, present or future.



It must be of some Value	The consideration need not be adequate to promise but it must be of some value in the eye of the law. It is understood in the sense of something in return and that something can be anything, adequate or grossly inadequate.
It must be Real and non-Illusory	The consideration must be real and not illusory. Example: X engages Y for doing a certain work and promises to pay reasonable remuneration. This promise is not enforceable because the consideration is uncertain.
Something other than the Promisor's Existing Obligation	The act constituting consideration must be something which the promisor is not already bound to do because a promise to do what a promisor is already bound to do adds nothing to the existing obligation.

11.2 TYPES OF CONSIDERATION

Past Consideration	The consideration, which has already moved before the formation of agreement. Example: X renders some service to Y at Y's request in the month of May. In June, Y promises to pay X Rs.1000/- for his past services. Past services amount to past consideration. X can recover A's 1000/- from Y.
Present Consideration	The consideration, which moves simultaneously with promise, is called present consideration. Example: In case of cash sale, promise to pay the price and promise to deliver the goods are performed simultaneously.
Future Consideration	The consideration, which is to be moved after the formation of agreement, is called future consideration. Example: X promises to deliver certain goods to Y after 10 days and Y promises to pay after 10 days from the date of delivery.

12. DIFFERENCE B/W STRANGER TO THE CONTRACT & STRANGER TO THE CONSIDERATION

STRANGER TO THE CONTRACT

Though a stranger to consideration can sue because the consideration can be furnished or supplied by any person whether he is the promisee or no, but a stranger to a contract cannot sue because of the absence of privity of contract (i.e. relationship' subsisting between the parties to a contract).

EXCEPTIONS:

- In case of Trusts: The beneficiary (i.e. the person for whose benefit the trust has been created) may enforce the contract.
- In case of Family settlement: The person for whose benefit the provision is made under family arrangement may enforce the contract.



- Assignment of a Contract: Where a benefit under a contract has been assigned, the assignee can enforce the contract subject to all equities between the original parties to the contract e.g. the assignee of an insurance policy.

STRANGER TO THE CONSIDERATION

General Rule According to Sec.- 10, consideration is one of the essential elements of a contract. According to Sec.- 25, an agreement made without consideration is void.

Exceptions to the General Rule No Consideration, No Contract

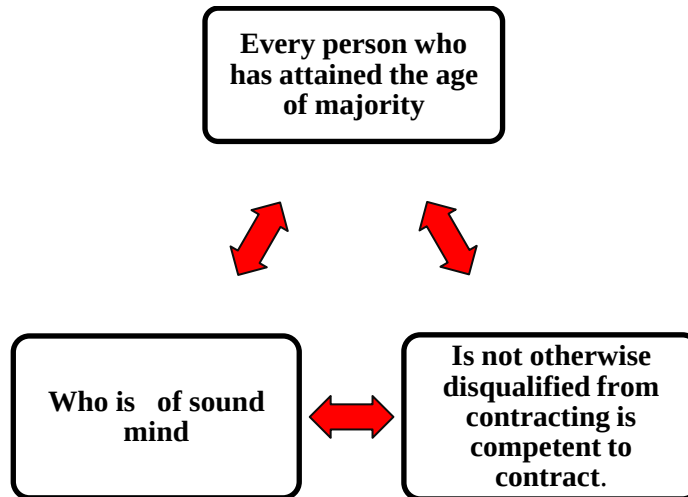
- a. Agreements Made on Account of Natural Love and Affection [Sec.- 2(1)]. Such agreement made without consideration is valid if;
 - It is expressed in writing,
 - It is registered under the law,
 - It is made on account of love and affection, and
 - It is between parties standing in a near relation to each other.
- b. Promise to Compensate [Sec.- 25(2)]: Such promise made without consideration is valid if;
 - It is a promise to compensate (wholly or in part); and
 - The person who is to be compensated has already done something voluntarily or has done something which the promisor was legally bound to do.
- a. Promise to Pay Time Bared Debt [Sec.- 25(3)]: Such promise without consideration is valid if
 - It is made in writing,
 - It is signed by the debtor or his agent, and
 - It relates to a debt which could not be enforced by a creditor because of limitation.
- b. Completed Gifts



CAPACITY OF PARTIES

13. WHO IS COMPETENT TO CONTRACT?

As per section 11 of the Indian Contract Act



13.1 WHO IS MINOR?

Section 3 of Indian Majority Act 1975 says any person below the age of 18 is Minor

RULES REGARDING MINOR

Agreement is void ab initio, i.e., without any legal effect.	(Mohiri Bibi v Dharamodas Ghose) A minor is incompetent to enter into any contract. Therefore, any agreement made by a minor is void ab initio, i.e., it is without any legal effect.
An agreement for benefit of minor is enforceable by minor only.	(a) The principal laid down in (Mohiri Bibi v Dharamodas Ghose) applies only if the agreement creates an obligation/liability on a minor. (b) Where, an agreement is for the benefit of a minor, the agreement is not void and therefore the minor can enforce such agreement. (c) If the other party to the agreement fails to perform his part of obligation, then minor can claim compensation.
No Estoppels Against A Minor	(a) If the rule of estoppels is applied against a minor, it would amount to an indirect way of enforcing a void agreement. (b) Therefore, the rule of estoppels does not apply against a minor.
No Ratification By A Minor	(a) Ratification <i>means</i> acceptance of a transaction already done. (b) An agreement entered into by a minor cannot be ratified by him after he has attained majority. (c) Where on attaining majority, a minor agree to pay for the goods supplied by a third party. Such agreement is void for want of consideration.
No Liability Of Guardian	The guardian of a minor shall not be liable for acts of a minor.



Minor's liability for necessities	Nature of liability As per sec.68, a minor is liable for necessities supplied to- (a) Him, or (b) Any other person who is dependent on the minor. Conditions (a) The liability is only for 'necessities of life'. The term 'necessity' means necessities of life as per the social status and conditions of life of the minor. (b) The minor is not already in possession of such necessities. (c) The minor shall not be personally liable.
Position of Minor	(a) Minor cannot be a guarantor. (b) Minor may be a shareholder/member of a company but only for fully paid up shares. (c) Minor can be an apprentice provided he is of at least 14 years of age. (d) Minor cannot be a partner in a firm. However, he may be admitted to the benefits of partnership.

13.2. A PERSONS OF UNSOUND MIND?

Meaning of 'Sound Mind'	Persons said to be of Sound Mind if he is able to- (a) Understand the contract, and (b) Make a rational & meaningful judgment.
Three Kinds Of Unsound Mind	• Idiots, • lunatics and • drunken persons

13.2. (B) At the time of *Entering* into a contract, a person must be of sound mind. A person can enter into a contract in accordance with the following principles-

NATURE OF PERSON	WHEN CAN HE ENTER INTO A CONTRACT?
A person of sound mind	(a) He can enter into a contract at All the Times. (b) He cannot enter into a contract only at such intervals of time, when he is of sound mind.
A person of unsound mind	He can enter into a contract only at such intervals of time, when he is of sound mind.

13.3 PERSONS DISQUALIFIED UNDER LAW

Contract by disqualified persons	Besides minors and persons of unsound mind, there are also other persons who are disqualified from contracting, partially or wholly. Contracts by such person and with such persons are void. If, by any provincial legislation, person is declared 'disqualified proprietor', he is not competent.
An Alien Enemy	During war, cannot enter into a contract with an Indian subject. He cannot sue in Indian Courts without a licence from the Central Government. Contracts made before the war may either be suspended or disallowed if they are against the public policy or if their performance would benefit the enemy.



Corporations	A statutory corporation cannot enter into a contract which is ultra vires its memorandum. Likewise, municipal bodies are disqualified from entering into contracts which are not within their statutory powers.
Sovereign States, Ambassadors	Enjoy certain special privileges with the result that they cannot be legally proceeded against in Indian Courts and Indian Citizen has to obtain a prior sanction of the Central Government in order to sue them in our law courts. However, they can, at their will enter into contracts which may be enforceable in Indian Courts.
Insolvents	When a debtor is adjudged insolvent, his property vested in the official receiver or the official assignee. As such the insolvent is deprived of his power to deal in that property it is only the official receiver or the official assignee is the one who can enter into contract in respect of that property and can sue and be sued on his behalf.
Convict	A convict while undergoing imprisonment is incapable of entering into contract. This incapacity to contract or to sue on a contract comes to an end when the period of sentence expires or when he is pardoned.

FREE CONSENT

Meaning of Consent:

The consent means an act of assenting to an offer. According to Sec. - 13, “**Two or more person are said to consent when they agree upon the same thing in the same sense**”. Thus, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is called ‘**Consensus-ad-idem**

14. FREE CONSENT

<i>Meaning of Free Consent</i> [Sec. - 14]	Free consent is one of the essential elements of a valid contract as it is evidenced by Sec.- 10, which provides that all agreements are contract if they are made by the free consent of the parties. According to Sec. - 14, Consent is said to be free when it is not caused by (a) coercion, or (b) under influence, or (c) fraud, or (d) misrepresentation, or (e) mistake.
Effect of absence of Free Consent [Sec.- 19]	When there is consent but it is not free (i.e. when it is caused by coercion or undue influence or fraud or misrepresentation), the contract is usually voidable at the option of the party whose consent was so caused.



14.1 COERCION

Coercion [Sec 15]	Coercion means compelling a person to enter into contract under a pressure or a threat. According to Sec. - 15, a contract is said to be caused by coercion when it is obtained by (a) committing any act which is forbidden by the Indian Penal Code; or (b) threatening to commit any act which is forbidden by the Indian Penal Code; (c) unlawful detaining of any property; or (d) Threatening to detain any property. A suicide and a 'threat to commit suicide' are not punishable under the Indian Penal Code. It does not mean that 'suicide and threat to commit suicide are permitted by Indian Penal Code. The question whether a threat to commit suicide amounts to coercion or not was considered by Madras High Court in case of (Chickham Ammiraju v.Seshamma). In case, a person threatened to commit suicide if his wife and son did not execute a release deed in a favour of his brother in respect of certain property .It was held that through a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden by that code. Hence, the treat to commit suicide amounted to coercion and the release deed was therefore, voidable.

14.2. A (UNDUE INFLUENCE) [SECTION 16]

Undue Influence [Sec. 16(1)]	Meaning of Undue Influence a) The term 'undue influence' means dominating the will of the other person to obtain an unfair advantage over the other. According to Sec. 16(1), a contract is said to be induced by undue influence. b) Where the relations subsisting between the parties are such that one of them is in a position to dominate the will of the other, and the dominant party uses that position to obtain an unfair advantage over the other.

14.2. B (PRESUMPTION OF DOMINATION OF WILL) [Sec. 16(2)]

According to Sec. - 16(2), a person is deemed to be in a position to dominate the will of another in the following three circumstances:

<i>Circumstances</i>	Examples
a) Where he holds a real or apparent authority over the other.	Master and servant, parent and child, Income Tax Officer and assessee, Principal and a temporary



	teacher.
b) Where he stands in a fiduciary relation to the other.	Trustee and beneficiary, spiritual adviser (Guru) and his disciples, solicitors and client, guardian and ward.
c) 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.	Medical attendant and patient.

Effect of Undue Influence [Sec.- 19A]	When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
Discretion of Court	Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any such benefit there under, upon such terms and conditions as the court may seem just.

14.2. C [DISTINCTION: COERCION DIFFERS FROM THE UNDUE INFLUENCE IN THE FOLLOWING RESPECTS]

Basis of Distinction		Coercion	Undue Influence
1.	Relationship	Parties to contract may or may not be related to each other.	Parties to a contract are related to each other under some sort of relationship.
2.	Consent	Consent is obtained by giving a threat of an offence or committing an offence.	Consent is obtained by dominating the will.
3.	Nature of pressure	It involves physical pressure.	It involves moral pressure.
4.	Who can exercise	Even a stranger to the contract can exercise it.	It can be exercised only by a party to a contract and not by a stranger.
5.	Restoration of benefit	The aggrieved party has to restore the benefit received under. (Sec. 64).	The party avoiding the contract may or may not return the benefit under (Sec. 19A).

14.3 FRAUD

Fraud	Meaning: The term ‘fraud’ means a false representation of fact made willfully with a view to deceive the other party. Sec- 17 defines the fraud as follows: ‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another partly thereto or his agent or to induce him, to enter into the contract: a) The suggestion, as to a fact, which is not true, by one who does not believe it to be true, e.g. X sells to Y locally manufactured goods as imported goods charging a higher price. It amounts to fraud.



	b) The active concealment of a fact by one having knowledge or belief of the fact. Mere concealment is no fraud. But where steps are taken by a seller concealing some material facts so that the buyer even after a reasonable examination cannot trace the defects, it will amount to fraud, c) A promise made without any intention of performing it d) Any such act or omission as the law specially declares to be fraudulent, e) Any other act fitted to deceive. It covers those acts, which deceive but are not covered under any other clause.
Silence as to Fraud	General Rule: According to explanation to Sec- 17, “Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.” Example – A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about the horse’s unsoundness. This is not fraud by A Example – (In <i>shri Krishna v. Kurukshetra University AIR 1975 SC 376</i>) a candidate failed to mention the fact of shortage of attendance in the examination form. Held, no fraud. Exceptions to the General Rule: The general rule that silence doesn’t amount to fraud has the following exceptions; Where the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak. Such duty arises in the following two cases: i. Where the silence itself is equivalent to speech. Example-B says to A, “If you do not deny it, I shall assume that the horse is sound.” A says nothing. Here A’s silence is equivalent to speech. If the horse turns out to be vicious A can be held liable for fraud. ii. Half Truth: Half-truth is worse than a blatant lie. Partial truthful disclosures may easily deceive the other party, e.g., prospectus of a company disclosing only average dividend declared by the company in the last 5 years instead of the actually dealing dividends over that period is a glaring example of half-truth amounting to fraud.

14.4 MISREPRESENTATION

Meaning and Essential Elements of Misrepresentation [Sec. - 19]	The term ‘Misrepresentation’ means a false representation of fact made innocently or non-disclosure of a material fact without any intention to deceive the other party. Sec.- 18 defines the term ‘misrepresentation’ as follows:
	The effects of misrepresentation are as follows: - 1) Right to Rescind the Contract: The party whose consent was caused by misrepresentation can rescind (cancel) the contract but he cannot do so in



Effects of Misrepresentation [Sec.- 19]	the following cases: <i>i)</i> Where the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence; <i>ii)</i> Where the party gave the consent in ignorance of misrepresentation; <i>iii)</i> Where the party after becoming aware of the misrepresentation take a benefit under the contract; <i>iv)</i> Where an innocent third party, before the contract is rescinded, acquired for consideration some interest in the property passing under the contract; <i>v)</i> Where the parties cannot be restored to their original position. 2) Right to Insist upon Performance: <i>The party whose consent was caused by misrepresentation may if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.</i>

14.5 MISTAKE

Mistake [Sec.- 20]	Meaning	A mistake is said to have occurred where the parties intending to do one thing by error do something else. Mistake is an erroneous belief concerning something. The mistake can be of two types shown below:
	Mistake of Law [Sec. 21]	Mistake of Indian Law The contract is not voidable because everyone is supposed to know the law of his country. Mistake of Foreign Law A mistake of foreign law is treated as mistake of fact, i.e. the contract is void if both parties are under a mistake as to a foreign law because one cannot be expected to know the law of other country.
	Mistake of Fact	Mistake of fact can be either bilateral mistake or unilateral mistake. a) Bilateral Mistake [Sec. 20]: The term ‘bilateral mistake’ means where both the parties to agreement are under a mistake. According to Sec.- 20, “Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.” b) Unilateral Mistake [Sec. 22]: The term ‘unilateral mistake’ means where only one party to the agreement is under a mistake. According to Sec.- 22, “A contract is not voidable merely



		because it was caused by one of the parties to it being under a mistake as to matter of fact.”

15. LEGALITY OF OBJECTS

15.1 [CIRCUMSTANCES UNDER WHICH THE OBJECT OR CONSIDERATIONS IS DEEMED TO BE UNLAWFUL]

If it is forbidden by Law	If the object or the consideration of an agreement is the doing of an act, which is forbidden (i.e. prohibited) by the law, the agreement is void. An act is said to be forbidden by law when it is punishable either by the criminal law of the country or by special legislation.
If it Defeats the Provisions of any Law	If the object or the consideration of an agreement is of such nature that, if permitted, it would defeat the provisions of any law, the agreement is void.
If it is Fraudulent	If the object of an agreement is to defraud others, the agreement is void.
If it involves or Implies Injury to a Person or Property of Another	If the object of an agreement is to injure a person or the property of another, the agreement is void.
If the Court Regards it as Immoral or Opposed to Public Policy	If the object or consideration is immoral or is opposed to the public policy, the agreement is void.

15.2 ILLEGAL AGREEMENTS

Illegal Agreements	Meaning	Illegal agreements are those agreements, which are: a) The collateral transactions to an illegal agreement also become illegal and hence, cannot be enforced. b) No action can be taken for the recovery of money paid or property transferred under an illegal agreement and for the breach of an illegal agreement. c) In case of an agreement containing the promise, some part of which is legal and other part illegal, the legal position is as under:
If the illegal part cannot be separated from the legal part.		The whole agreement is altogether illegal.
If the illegal part can be separated from the legal part.		The Court will enforce the legal part and Reject the illegal part.



15.3 AGREEMENTS OPPOSED TO PUBLIC POLICY

The following agreements have been held to be opposed to public policy:

Agreements of Trading with Enemy	Agreements made with an alien enemy are illegal on the ground of public policy.
Agreement for Stifling Prosecution	An agreement for stifling prosecution is illegal on the ground of public policy.
Agreements in the Nature of Maintenance and Champerty	Maintenance is an agreement whereby one party having no interest in suit, agrees to assist another to maintain suit. Champerty is an agreement whereby one party agrees to assist another in recovering property and in turn is to share in the proceeds of the action.
Agreement for the Sale/Transfer of Public Offices and Titles	The agreements for the sale or transfer of public offices or to obtain public titles like Padma Shree are illegal on the ground of public policy.
Agreements in Restraint of Parental Rights	An agreement, which prevents a parent to exercise his right of guardianship, is void on the ground of public policy.
Agreement in Restraint of Personal Liberty	An agreement that unduly extracts the personal liberty of any person is void on the ground of public policy.
Agreement in Restraint of Marriage (Sec.- 26)	Every agreement is restraint of marriage of any person other than a minor is void.
Agreement in Restraint of Trade (Sec.- 27)	Every agreement, by which any one is restraint from exercising a lawful profession trade or business of any kind, is to the extent void.
Agreement in Restraint of Legal Proceeding (Sec.- 28)	An agreement which restraints a party absolutely from enforcing his legal rights arising under a contract or an agreement which curtails the period of limitation within which the legal rights may be enforced is void.

VOID AGREEMENT AND CONTINGENT AGREEMENT

MEANING OF VOID AGREEMENTS

According to **Sec. 2 (g)** of the Indian Contract Act, 1872, a void agreement is an agreement, which is not enforceable law. The agreements, which are not enforceable by law right from the time when they are made, are void-ab-initio.

16.1 THE FOLLOWING TYPES OF AGREEMENTS HAVE EXPRESSLY BEEN DECLARED VOID UNDER VARIOUS SEC'S OF THE INDIAN CONTRACT ACT.

1)	Agreements by or with person's incompetent to contract (Sec. 10 & 11).
2)	Agreements entered into through a mutual mistake of fact between the parties (Sec.20).
3)	Agreement, the object or consideration of which is unlawful (Sec.23)
4)	Agreement, the consideration or object of which is partly unlawful (Sec. 24).
5)	Agreement made without consideration (Sec. 25).
6)	Agreements in restraint of marriage (Sec. 26).



7)	Agreements in restraint of trade (Sec.27).
8)	Agreements in restraint of legal proceedings (Sec. 29).
9)	Wagering agreement (Sec. 30).
10)	Impossible agreements (Sec. 56).
11)	An agreement to enter into an agreement in the future.

Agreement in Restraint of Trade (Sec. 27)	“Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.” This is because Article 19 (9) of the Constitution of India regards the freedom of trade and commerce as a right of every individual. Therefore, no agreement can deprive or restrain a person from exercising such a right.
Exceptions to the rule that “An Agreement in Restraint of Trade is Void.”	Restriction in case of sale of goodwill [Sec. 55(3)] – a partner may upon the sale of the goodwill of a firm, make an agreement that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreement shall be valid if the restrictions are reasonable. Trade Combinations: Trade combinations which have been formed to regulate the business or to fix prices are not void, the trade combinations which tend to create monopoly and which are against the public interest are void. Service Agreements: A clause in service agreement may or may not be in restraint of trade.
Wagering agreements (sec. 30)	Wagering Agreements: Sec. - 30 Agreements by way of wager are void; and no suit shall be brought for recovery anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or uncertain event on which any wager is made. Cleaning of Wagering Agreements: An agreement between two persons under which money or money’s worth is payable, by one person to another on the happening or non-happening of a future uncertain event is called wagering agreement. Effects of Wagering Agreement: - The agreement is void. - The agreement is illegal in states of Maharashtra and Gujarat. - No suit can be filed to recover the amount won on any wager. Agreements not to be treated as wags: - Agreement to pay prize money not exceeding Rs. 1000. - An agreement to pay a prize exceeding Rs. 500 to the winner of a horse race is not a wager.
Contingent Contract (Sec – 30)	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. Insurance contracts provide the best example of contingent contracts. (Sec. 31) Example-I: A contracts to pay B Rs.10, 000/- if B’s house is burnt. This is a contingent contract. Example – II: A promises to pay B Rs.1 crore if a certain ship does not return



	within a year.
Essential Features of a Contingent Contract	a) Dependence on a Future Event: The performance of a contingent contract depends upon the happening or non-happening of some future event. b) Collateral Event: The event must be collateral to the contract. c) Uncertain Event: The event must be uncertain. Note: The performance of a contingent contract must depend upon the happening or non-happening of an event and not on the mere will of the promisor. For Example: If A promises to pay to B Rs.10,000/- if he so chooses, it is not a contingent contract.

DISTINCTION BETWEEN A WAGERING AGREEMENT AND A CONTINGENT CONTRACT

Basis of Distinction		Wagering Agreement	Contingent Contract
1.	Reciprocal promises	It consists of reciprocal promises.	It may or may not consist of reciprocal promises.
2.	Void /valid	It is void.	It is valid.
3.	Main/Collateral Future Event.	Future event is sole determining factor.	Future event is collateral to the contract.
4.	Nature	It is always of a contingent nature.	It may not be of a wagering nature.
5.	Interest of Parties	Its parties have no other interest in the subject matter of the agreement except winning or losing of wagering amount.	Its parties may have other interest as well.

BENEFITS OF CONTRACT

Avoids Misunderstanding and legal disputes (Impact on business)

Misunderstanding is a common problem confronted in any business due to several reasons. To avoid such cases, drafting a contract is important and it is required for both parties to read the consented rules and abide by them. It has a large impact on the business as breaching the contract rules can lead to conflicts between the parties and thereby affect the business overall. Therefore, contracts in business are important.

Acts as a Record of the Business (Impact on business)

A written contract is a relevant record stating the mutual consent of the proceedings listed in the agreement. It can be used for future reference and, comprises information regarding the stipulated delivery timeline of any work assigned as per contract. The tenure of the contract is also highlighted in the agreement, which provides more clarity regarding the termination details.



However, the contract may be terminated in the worst case if the other party is not fulfilling the rules mentioned in the contract or bypassing the terms

Evidence in Court of Law

The contract can act as legal evidence if any of the party files a case against the other at times of contract breaching.

Increases Operational Efficiency

Contracts are essentially binding agreements that state that one side will deliver goods and services for a certain consideration by the other side. A contract with the appropriate term will help the business to operate efficiently.

It is important to understand that a blockade in a contract is equivalent to a blockade in revenue. Conversely, a well-drafted contract leads to a smooth flow of operation and hence easily helps to generate revenue. In addition to this, contracts are easier to manage and are comprehensive. This helps the business operation to save up a lot of revenue that can be diverted to more productive means.

Proof of Details (Impact on business)

The prime purpose of creating a contract is related to the recording of details, which both parties have agreed with mutual consent. It provides a precise knowledge of the services provided by the third party or monetary expectations to be met by the person. These details will serve as legitimate proof and are very important in a contract.

Provides Security (Impact on business)

A contract document plays a pivotal role in making the parties secure as it clearly specifies the tenure of the contract and set of responsibilities. Here, an employer is lawfully responsible to pay the committed salary on time and the employee is responsible to perform his duties as designated. Any deviation is considered contract breaching and, either of them has the sole rights to take appropriate action. Therefore, it is pivotal to understand the importance of law of contracts.

Provides Confidentiality

It includes an NDA (Non-disclosure agreement, which protects confidential information. According to this agreement, concerned parties are not entitled to reveal the business and monetary transactions between them with any third person. In case of disclosure, either of them will be subjected to suffering as per contract rules, enforced by the law legally.



Prevents Conflicts and Minimizes Risk

Contracts detail down each party's responsibility. This leads to clarity between the parties and better understanding among them regarding the deal. Conflicts in a business are undesirable as they exploit resources that could have otherwise been used to increase productivity.

BUSINESS/COMMERCIAL CONTRACTS: A BRIEF

A commercial contract forms an integral and critical part of any business venture, as such arrangements detail the rights and obligations, commercial terms discussed and agreed upon between the parties including recourse in case of any dispute. Additionally, commercial contracts are documents that cover a combination of legal and commercial factors.

Now, the term “contract” is defined under Section 2(h) of the Indian Contract Act, 1872 as an agreement enforceable by law. Commercial contracts are primarily governed by the Contract Act and; the Specific Relief Act, 1963 (“SRA”).

It also provides the grounds which are necessary to claim damages and indemnity from a defaulting party in case of breach or violation of any provisions or obligations under the contract. On the other hand, the SRA provides for remedies to persons whose contractual rights have been violated such as the recovery of possession of the property, specific performance of the contracts, rescission of contracts, rectification of instruments etc. Under this background, let us understand some important features of Commercial Contracts in detail.

NEGOTIATION OF BEST COMMERCIAL AND OPERATIONAL TERMS WITH VENDOR

Following are some major guidelines for creating best commercial and operational terms with the vendor:

1. Make a plan

Before you reach out to the vendors, make a plan as to what you are going to ask. For example - have a plan in place before you approach a vendor to negotiate new payment terms. It's important to know what you can afford to pay now. This plan will give you a starting point from which to negotiate. Additionally, take the time to review what your rights are under your contract. Be sure to check for cancellation clauses and penalties in addition to late payment fees. You may want to speak to a lawyer about the specifics of your vendor agreement before exploring a renegotiation.

2. Build a foundation of communication

Without clear and trustworthy communication, one never gets anywhere. Take the time to mindfully commit to the conversation, and speak in person whenever possible. Do your best to respond to communications in a timely manner, and show respect by saving communication for



appropriate times. Consider a single point of contact for the vendor, so it's always the same person reaching out and getting to know one another. When there are issues, give your full attention to solving the problems and establishing trust. If a vendor sends mass emails about prices or services, it is unlikely they are open to negotiation so look for vendors with a personal touch in communication.

3. Be proactive in communication

Early communication is always more welcome than suddenly reaching out in an emergency. Try to be proactive about your need to renegotiate. Explore renegotiations and deadline extensions before you stop payment or cancel the agreement altogether.

4. Research pricing

It is critical that one research about the pricing and market fluctuations. You will also need to understand variance in quality, since most vendors will try to justify higher prices with better quality. For most vendors, it is economical to keep existing customers and more expensive to find new business. If a vendor is worried, they might lose you, this could be used as leverage as they may be more willing to whittle down prices. Understanding what existing vs. new business costs them can aid in negotiation.

5. Learn from

them Treat your vendors like the industry experts they are, and ask them to help you learn more about your field. Not only will you better understand your industry, but you will earn their respect. Do your best to understand where they are coming from and the issues they face in the industry. Vendors want to work with well-informed business owners that will run their companies successfully over the long term. Demonstrate that you want to stay on the cutting edge of industry development and learn the details of the business and you will demonstrate that you are a company smart enough for partnership.

6. Sell the vendor

Your vendor wants to be well-represented and sell as much of their product as possible. Demonstrate to the vendor how you can help them meet their goals and increase their sales. Will you get their product in front of key demographics? Is your sales team world-class? Maybe you can find ways to promote the vendor in your operations. Sell your operation to the vendor and they will be excited to work with you (and be open to negotiations).

7. Get quotes

Even if you know which vendor you would prefer, always get multiple offers from potential vendors. Competition is key for driving down pricing and increasing the customer service of your vendor. Consider not only other products, but getting your own wholesale with transport



and packaging (or any other steps the vendor would complete). Don't forget to get quotes for different quantities or tiers. The entire process of procurement is negotiable and presents multiple touch points for improvement and innovation.

8. Try a different angle

It may be that your vendor is unable or unwilling to negotiate price. That does not mean the contract negotiation is over. Try finding other areas where you can make a better deal, perhaps the down payment, interest, repayment terms and length, discounts in bulk, or other factors.

9. Talk to customers

If you want to establish a relationship with a supplier that will include the perks of price negotiation, it is a good idea to talk to their current customers. Ask the supplier for a list of client references and then reach out to them. You can determine if they are a reliable vendor and also come armed with the prices their existing customers are paying. The payment terms offered to these customers may give you a jumping off point for your negotiations.

10. Lead with a deposit

The vendor is the one taking a risk, and what they truly want is to get paid. If a vendor feels confident in your payment, they will be more willing to negotiate prices. Therefore, offering up a large deposit or downpayment on an order can encourage the vendor to give you a better price.

11. Be Patient

It's a general rule of thumb that the "winner" is usually the party who wants it the least, because the party who wants it the most is more willing to bend. When you are ready to negotiate, have a Plan B and even a Plan C for other vendors. Stay confident and remember that you can always walk away. Typically, it is not a good idea to take the first offer—carefully consider and respond with a better counter offer. It is also important to leave plenty of time for negotiations and don't rush through.

12. Be Partners

A truly successful relationship between you and your vendors will look more like a partnership, not like an order fulfillment chore. Figure out what will make your vendor's life easier—how can you save them money or time? Offer your supplier something that is mutually beneficial and treat the relationship like a long-term partnership. Consider what other services and perks you could offer them beyond your business order. In a partnership, you may log months or even years together, so know when to back off and let them "win" for the time being.



GOOD CONTRACT: ANALYSIS

Contracts gain such vital importance in our lives because they legally bind the parties in a relation. Any breach of a contract can be redressed, and the damages can be liquidated. Besides the basic feature, the contract also contains other vital legal aspects that boost the relationship between parties.

In general, a good contract is understandable and unambiguous. Contracts that clearly state their terms and condition are preferred over contracts that don't. All relationships require clear communication for healthy continuation and so do business relations. Contracts serve as an efficient communication tool that ensures that the relationship is a healthy one.

Contracts are by nature collaborative and relational. By clearly stating the important clauses for the parties they lead to transparency which enhances communication. A contract with convoluted language and imprecise terms is likely to cause a great deal of confusion between the parties. Further, well drafted contracts clearly capture the obligations of the parties. If a party tries to back out of its obligations, it can cause problems in the relationship. Hence, a good contract cuts down the likelihood of a breach.

GENERAL AND SPECIAL CONDITIONS OF A CONTRACT

Although, in the previous paras, we have already discussed in detail on contract, its meaning, significance, valid essentials of contract also the concept of commercial contracts. Yet, it is important to note that it is majorly the terms and conditions of the contract, which make the contract a good contract. It is always imperative that general and the specific terms are captured clearly in contract. This is not only making the agreement effectively enforceable but also minimize the risk of dispute between the parties.

General Conditions

The general terms and conditions of the contract include but not limit to the following:

1. Legal Status of the Parties

This clause deals with the legal status and nomenclature of the parties entering into the contract.

2. Definitions

Definition clause is an important clause in a contract. It defines all the important and capitalized terms in a contract. It majorly aims to capture the intent of a capitalized term used in a contract.

3. Interpretation Clause

A good contract always captures a general interpretation clause, which clarifies the intention of some general terms used in the agreement. For example, he includes she and alike.



4. Object/ Scope of Work and/or Services

This is one of the important clauses in a contract. It captures the scope of work/object for which the contract is being entered upon between the parties.

5. Representations and Warranties

In this clause, parties represent and warrants certain factual details, which forms the integral part of the contract and basis which parties are acting upon the contract.

6. Contractual Period

This clause defines the term of the contract. A good contract also captures the renewal of term and the conditions of such renewal.

7. Fees and Taxes

Consideration is a valid essential of the contract. Hence this clause captured fees and taxes mutually decided for the scope of work of that contract.

8. Payment Method

Apart from consideration for a contract, it is also vital to clearly capture the method vide which the fees and commercials of the contract shall be paid.

9. Commencement Date

This clause identifies the effective date of the contract on which the rights and obligations of the parties shall take effect.

10. Force majeure/Mitigating Factors

The term “Force Majeure” simply means “greater factor”. This clause should be included in all commercial contracts because it can shield parties from events that are beyond their control. For example a shipping schedule could be unavoidably interrupted in the event of a natural disaster such as an earthquake or hurricane. In general, the term “force majeure” is very broad, and many contracts have clauses that cover items like terrorist attacks and even acts of God. This provision is necessary to ensure that any failure to perform as a result of an unforeseen interruption is not considered as breach of contract.

Special Conditions

As the name suggests, special conditions are special as per the nature of the contract. These conditions cannot be common for all the contracts. Few instances of special conditions are as follows.



- Sub-Contracting
- Sub-Contracting
- Additional Scope of Work
- Alternative Dispute Resolution
- Data Deletion and/or Data Purging Clause
- Privilege and Immunities
- Tax Exemption
- Choice of Law

Execution of Contracts

Contract execution is a system event in which all appropriate parties sign the contract and the contract becomes a legal entity. When the contract is signed, an internal user can record the execution and attach a scanned signed copy of a document to the contract.

In short, executed contracts are agreements that have passed the signature stage and have been approved by all parties involved. An executed agreement establishes a contractual and enforceable relationship, and each party is now responsible for fulfilling the legal obligations stated in the agreement.

CONTRACT RELATED DOCUMENTS AND CORRESPONDENCE

Almost all the well drafted contracts keep the following clause in the contract:

“Documentation and Correspondence. All documentation and correspondence to be delivered between the Parties pursuant to this Agreement shall be in the English language.”

The clause itself confirms that there are plenty of correspondence and documents in a contract and each and every such documents and correspondence are vital to the contract. Hence this section deals with the common documents and correspondence related to a contract.

Contract Documents: Meaning and Significance

A contract document is a legally binding agreement between two or more parties. It captures:

- | |
|---|
| <ul style="list-style-type: none">• the terms and conditions of the relationship between the parties of the contract, and |
| <ul style="list-style-type: none">• sets forth the rights and obligations of each party. |

The contract document may also include different types of contract documents, and the specific documents required for a particular project will vary depending on the type of project and the contracts involved. The most common types of contract documents are:

1. Contract Agreement: A contract agreement defines the agreement between the client and the contractor in which the parties are specified and their responsibilities are defined in the



construction process. It is the essential document to which other contract documents attach or reference. A standard document contacts can be used for the agreement.

2. Scope of work: This document outlines the specific work to be completed under the contract. It may also include information on how the work will be performed, timelines, milestones, and other important details.

3. Addendum: An addendum is a document attached to and executed with the original contract, making it a part of the original contract from the start. It usually contains information or requirements of the parties that are not fully spelled out in the contract. An addendum should not be confused with an amendment (or modification), which is a document that modifies an already signed contract.

4. General Conditions: General conditions define all general terms and items such as utilities, vehicles, organizational structure, mobilization, and demobilization. But these items are not directly related to the construction activities. Obligations of both parties, general conditions, overhead costs, bonuses, and some other conditions are included in this portion. General conditions set the framework of the contract that establishes all the rights and obligations of the parties involved.

5. Special Conditions: Special conditions describe specific requirements and instructions for the work. Mostly they are addendums to the general conditions. Special conditions include details and conditions regarding the individual tasks or the whole project.

6. Bill of Quantities: Bill of Quantities is a document used for tendering that lists all work to allow the contractor to price the work for which he or she is bidding. It includes quantity and price for each work and after the bidding phase, it will be an attachment of the contract document.

7. Schedule: Work schedule is very important for both parties. Because a project cannot be performed without a proper plan. A project schedule shows site delivery date, start and finish milestones, project duration, and other useful information. Tasks are listed and grouped under specific Work Breakdown Structure levels such as civil, electrical, and mechanical works within a project schedule. A work schedule can be created by using various project scheduling techniques.

MAINTENANCE OF CONTRACT DOCUMENTS

Many people who have shred their calories in finding a specific document in a sea of paperwork, can easily understands the importance of document management. However, document management for contracts is much more hurricane and complex task entirely. At the same time, it is equally important to maintain the contract documents, as this assists in the effective realization of contractual rights and also to execute it rights, if need so.



It involves organizing and tracking documents. Maintenance of contract documents means creating and maintaining accurate records of all communications and correspondence with contracting parties. It may or may not involve monitoring compliance with contract terms and keeping track of any changes or amendments that need to be made.

Types of Maintaining Contract Documents

Document management is the process of sourcing, organizing, storing, and analyzing documents. When it comes to document management, there are two main types of systems: (a) manual and (b) electronic.

(a) A manual document management system (DMS) is controlled by humans. This could involve a physical filing system where employees manually file documents or an online system where employees enter data into a database.

(b) An electronic document management system (EDMS), on the other hand, is a system that is controlled by computers. This could involve an online system where employees access files remotely or an offline system where employees download files to their computers.

Document Management vis-à-vis Contract Management

Document Management	Contract Management
Document management includes maintaining, arranging and storing the documents for better tracking and retrieval, when necessary, but it does not include features like negotiation, risk management, and compliance.	Contract management includes elements of negotiation, risk management, and compliance.
Document management is simply the process of organizing and storing documents.	Contract management is the process of negotiating, drafting, executing, and managing contracts.
Document management helps businesses find specific documents quickly and easily.	Contract management helps businesses manage their contractual obligations effectively.
Document management is a sketchy solution that helps businesses organize and track documents.	Contract management is a more comprehensive solution that includes risk management, compliance, and the negotiation of contracts.
Document management is more beneficial for businesses that need to find specific documents quickly and easily.	Contract management is more beneficial for businesses that need to manage contractual obligations.



TRACKING OF CONTRACTS AND EXTEND, RENEW AND CLOSE

Contract tracking is the process whereby stakeholders in the contract lifecycle (particularly in legal or compliance) are able to know where a contract is alive or not, without having to investigate across multiple systems.

Contracts go through many stages to minimize an organization's financial, legal, and procurement risks. These stages include:

Request and draft: The parties decide to enter into an agreement, and one party offers the initial draft with the necessary clauses, terms, and conditions.
Review and negotiations: A lawyer or business professional examines the contract provisions to identify any potential risks. Both parties negotiate over the contract's terms and conditions and make any necessary adjustments to establish acceptable terms for both sides.
Approval and execution: If both parties agree to the contract's wording, they approve it and execute the deal via their preferred signing method.
Storage: Each party should store the signed contract in a secure yet easily accessible location.
Performance: Each party complies with its obligations and monitors the other's performance over several months or even years. This stage also usually requires quickly finding, searching, and reviewing contract provisions.
Reporting and analytics: Both parties can accumulate, filter, analyze, and report on contract data.
Amendments: Both parties can negotiate addendums to their contracts and use joiners to add a new party to the original contract.
Extend, Expiration (Close) and Renewals: When the parties reach the end of the contract, they may decide to renew their agreement, negotiate a new contract, or terminate it.

When done correctly, contract tracking empowers stakeholders to execute, monitor, and comply with the agreement's terms more effectively. Additionally, a contract tracking system makes document processing and the approval process smoother and lets an organization gain valuable insights into its own operations.

Golden Rules for Tracking the Contract for Renewals, Extension and Closure:

Following are the golden rules which help in the effective tracking of the contracts

Know the place/storage of contracts

The first thing you should do when preparing to track your contracts and their details is to be sure you know where all of your agreements are located. It might sound simple, but for far too many companies, contracts are not all stored in one location.



Wherever you choose to store your contracts - whether it's a filing cabinet, a shared drive, or using contract management software - establish a system for organizing your repository so you can quickly find any agreement when it needs to be referenced or reviewed. This is a crucial beginning step that will impact everything else you do with your contracts throughout the life of each agreement.

Determine the requirement of tracking

Once each new agreement has been executed. Consider documenting every piece of important data that needs to be monitored. One need to create a strategy through the time know that contract is expired and archived. Some of the common pieces of information to track and monitor during the contract lifecycle include:

- Deliverables and obligations
- End dates
- Opt-out/renegotiation windows
- Termination notice requirements
- High-risk clauses
- Compliance requirements
- Contract performance.

Be proactive, not reactive

Staying ahead of dates and deadlines and proactively looking for risks and opportunities during the contract monitoring process will help to remain in control of agreements and obligations. By regularly reviewing agreements marked as important or critical areas and the specific areas outlined in the previous section, one will have the best chance of catching any changes needed or corrections early rather than having to react to issues after they happen.

The reason it's so important for contract managers to track deadlines well in advance is so there's time to assess the situation before making a decision about next steps. For example, when you know a contract end date is coming weeks or months ahead of time, you can work with other stakeholders to make an informed decision about renewing, renegotiating, or terminating the agreement.

BUILD AND MAINTAIN RELATIONSHIP WITH VENDORS, CLIENTS

Business relationships are a two-way street. One party does not hold more power over the other. It requires commitment and maturity from both sides. Understanding each other's perspectives and respecting differences is key, along with an understanding of how each party benefits themselves as well as each other.



It requires open and honest communication, and the ability to have difficult conversations if required. It's worth it though, as a great supplier relationship can make a world of difference in serving your customers and lowering your own stress levels.

1. Choose suppliers that align with your values

If excellent customer service is important to you then choose suppliers for whom this is also paramount. It is vital for good customer relations that any products, materials or services you supply your clients have warranties or return policies that match your own. It is a bit like personal relationships. It is very difficult to maintain a relationship with a person who differs in core values. When selecting suppliers consider their ethics, values, positioning and reputation.

2. Understand Suppliers Needs

Respect their way of doing things and make it easy for them by following their processes and timelines. Provide the product as per the requirements of customer/supplier as the case may be. Stay on top of supplying things like insurance certificates, business information and purchase order numbers.

3. Be a great customer

Think about what you love about your customers and do the same for your suppliers. Pay on time and keep your records in order so you don't have to waste your suppliers' time by getting them to re-send things.

In the same way that you go the extra mile to look after a great customer, so will your suppliers if you are a great customer to them. Putting some deposits in the goodwill bank can be very helpful if you need a favor from your suppliers at a later stage.

4. Maintain regular communication

Keep in touch with your suppliers and try and schedule a time to get together over a coffee. Reflect on what's working well and talk through areas for improvement.

Having the opportunity for both parties to provide feedback on what's been helpful or difficult can be the spark to develop innovative ways to strengthen the relationship even further.

5. Give timely feedback

Don't ring up and yell at your supplier if stuff is not going right. Instead, be calm and direct so things do not fester and become the proverbial storm in a teacup.

Despite the very best preparation and planning, mistakes and miscommunication can happen. It is important to tackle them with your supplier quickly and in a professional manner. Always



allow your supplier the opportunity to be part of a solution. In a good supplier relationship, it is essential to speak up when something is wrong.

6. Reward good service with loyalty If your supplier has done the right thing by you, reward them with your loyalty and continue your business relations with them.

CONTROL OVER ANY CHARGES FOR SERVICES OUT OF THE SCOPE OF THE CONTRACT

A change to an existing contract is a modification. A contract modification could change the scope of the contract, the price of the contract, or both. A contract modification exists when the parties to the contract approve the modification either in writing, orally, or based on the parties' customary business practices.

However, in cases where the parties to an arrangement have agreed to a change in scope, but not the corresponding change in price (for example, an unpriced change order), the reporting entity should estimate the change to the transaction price in accordance with the guidance on estimating variable consideration.

Management should assess all relevant facts and circumstances (for example, prior experience with similar modifications) to determine whether there is an expectation that the price will be approved. Below example illustrates a contract modification with an unpriced change order.

ACTION IN CASE OF BREACH OF CONTRACT

Chapter VI (Section 73 to 75) of the Indian Contract Act, 1872 deals with the consequences of breach of the contract.

Section 73 – deals with compensation for loss or damage caused by breach of contract

When a contract has been broken, the 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, which naturally arose in the natural 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.

- No compensation shall be given to any remote and indirect loss or damage sustained by reason of breach. Compensation in regard to failure to discharge obligation which resembles those created by the contract.
- An obligation resembling those created by contract has been incurred and has not been discharged, any person affected by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.
- Compensation for loss or damage which naturally arose in the usual course of things from such breach.



- Compensations to be recovered for loss or damage which the parties knew or which would have naturally arisen in the usual course, to be likely to result from the breach of it.

An uncommonly known fact is that Section 73 is based on a case law, i.e., *Hadley v. Baxendale* (1854) 9 Ex. 354. The well-known rule in this case was stated by the Court as follows:

“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 either such as may reasonably and fairly be considered as arising naturally, i.e., according to 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.”

Section 73 deals with remote and indirect loss or damage

It states that no compensation is payable for remote and indirect loss or damage arising out on account of breach of contract. The indirect loss cannot be said to arise on usual course of things. The aggrieved party can claim compensation for indirect loss or loss of profit, only where it is expressly made known to the other party or contemplated by contract that breach of non-performance of the contract would result in some indirect loss or loss of profit to the party term remoteness of damage refers to the legal test used for deciding which type of loss caused by the breach of contract may be compensated by the award of damage.

Section 73 deals with breach of resembling contract

It confers a statutory right upon a party to get compensation from a party who has incurred a statutory obligation to pay compensation in case default even though there may be no contract to pay compensation. The party in default is under obligation to pay compensation to the injured party as if there was a contract and has broken such contract.

Section 73 deals with: mitigation of losses

It explains that the means which existed of remedying the inconvenience caused by the non-performance of the contract must be considered while calculating the damage or loss for breach of the contract. [*M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore*, AIR 1981 SC 162, 168]

Section 74 – Penalties with regard to Breach of Contract

The party to the contract may agree at the time of contracting that, in the occurrence of breach, the party in default has to pay a stipulated sum of money to the other, or may agree that in the event of breach by one party any amount paid by him shall be forfeited. If this sum is genuine pre-estimate of damage likely to flow from the breach is called ‘liquidated damages’. If it is not genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be called ‘penalty’



Section 74 provides for the measure of damages in two classes: (a) where the contract names a sum to be paid in case of breach; and (b) where the contract contains any other stipulation by way of penalty (Fateh Chand v. Balkrishna Das [1964] 1 SCR 515).

Essence of Penalty and Liquidated Damages

Penalty is a payment of money to a non –defaulting party, which puts the other party in fear and enforces the other party to perform its promise under the contract. The penalty is deterrent in nature.

A liquidated damage is a genuine and reasonable pre-estimate of damage. Liquidated damages mean it shall be taken as the sum which the parties have by the contract assessed as damages to be paid whatever may be the actual damage

Section 75 – Compensation to the Party Rightfully Rescinding the Contract

A person who rightfully rescinds the contract is entitled to compensation for any damage which he has sustained through non fulfillment of the contract .A party to a contract is entitled to rescind the contract in circumstances given in Section 39, 53, 55, 64 and 65 of the Contract Act. The claim for compensation under Section 75 is maintainable when the right of repudiation of the contract has been exercised either of the Section 39, 53, 54 and 55 of the Contract Act, 1872 (Mirza Javed Murtaza v. UP Financial Corpn), Kanpur, AIR 1983 All. 235.

Damage can be claimed by:

Only those parties can claim damages for breach of contract who have performed or is willing to perform his part of the obligations arising under the contract. Section 73 and 74 are for the benefit of a party willing to perform the contract and not for defaulting party. Loss which is caused by the party's failure to fulfill his duty is not recoverable from the other party. A party to a Contract cannot be in a better position by reason of his

own default, than if he had fulfilled his obligations. A person, who is not a party to the contract, cannot claim damages.

Can damage or loss suffered by a third party be claimed?

A party claiming the damage need not necessarily suffer any loss from breach of contract. When it is contemplated by the contract. When it is contemplated by the contract that breach by any of the parties to the contract is likely to cause loss to an identified or identifiable stranger to the contract, rather than to the contracting party, a party not in default can claim damages for the loss caused to an identified or identifiable stranger to the contract. Thus, the party may recover substantial damages even though it does not personally bear the cost of correcting the defects or personally suffers the diminution in the value; provided this was intended or was within the contemplation of the parties; and if such intention or contemplation is shown it is immaterial that



the true prayer or suffered is stranger to the contract. [Alfred McAlpine Constn Ltd. v. Panatown Ltd.]

Can interest be claimed as damage?

Interest would be refused if the party fails to show that interest is being claimed under a contract or on account of usage or customs. The Supreme Court in Mahavir Prasad Rungta v. Durga Dutta, 1961 AIR 990 has ruled that interest can be claimed only if it is payable by custom or there is express or implied provision in the agreement for payment of interest or under provisions of substantive law plaintiff is entitled to recover the interest.

Nature of remedy of damage

The principle behind awarding damage for breach of contract to the party, who has suffered the loss, is to place that party in the same position in which it would have been had that contract not been broken. The damages must commensurate with the loss suffered. Where the contract is broken by one party, contract is discharged, and the obligations under the contract come to end; a new obligation arises for the payment of damages.

A contract is the fountain head of a correlative set of rights and obligations of the parties and would be of no value if there is no statutory provision for compensation for damage or loss caused to the aggrieved party. Chapter VI of the Indian Contract Act, 1872 provides for the remedy to the non-defaulting party to contract by way of compensation for damage or loss caused due to breach of contract by the other party. Section 73 provides for compensation for actual damage or loss from the party in breach of the contract Reasonable liquidated damages are payable without proof of loss. Section 74 provides that contracting parties in the event of breach, may agree that the defaulted party shall pay a stipulated amount to the other, or may agree that in the event of breach by one party any amount paid to him shall be forfeited. If it is not genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be called penalty. However mere stipulation does not give right for compensation by way of penalty. Prove has to be established for loss or damages caused by breach of contract.

A Decree for Specific Performance

The situation where specific performance of contract may be allowed are as under:

When there is no standard for ascertaining actual damage

When it is impossible to quantify the actual damage caused by the non-performance of the act agreed to be done, the Court may, in its discretion, grant a decree of Specific Performance of that act.



When monetary compensation would not afford adequate relief

When the act agreed to be done is such that compensation offered in money for its non-performance would not afford adequate relief. However, until the contrary is proved, it is to be presumed that:

The breach of a contract to transfer immovable property cannot be adequately compensated by payment of money.

- Where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market.
- Where the property is held by the defendant as the agent or trustee of the plaintiff.
- Usually, the Courts are entitled to presume that in case of breach of contract to transfer of immovable property, mere compensation is not adequate relief, whereas specific performance is adequate relief, whereas in the case of movable property, compensation is the ordinary relief and specific performance is exceptional. However, it must be noted that these presumptions are rebuttable.

In Bank of India v. Chinoy, it was held that if shares are freely available in the market, then specific performance would not be granted. If shares of a particular company, for instance a private company are not readily available in the market, specific performance would be granted.

Suits for Enforcement of a Contract to Execute A Mortgage

In a suit for the enforcement of a contract to execute a mortgage or furnish any other security for the repayment of any loan which the borrower is not willing to pay at once, specific performance may be allowed. However, where only part of the loan has been advanced by the lender, he must be willing to advance the full amount of the loan.

- Contracts for the purchase of any debentures of a company.
- Suits for the execution of a formal deed of partnership.
- Suits for the purchase of partner's share.

Suits for the enforcement of a building construction contract or any other work on land, provided the following three conditions are fulfilled:

1. The building or other work has been described in the contract in a reasonably precise manner, so as to enable the Court to decide the exact nature of building or work;
2. The plaintiff has substantial interest in the performance of the contract, and the interest is such that financial compensation for non-performance of the contract would not be adequate relief; and



3. After the contract, the defendant has obtained possession of the whole or any part of the land in question.

It is important to remember that specific performance is an equitable remedy, and is therefore left to the discretion of the Court, rather than to the right of a person by law.

An Injunction

Under Section 36 of Specific Relief Act 1963, an injunction is defined as an order of a competent court, which:

•	Forbids the commission of a threatened wrong,
•	Forbids the continuation of a wrong already begun, or
•	Commands the restoration of the status quo (the former course of things).

Under Sections **36 & 37 of the Specific Relief Act 1963**, there are two types of injunctions – temporary and perpetual, whereas Section 39 governs mandatory injunctions.

- Temporary or interim injunctions are governed by Order 39 of Civil Procedure Code 1908 and are those injunctions that remain in force until a specified period of time, e.g. 15 days, or till the date of the next hearing. Such injunctions can be granted at any stage of the suit. L
- Permanent or perpetual injunctions, as under Sections 38 to 42 of the Specific Relief Act, 1963 are contained in the decree passed by the Court after fully hearing the merits of the case. Such an injunction permanently prohibits the defendant from committing an act which would be contrary to the plaintiff's rights.

When are perpetual injunctions granted?

Under Section 38 of the Specific Relief Act 1963, whenever the defendant invades, or even threatens to invade the plaintiff's right to enjoyment of property or right to property itself, the Court may grant to the plaintiff a perpetual or permanent injunction in the four cases as follows:

(i)	Where there is no standard for quantifying the actual damages caused, or likely to be caused, to the plaintiff, by the invasion of his rights;
(ii)	Where invasion of the plaintiff's rights is such that any compensation in money would be inadequate relief;
(iii)	Where the defendant is a trustee of the property for the plaintiff; (iv) Where the injunction is necessary to prevent multiplicity of judicial proceedings.

Mandatory injunctions are granted in cases where in order to prevent the non-performance of an obligation, it is necessary to compel the performance of certain acts which the Courts are capable of enforcing. Thus, the Court may at its discretion grant an injunction to prevent such non-performance and also to compel performance of the required acts. This injunction is applicable to



the breach of any obligation. It may be permanent or temporary, although temporary-mandatory injunctions are rare.

Damages instead of, or in addition to injunction:

Section 40 of the Specific Relief Act 1963 states that a plaintiff may claim damages either in addition to or in substitution for suing for perpetual or mandatory injunction, and if the Court deems fit, it may even grant such damages.

It is worth emphasizing that damages and injunction are not alternate remedies. Both may be allowed at the discretion of the Court.

However, damages cannot be granted unless the plaintiff has claimed damages in the plaint. In the event that the plaintiff has not claimed damages in the plaintiff itself, he should be allowed to amend the plaintiff, at any stage of the proceedings, on such terms as may be just in the circumstances of the case.

To conclude, it is thus evident that there are several remedies available in case of breach of a contract, none of which are very simple. One would have to overcome an abundance of challenges and rebuttals to prove a case of breach of contract.

INDEMNITY BONDS & UNDERTAKINGS

As per Section 124 of the Indian Contract Act of 1872, an Indemnity bond refers to an agreement between two persons or parties, where one person promises to make payment for the losses and damages of another person caused by his/her conduct or by another party. In other words, it is a financial contract drawn between two parties that promise financial security to a person as the aggrieved party can claim monetary compensation if the contract is breached. The Indemnity bond is primarily used in the mortgage, accounting, law, IT, and insurance industries.

Undertaking is a promise to do something on happening or non-happening of certain event as may be undertaken by person promising therein. Undertaking can be said to be a formal promise or pledge entered into by a person and if it was given to the court then additionally it was a promise to act in a particular manner.



CHAPTER -9 CIRCULARS, STANDING ORDES, SHOW CAUSE NOTICE, BIDS & TENDER

CIRCULARS

According to Cambridge dictionary, a circular is a letter or notice sent to a large number of people. The purpose of circulars is to disseminate the information to large number of individuals. Generally, circulars are in written form so as to create a permanent record of the information and the same may be accessed to by the individuals in present as well as in future. A circular may be issued and circulated in various modes but in present era, the prevalent mode in which circulars are issued are in electronic form such as by placing them at the website, sending them by emails etc. However, conventional method are still in operation such as circulating the written, typed or printed copies of circulars to individuals.

Circulars are issued by varied range of individuals and authorities. For example, A company may issue a circular to its employees for dissemination of a policy approved by the Board of Directors to be complied by the employees.

IMPORTANT POINTS FOR DRAFTING A CIRCULAR

Following points are to be considered while drafting a circular:

1. Issuing Authority: It is important to mention the name of the issuing authority on the circular for communicating the position and authority of the addressor. It reduces the chance of confusion in addresses and increase the chances of observance.
2. Details of Addressee: It is essential to mention the details of addressees by name, designation etc. in circulars. The addressees are required to comply with the information specified a circular. Therefore, mentioning the details of addressees make the circulars effective.
3. Subject: The mention of subject in a circular ensures that the circular receives the required attention. This will make circular more effective and chances of avoidance gets reduced.
4. Reference to Preceding information: It is mandatory to mention the reference to the information already provided before the present circulars. It ensures the completeness of information and the addressee may understand the complete matter contained therein.
5. Main Information: The main purpose of the circular is to disseminate the information to selected group of individuals. The information should be complete and in understandable language leaving no chance of ambiguity.
6. Source of Authority: It is always preferable to mention the source of authority under which the signatory has issued the circular. This gives emphasis on observance of the circular and increases the chances of amenableness.
7. Signature: The signature on the circular makes it more reliable.



ADVANTAGES OF CIRCULAR

The advantages of issuing circular are:

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| <p>1. Ease of dissemination of information: Circulars play significant part in the development and easy working of the businesses of organisations. Through circulars the information is circulated with ease.</p> |
| <p>2. Economical: Circulars are economical way of dissemination of information effectively. Through circulars, large number of individuals may be reached.</p> |
| <p>3. Expeditious: Through circulars, important information can be disseminated to a large number of people expeditiously. Hence, it saves time and efforts of the authority.</p> |
| <p>4. Less Efforts: Issuing circular for dissemination of information requires less efforts and can produce upright results.</p> |
| <p>5. Develop Consciousness: Systematic and regular use of circulars for dissemination of information develop consciousness in the addressees and improves effectiveness.</p> |

PUBLIC NOTICES

Public notices are issued to convey information to large number of receivers that may called public. These are announcements made on a happening of a certain event of public interest. These may be issued by a Government Agency or by an individual including organisations. These are effective mode by which Public are informed about an important event. These may be issued for varied reasons such as providing information relating to , change in a law, Struck off the name of companies by Registrar of Companies, Status of Complaints by an authority, Call for Information regarding submission of information pertaining to ‘Unclaimed Non-convertible Securities’, Public Notices by companies etc. They are published through websites, newspapers or any other prevalent way. Public notices has gained admiration in present era due to public has become vigilant and technology is developed. They help the public being aware of recent developments and relevant information and as a result it improves transparency.

HOW TO DRAFT A PUBLIC NOTICE?

Drafting of Public notice

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| <p>1. Name of the Issuer: A public notice should start from the name of organisation in order to be distinct, highlighted and attract attention.</p> |
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2. Details of the Issuer: A public notice should also contain all the details of the organisation which a reader may require after reading. This will be helpful for the readers who wish to take necessary action or seek further details.
3. Title Heading: The heading of Public notice should be expressed in clear words so as to understand the purpose of issuing the public notice. This enables to attract the attention of the readers who are interested in the matter.
4. Comprehensive Details: The information is to be written in comprehensive manner. It is the duty of the draftsmen that it provides all the relevant details considering the available resources such as space for advertisement and cost involved.
5. Statutory/Regulatory Requirement: If a Public Notice is published in compliance of a statutory requirement, it is necessary to give the reference of the particular statutory/Regulatory provision along with the name of statute.
6. Date and Place: It is imperative to mention the date and place for issue of Public Notice.
7. Designation of the issuer: The designation of the issuer should be mentioned in the public officer. The mention of the name of the authority can also be published.

STANDARD BIDS AND TENDERS

As per the Cambridge dictionary, tender is a written or formal offer to supply goods or do a job for an agreed price. It refers to an invitation to offer (bid) for a purpose. The process of inviting bids for tenders have been initiated frequently by the organisations for large projects. Tendering processes encourage the availability of goods or services on competitive prices. The tendering process becomes open for all the eligible bidders thereby ensuring the competitive prices. It also stimulates the availability of the resource required in a timely manner. The process of tendering is formal and legally binds the person entering into the contract after awarding of tender. The process of inviting tender empowers the Tender issuing authority to finalise the terms and conditions of the tender independently. However, the conditions of the tender should comply with the statutory, regulatory requirements, should not be unreasonable and arbitrary.

Important considerations for preparing a document for Tendering Process

1. Name and address of the organisation: The name and address of the organisation be mentioned on the initial page of the document.
2. Subject of the document: The subject of the tender documents to be mentioned in clear and comprehensive manner in order to attract the attention of the Bidder.



3. Index of the tender document: The index of the documents can make the document convenient for the prospective bidder.
4. Important dates and necessary information: The information such as Tender Publication Date, Last date and time for sending Pre-Bid Queries in writing, Cost of Tender, Earnest Money Deposit, Pre-Bid Meeting date, time & venue, Last Date & address of Submission of Bids, Date, time & Venue of opening of Technical Bids and Financial Bids, contact details etc. should be provided in the tender document.
5. Disclaimer Clause: A disclaimer clause with respect to reservations or observation on the tender documents should be placed in the tender document.
6. Job Description: The job description in details should be mentioned in the tender document in order to acquaint prospective bidders with the requirements attached with the Job and evaluate and prepare their bids accordingly.
7. Division of tender documents in parts: The tender document be preferably prepared asking for Bid submissions in two parts i.e. Technical Bid and Financial Bids. 8. Fees and Deposits: The tender document should mention the fees and deposits commensurating the nature and quantum of work. The cost of the tender document may be required from the prospective bidder. Further, the provisions relating to Earned Money Deposit (EMD) and Security Deposit are also to be placed in the tender document.

BYE LAWS

According to Collins' Dictionary, A bye law is a law which is made by a local authority and which applies only in their area. So, certain organisations frame their Bye Laws for effective functioning. Bye-Laws are legal tools used to regulate a particular subject or area so as to achieve orderly development of that subject. The nature of the Bye-Laws i.e. Mandatory or directory depends upon the subject matter for which they were made and the language used by the draftsmen in drafting the legislature empowering the making of Bye Laws. The authority to frame the bye laws are generally provided by the legislative enactment that is mandatory for that organisation to comply.

The legal recognition of Bye Laws are as under:

According to Article 13(3)(a) of 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;

According to section 3(29) of General Clauses Act, 1897, "Indian law" shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof, or thereafter has



the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;

So, a Bye Law is also a Law recognized by the Constitution of India and also under various statutes.

WHEN A BYE LAW SHOULD BE MADE

Section 22 of General Clauses Act, 1897 provides that where, by any Central Act or Regulation which is not to come into force immediately, on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

EXAMPLES OF BYE LAWS

- New Delhi Municipal Council Solid Waste Management Bye-Laws, 2017
- Bye Laws of National Stock Exchange of India Limited
- Bye Laws of Bombay Stock Exchange
- Bye-laws of a Multi State Cooperative Society
- Bye- laws of ICSI Institute of Insolvency Professionals
- ICSI registered Valuers Organisation Bye Laws
- Bye Laws made by various bodies for Arbitration Proceedings

SHOW CAUSE NOTICE (SCN)

A show cause notice is a document delivered to other party to represent the matter. It summarizes the alleged matter and grants the other party an occasion to explain themselves. SCN may be issued for varied reasons by various authorities such as by Courts, Government, Quasi-judicial Authorities, Employers, other authorities etc. The issuance of SCN is preferred by authorities due to the observance of the principle of Natural Justice. It is based on the principle 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. SCN provides an opportunity to the receiver to counter a potentially harming claim. SCN may be in any form depending upon the requirement for calling of the information and explanations.



Essentials of Show Cause

A show cause notice should inter alia address the following essentials:

1. SCN should contain the name of the issuer.
2. It should be issued in writing.
3. It should be written in clear language in order to avoid ambiguity.
4. It should mention the correct and brief facts.
5. If there is a violation of Law, it should be specifically mentioned.
6. Charges should be levelled specifically and they should be vague or in contradiction with the information contained in SCN.
7. Proposed action should also be mentioned in the SCN. For eg. Penalty, Legal action, Suspension etc.
8. The time limits that have been provided to the receiver should be mentioned in the notice.
9. Adequate time limit should be given for the reply, unless otherwise specifically provided by any law.
10. References and Annexures should be provided, wherever required.

STANDING ORDERS

‘Standing Orders’ defines the conditions of recruitment, discharge, disciplinary action, holidays, leave, etc., go a long way towards minimising friction between the management and workers in industrial undertakings. The Industrial Employment (Standing Orders) Act(said Act) requires employers in industrial establishments to clearly define the conditions of employment by issuing standing orders duly certified. It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months.

Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc. The text of the Standing Orders as finally certified under the said act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.



The objects of standing orders is that the employer, once having made the conditions of employment known to his employed workmen cannot change them to their detriment or to the prejudice of their rights and interests. The express or written conditions of employment, it is open for the prospective worker to accept them and join the industrial establishment.

IMPORTANT ASPECTS FOR ISSUING STANDING ORDER

1. The employer of the establishment submits to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.
2. Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment.
3. The draft Standing Orders shall be accompanied by a statement containing prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.
4. It is the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders.
5. On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in such manner as may be prescribed, together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice.
6. Certifying Officer files a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.
7. Standing Orders comes into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives.



MATTERS TO BE PROVIDED IN STANDING ORDER

1. Classification of workmen, e.g., whether permanent, temporary, apprentices, probationers, or badlis.
2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
3. Shift working.
4. Attendance and late coming.
5. Conditions of, procedure in applying for, and the authority which may grant, leave and holidays.
6. Requirement to enter premises by certain gates, and liability to search.
7. Closing and re-opening of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom.
8. Termination of employment, and the notice thereof to be given by employer and workmen.
9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.
11. Any other matter which may be prescribed under the Industrial Employment (Standing Orders) Act, 1946.



CHAPTER -10 SETTLEMENT AGREEMENTS

SETTLEMENT AGREEMENTS

A settlement agreement is a legal contract that resolves the disputes among all parties by coming to an agreement. It is a legal document where all parties in a court case, in civil law, agree to an outcome of any judgment being made in advance.

Usually, in settlement agreements, there is no need for a long court case which saves the clients both time and money. Settlement agreements are formed through mediation rather than through a trial. However, the judge will ultimately make the decision to approve the settlement after one is reached. Settlement agreements allow all parties to be hard and be satisfied with the outcome.

WHAT IS THE PURPOSE OF A SETTLEMENT AGREEMENT?

If you are contemplating a way to settle your dispute without having to go to court, drafting a settlement agreement may be one of your legal options. With this type of agreement, one party must complete an action or pay a certain amount in exchange for the other party's promise to stop legal proceedings. Here are some situations in which a settlement agreement can apply:

- Any property damage claim;
- Mediation/Conciliation Settlement Agreements;
- Corporate Settlement Agreements;
- Family Business Settlement; and
- Employment disputes.

With any settlement agreement, there first needs to be negotiations in order to agree on certain provisions. A mediator is useful to agree on a factual account of the situation if necessary. In some corporate settlements, one party may only agree to settle if no wrongdoing or liability must be admitted. Some settlement agreements may also have conditions, such as how long a party has to fulfill his or her contractual obligations. Therefore, you must agree on whether all current and future claims are resolved by this agreement or whether it fulfills only a single claim or lawsuit.

HOW CAN YOU PREPARE FOR A SUCCESSFUL SETTLEMENT AGREEMENT?

Understanding the potential terms and researching them will get you ahead in the settlement agreement process. You can start by looking at any terms that would assist the case in the mediation process. For example, an insured claim being resolved by settlement agreement usually involves payment in exchange for release of legal liability. For these cases, a minimum of preparation requires consideration of whether payment will be made as a lump sum or in a series of payments. In addition, the scope of the claims being asserted and any releases must be considered.



FAMILY SETTLEMENT DEEDS

S.NO.	PARTICULARS	PROVISIONS
1	Concept of Family Arrangement 	A family arrangement is an agreement between members of the same family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. <u>According to the Supreme Court</u>, A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of few, is undoubtedly a milestone in the administration of social justice.
2	ESSENTIALS OF FAMILY SETTLEMENT <u>CASE LAW</u> KALE V. DY. DIRECTOR OF CONSOLIDATION	The Supreme Court has laid down the following essentials of a family settlement. 1. The family settlement must be a <i>bona fide</i> one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family. 2. The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence. 3. The family arrangement may be even oral in which case no registration is necessary. 4. It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing.
3	Family Arrangement When Enforceable? <u>CASE LAW:</u> <i>Lakshmi Perumallu v. Krishnavenamma</i>	No doubt, a family arrangement, which is for the benefit of the family generally, can be enforced in a court of law. But before the court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon

SPECIMEN FORM**Settlement of Family Business**

This Deed of Family Arrangement is executed on this in the year 2013 between :

A B S/o MN aged years, occupation..... R/o (Hereinafter called as the first party)

CD S/o XM aged years, occupation and R/o (Hereinafter called as the second party)



WHEREAS

1. The first party has started and carried out the business and undertaking described in Schedule 'C' by his own initiative and efforts with his own capital and funds.
2. The second party, who is son of the pre-deceased son of the first party and residing with him under the care and parentage of the first party and assisting him in conduct of the aforesaid business for which he was being paid share in profit. The second party thus having contributed his labour and skill for the development of the business rendered valuable services for the same and rendered himself entitled for an equal share in the said business. It has been settled and decided to distribute the business amongst the parties so also the properties. The first party shall hold the share in business and properties described in Schedule 'D' and the second party shall hold the share in business and properties described in Schedule 'E'.
3. The movable and immovable properties, which is also described in Schedule 'C' have been acquired by the first party out of the funds of the said business in his name and for his use and benefits.

NOW THIS DEED WITNESSETH AS FOLLOWS

1. The second party shall hold, own and possess as full and absolute owner of the business and properties described in Schedule 'E' without any demand or claim by the first party any account whatsoever for which, he has expressly granted, conveyed, transferred and assigned by the first party.
2. The business and properties have been distributed amongst the parties to this deed. It is hereby decided and declared that the first party hereinafter shall hold, own and possess as full and absolute owner of the business and properties described in Schedule 'D' and the second party shall not interfere in the same and he has relinquished his rights in the said part of business and properties described in Schedule 'D'.

IN WITNESS WHEREOF the parties to this DEED have put and subscribed their respective hands in presence of witnesses on this day of in the year at

Witnesses

1.	First Party
2.	Second Party



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Every person of sound mind, not being a minor, may dispose of his property by a will.

Section 59 of the Indian Succession Act, provides for the persons capable of making wills. Accordingly, every person of sound mind not being a minor may dispose of his property by will. A married woman may dispose by will of any property which she could alienate by her own act during her life. Even persons who are deaf or dumb or blind can make will provided they are able to know what they do by it.

Further, a person who is ordinarily insane, may make his will during the interval in which he is of sound mind. However no person can make a will while he is in a state of mind arising from intoxication or from illness or from any other cause such that he does not know what he is doing.

2. In the light of judicial pronouncements, discuss the relevant considerations' in constructing a will.

Relevant considerations in construing the language of a Will, the courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense and many other things which are often summed up in somewhat picturesque figure.

The court is entitled to put itself into the testator's arm chair. Venkatanarasimha v. Parthasarthy

3. The court is entitled to put itself into the testator's arm chair. comment

In construing the language of a will the courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense and many other things which are often summed up in somewhat picturesque figure. The court is entitled to put itself into the testator's arm chair.

4. A family arrangement can be enforced in a court of law. comment

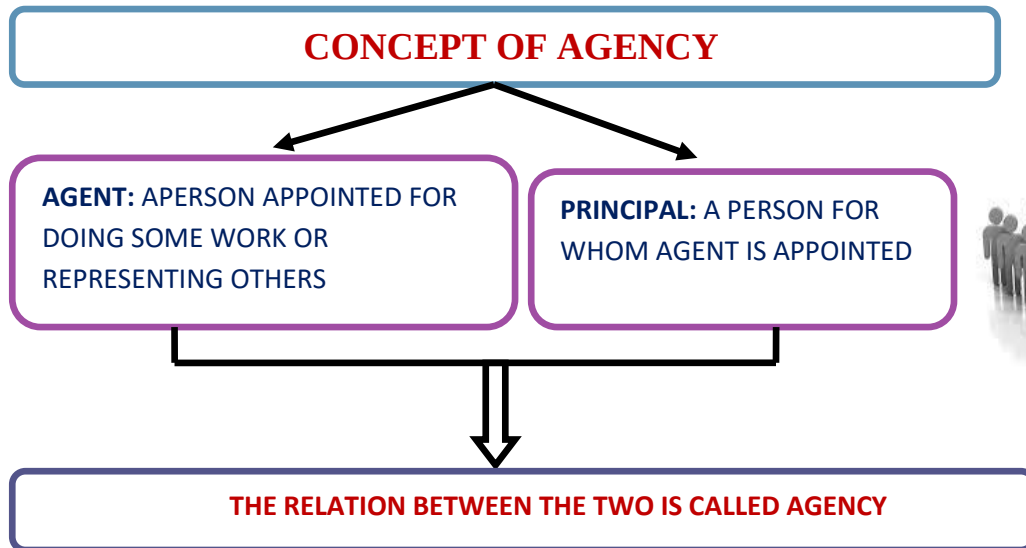
No doubt, a family arrangement which is for the benefit of the family generally, can be enforced in a court of law.

However, before the court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon.



CHAPTER -11

CONTRACT OF AGENCY



BASIC FEATURES OF CONTRACT OF AGENCY ARE

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| 1. The contract of agency is governed by (Sections 182 to 238) of the contract Act, 1872. |
| 2. Authority should be given either expressly or impliedly to bind his principal. |
| 3. While the principal should not be a minor, an agent could be a minor. |
| 4. Consideration is not necessary for an agency contract. |
| 5. For the acts of the agent, the principal is liable unless the agent has exceeded his authority. |

DEL CREDERE AGENCY

1. There is a special type of agency, which combines agency with guarantee. This is known as **Del credere agency**.
2. A **Del credere agent** is one who, for an extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer.
3. By reason of his charging a **Del credere commission** he assumes responsibility for the solvency and performance of the contract by the vendee and thus indemnifies his principal against loss.
4. He, therefore, gives an additional security to the seller, but he does not shift the responsibility of payment from the buyer to the seller. A commission Del credere is the premium or price given by the principal to the agent for guarantee, which presupposes a guarantee.



5. A del credere agent like any other agent is to sell according to the instructions of his principal, to make such contracts as he is authorized to make for his principal and be bound, as soon as he receives the money, to hand it over to the principal .
6. He is distinguished from other agents simply in this sense that he guarantees that those persons to whom he sells perform the contracts which he makes with them.

SPECIMEN OF AN AGENCY CONTRACT

AGENCY CONTRACT

An agreement made at.....this.....day of between..... (Principal) hereinafter called “the principal”) of the one part and..... (Agent) (Hereinafter called “the agent”) of the other part.

WHEREAS for the purpose of making sales of the principal’s goods principal approach the agent for agency contract and agent accept the same.

NOW THIS CONTRACT IS WITNESSED AS FOLLOWS

1. The duration of agency contract shall be 3 years.
2. That the agent shall not, while selling the principal’s goods make any representation in the trade or give any warranty other than those contained in the principal’s price list.
3. That the agent shall be allowed to deduct and retain as his agency commission with himself.....per cent of the list price of all good on behalf of the principal.
4. That the agent shall, in all his commercial dealings and on documents and on the name-plate or latter-head indicating his place of business, describe himself as selling agent for the principal.
5. That the agent shall not sell the goods of the principal to any purchaser expect at current price list of the principal conveyed by him from time. The agent may, however allow a discount or rebate of Per cent.
6. That either party may terminate this agreement at his option at any time after the expiration of years by giving the other month’s notice in writing.
7. That in the event of any dispute arising out of or in relation to or touching upon the agreement, the same shall be decided by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996.
8. That on the termination of this agreement for whatever reason the agent shall forthwith deliver to principal all the unsold stock of goods and shall pay to the principal for the shortages of deficiency of stock at list price less commission and rebate allowable to the agent.

IN WITNESS WHEREOF the parties to this contract have put and subscribed their respective hands in presence of witnesses on this day of..... in the year at

Principal

Witness:

Agent

Witness:



DEALERSHIP CONTRACT

This Agreement is made at _____ on the _____ day of _____, between a company incorporated under the Companies Act, 2013 and having its Registered Office at _____ through its Company Secretary, (hereinafter called "the Company") AND M/s _____, a partnership firm comprising Mr. _____ and Mr. _____, having its main business place at _____ (hereinafter called "the Firm").

WHEREAS the company, after having considered the proposal of the firm, has agreed to appoint the firm as its dealer on the terms and conditions as contained in this agreement.

NOW THIS AGREEMENT WITNESSETH AS UNDER:

1. That the company hereby appoints the Firm as its dealer to sell its products, more specifically defined in the Schedule to this agreement, in the areas also clearly defined in the said Schedule.
2. The agreement shall remain in force for one year commencing from _____ and shall be renewable for similar periods on the mutually agreed terms and conditions.
3. The Firm shall keep a minimum stock of _____ pieces of each of the company's products to meet the demand of the ultimate users/consumers, which quantity shall be reviewed every quarter in the light of the sales during the previous quarter and the market trends.
4. The company shall supply to the firm its products on 15 days credit from the date of the invoice and if payments are not made within the credit period, the principal amount shall be charged interest at the rate of _____ percent per annum from the sixteenth day of the invoice date till payment.
5. The company shall supply to firm sufficient quantities of publicity and advertisement material for display at the firm's sales outlets and for distribution in its area of operation.
6. The company shall bear 50% of the cost of maintaining the sales outlet of the firm including rent thereof
7. The company and the firm shall settle their accounts every 6 months and the balance credit/debit shall be squared by making payment by the party owing to the other.
8. The firm shall not sell any product of the company at a price higher than the one indicated by the company from time to time.

IN WITNESS WHEREOF the parties herein under have set their hands on the date and place hereinabove mentioned.

Witnesses:

1
2

for and on behalf of company
(.....)
Company Secretary

Mr. _____
Mr. _____
Partners, M/s A & B ASSOCIATES



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write short notes on the Del credere agency?

ANSWER: Refer chapter 1

2. Examine and discuss Ingredients of a contract of agency that must be specifically incorporated in a contract?

ANSWER: Refer chapter 11

3. Draft a Dealership contract?

ANSWER: Refer chapter 11



CHAPTER -12

ARBITRATION AGREEMENT

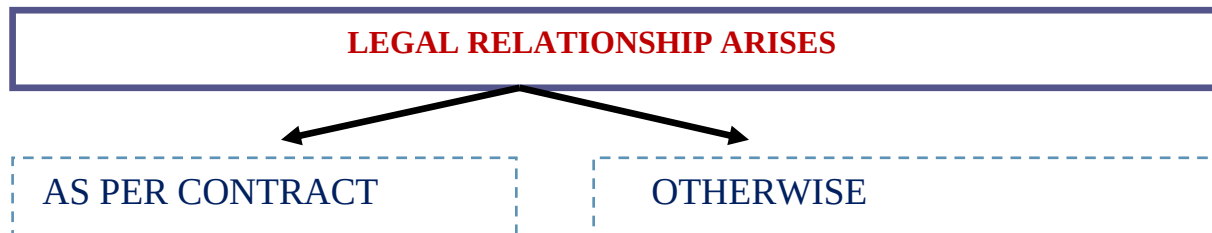
We're here to litigate the arbitration clause that was meant to avoid litigation.



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.



Section 2(1)(b) | Arbitration agreement means an agreement referred to in Section 7

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.

ESSENTIALS/FEATURES OF ARBITRATION AGREEMENT

(a) It must be in writing.
(b) It must be signed by the parties to the agreement.
(c) There must be an intention of the parties to submit any probable dispute to arbitration.
(d) Being an agreement it must satisfy requirements of Indian Contract Act.
(e) 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 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.

ARBITRATOR

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. In general, “arbitrator” is defined as *a person who is appointed to determine differences and disputes between two or more parties by their mutual consent.*



Arbitral tribunal” means a sole arbitrator or a panel of arbitrators

POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATOR SEC. 8

Following condition must be satisfied before judicial authority to refer parties to arbitrator.

- There shall be valid arbitration agreement
- Subject matter shall be within scope of arbitration agreement
- The application must be made by the party to arbitration agreement
- Application must be not later than the date of submitting his first statement on the substance of the dispute
- Application must be accompanied by arbitration agreement
- 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

MATTER WHICH CAN OR CANNOT BE REFERRED TO ARBITRATION

MATTER WHICH CAN BE REFERRED TO ARBITRATION

- Determination of damages in case of breach of contract
- Validity of marriage
- Matters of right to office
- Time barred claims

MATTER WHICH CANNOT BE REFERRED TO ARBITRATION

- Matters of Divorce
- Matters of Validity of will
- Guardian ship of minor
- Matters of Lunacy proceedings
- Matters of criminal nature



NUMBER OF ARBITRATORS SECTION 10

Section 10 of the Act provides that, the **parties are free** to determine the number of arbitrators, provided that such number **shall not be an even number**. If they fail to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.

**APPOINTMENT OF ARBITRATORS SECTION 11**

According to section 11(1) a person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

Section 11(2) states that subject to Section 11(6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

Section 11 (6) provides that where, under an appointment procedure agreed upon by the parties,-

- a. a party fails to act as required under that procedure; or
- b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. 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 take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11 (3) states that failing any agreement referred to in sub-section (2), 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.

Under Section 11 (4) if the appointment procedure in Section 11 (3) applies and-

- a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- b. 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, "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

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.

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.

GROUND FOR CHALLENGE SECTION 12

An arbitrator may be challenged by a party only if

- | |
|--|
| (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, |
| (b) He does not possess the qualifications agreed to by the parties. |

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.

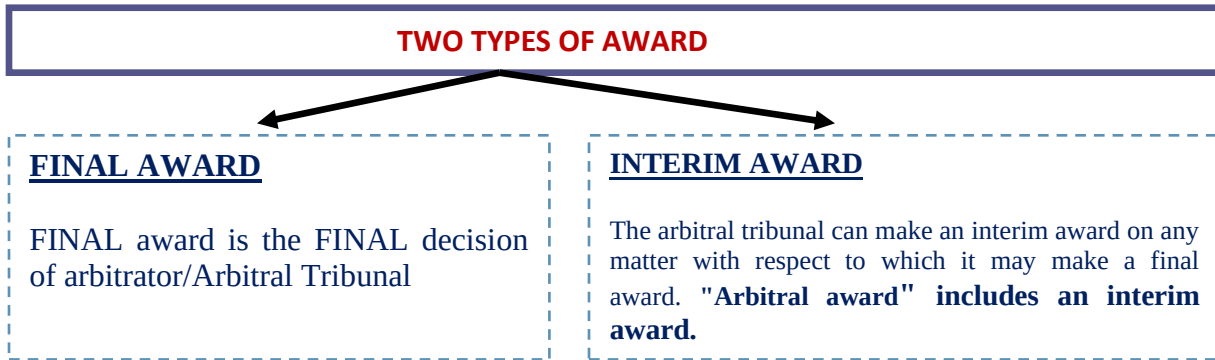
The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

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:

DECISION OF ARBITRATOR IS CALLED AWARD





ESSENTIALS /REQUISITE/CONTENTS OF A VALID AWARD

(a) An arbitration agreement is required to be in writing.
(b) The arbitral award is required to be made on stamp paper of prescribed value
(c) The award is to be signed by the members of the arbitral tribunal.
(d) The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
• Where the arbitration agreement expressly provides that no reasons are to be given, or • Where the parties settled the dispute and the arbitral tribunal has recorded the Settlement in the form of an arbitral award on agreed terms.
(e) The award should be dated i.e. the date of making of the award should be mentioned in the award.
(f) The arbitral tribunal is under obligation to state the place of arbitration
(g) After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award

TIME LIMIT FOR ARBITRAL AWARD

Section 29A(1) provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.-For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

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 subsection, 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.

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)

- The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
- 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
- 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
- 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.

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 recognizes a legitimate interest on his part in, obtaining a final settlement of the



- dispute
- b the parties agree on the termination of the proceedings,
 - c the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Section 32(3) says that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. This is subject to the provisions of Sections 33 and 34(4) of the Act.

CORRECTION AND INTERPRETATION OF AWARD

Section 33(1) provides that within thirty 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.

ADDITIONAL 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 correction 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-the party making the application furnishes proof that-

- A party was under some incapacity
- The arbitration agreement is not valid
- 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
- The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,
- The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- The arbitral award is in conflict with the public policy of India.

GROUND ON WHICH AN AWARD IS IN CONFLICT WITH THE PUBLIC POLICY

- (i) the making of the award was induced or affected by fraud
- (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.

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.

TIME LIMIT FOR SETTING ASIDE ARBITRAL AWARD

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.

FINALITY OF ARBITRAL AWARDS

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.

ARBITRAL TRIBUNAL Section 2(1)(d)

Arbitral tribunal means a sole arbitrator or a panel of arbitrators.

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 law in force in India and where at least one of the parties is

(a) An individual who is a resident in, any country other than India; or

(b) A body corporate which is incorporated in any country other than India; or

(c) The Government of a foreign country.

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.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM

(ADRS)

1. Alternate dispute resolution would include within it any method of dispute resolution other than court litigation. It would include arbitration, mediation and conciliation in main.
2. There is a growing awareness that courts will not be in a position to bear the entire burden of justice system.
3. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc.

ALTERNATIVE DISPUTE RESOLUTION (ADR) METHODS



4. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

REGISTRATION OF AWARD

The award which deals with immovable property of the value of Rs. 100 or more requires registration.

STAMP DUTY ON ARBITRATION AWARD

The stamp duty on the arbitration award passed by an arbitrator is payable as per the provisions of Indian stamp act, 1899 the rate of stamp duty varies from state to state.

SPECIMEN ARBITRATION AGREEMENT

ARBITRATION AGREEMENT

THIS AGREEMENT is made at..... this..... Day of..... Between Mr. x..... of residing at Hereinafter referred to as the party of the First Part and Mr. Y of residing at..... Hereinafter referred to as the party of the second part.

WHEREAS by an agreement (building contract) dated 2015 entered into between the parties hereto, the party of the first part entrusted the work of constructing a building on his plot of land situated at to the party of the second part on the terms and conditions therein mentioned.

WHEREAS the second party has commenced the construction of the building according to the plans sanctioned by the municipal corporation and has completed the construction to the extent of the 1st floor level.

WHEREAS the party of first part has made certain payments to the party of the second part on account but the party of the second part is pressing for more payments which according to the party of the first part he is not bound to pay and, therefore the work has come to a construction and delay in the work.

WHEREAS the said Agreement provides that in the event of any dispute or difference arising between the parties the same shall be referred to arbitration of a common arbitrator if agreed upon and the arbitration shall be governed by the provisions of the arbitration and conciliation act, 1996.

NOW THIS AGREEMENT IS WITNESS AS FOLLOWS

1. That the following points of dispute arising out of the said agreement dated... are hereby referred to the sole arbitration of the said Mr..... for his decision and award.
2. **The points of dispute are**
 - Whether the party of the second part has carried out the work according to the sanctioned plans and specifications.
 - Whether the party of the second part has delayed the construction.
 - Whether the party of the second part is overpaid for the work done up to now.



- Whether party of the first part is bound to make any further payment over and above the payments made up to now for the work actually done.
3. The said arbitrator shall allow the parties to file their respective claims and contentions and to file documents relied upon by them within such reasonable time as the arbitrator may direct.
 4. The said arbitrator shall give hearing to the parties either personally or through their respective advocates but the arbitrator will not be bound to take any oral evidence including cross examination of any party or person.
 5. The said arbitrator shall make his award within a period of four months from the date of service of a copy of this agreement on him by any of the parties hereto provided that, the arbitrator will have to power to extend the said period from time to time with the consent of both the parties.
 6. The arbitrator will not make any interim award.
 7. The award given by the arbitrator will be binding on the parties hereto.
 8. The arbitration shall be governed by the provisions of the arbitration and conciliation act, 1996.

IN WITNESS WHEREOF the parties aforementioned have signed this agreement on the date month and the year aforementioned.

Witness

First party

Witness

Second party

SPECIMEN ARBITRAL AWARD

ARBITRAL AWARD

In the matter of the arbitration and conciliation act, 1996 and in the matter of an arbitration agreement dated.....between..... S/o.....aged..... R/o.....and.....S/o, aged..... R/o.....

WHEREAS in pursuance of an agreement in writing dated the day of....., ...And made between the above named parties the said..... and Referred to us, for decision and award the matters in disputes and difference between them (**state the matters in difference**). Now we have heard and examined the parties and considered the pleadings and all allegations and counter allegations made by them against each other and also all book s papers, writings and other evidences produced before us.

Now, we have duly considered the matter referred to us de hereby make our award as follows.

We award:

1. That.....(here mention the decision of arbitrator)
2. That(here mention the decision of arbitrator)

Dated the day of....., ...

Sd/-

Arbitrator



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write short notes on the Components of an award.

An award is a document incorporating the adjudication or determination of a matter in dispute by the person competent to adjudicate and determine the dispute. An arbitral award is such adjudication by the Arbitral Tribunal to whom dispute is referred.

Components of an Award

1. **Recitals:** For the validity of an award it is not necessary to set out the recitals but it is desirable to state the facts which confer jurisdiction on the arbitrator and also the differences and disputes referred to the arbitrator.
2. **Operative parts:** Operative parts of award should highlight the issues, discuss necessary evidence received to settle the dispute on different points connected therewith, give statement of reasons and conclude the outcome of the evidence or findings in the shape of decision like that a Civil Court.
3. **Cost of the Award:** Award should mention the name of the party to bear the cost of the award.
4. **Date and place of the Award:** The award should indicate the date, place, when and where it was made. This indication is useful for checking that an award has been made within the time limit provided by law or agreed by the parties.

2. State with reference to case law whether a foreign arbitration award can be executed by an Indian court.

The issue involved in this question was considered in the case **Motorola inc. v. Modi Well West** in the matter of Arbitration and Conciliation Act 1995 read with CPC regarding execution of foreign award.

In this case the decree holder (Motorola) obtained an award against the judgment debtor (Modi Well west) in the arbitration proceedings conducted outside India and sought to enforce the same in India by filing an execution suit in a court situated in Delhi. The reasons for the decree holder to institute the execution suit in Delhi were that the judgement debtor was having a bank account in Delhi and was also holding 51% of shares of a company having its Registered Office in Delhi. On the other hand the judgement debtor contended that since its Registered Office was situated in Modipuram in the State of UP, only UP courts situated there would have jurisdiction to execute the award and that before the court executes a foreign award, the award should be made decree of the court under the provisions of the CPC.

In this case it was held that the courts in Delhi have jurisdiction to execute a foreign award.



3. Legality of an arbitration agreement of the parties on the subject matter already pending in the court.**Legality of an arbitration agreement of the parties on the subject matter already pending in the court**

The existence of an arbitration agreement before the case is brought to the court is not necessary and parties can enter in to an arbitration agreement during pendency of proceeding before the court.

This view was established in **P. Anand Gaipathi Raju V. PVG Raju** were during the pendency of the appeal before supreme courts all the parties enter into an arbitration agreement and agreed to refer their dispute to retired supreme court judge as sole arbitrator. The agreement was in the form of an application and had been signed by all the parties. It was held that the agreement need not already be in existence; the phrases ‘which is the subject of an arbitration agreement’ does not necessarily require that the agreement must already be in existence before the action is brought in the Court – the phrase also connotes an arbitration agreement being brought into existence while the action is pending. The court further stated that the arbitration agreement satisfied the requirements of section 7 and that of the language of section 8 is peremptory. It is therefore obligatory for the court to refer the parties to arbitration in terms of their agreement. An application under section 8 merely brings to the court’s notice that the subject matter of the action before it is the subject matter of an arbitration agreement.

4. Somesh had entered into a contract with Exel Ltd. for supply of raw material. They also entered into an arbitration agreement to refer any dispute or difference arising between them to an arbitral tribunal appointed by them. A dispute having arisen due to alleged supply of sub-standard material by Somesh and withholding of payment by Exel Ltd., it was referred to the arbitral tribunal. Draft a specimen of the award by the arbitral tribunal.

Refer page no. 85 of chapter 9

5. Precious Gems Ltd. had submitted a sealed tender to Beautiful Watches Ltd. for the award of a contract to supply gems. However, its tender was not accepted. The document of tender contained an arbitration clause. Precious Gems Ltd. invoked the said arbitration clause and sought an interim relief on the ground that the floating of a tender and the response thereto constituted an arbitration agreement. Will the company be entitled to relief under the Arbitration and Conciliation Act, 1996? Refer to decided case law in support of your answer.

The company is not entitled to any relief under the provisions of Arbitration and Conciliation Act, 1996. The facts of the given problem are based on the case **Tulip I.T. Services Ltd. v. Punjab National Bank**

In this case, the Delhi High Court dismissed the petition and held that the position of law appears to be clear. Since the response to the tender by the petitioner was not accepted, it had not transformed into a contract and no arbitration agreement could be said to exist between the parties permitting the petitioner a resort to arbitration as per the terms of the tender.



Further, the court held that even otherwise, no party inviting tenders for execution of a work can contemplate or visualize a situation where several unsuccessful tenders for a given contract, even before the award of a contract, can all enter into separate arbitration proceedings. Such an interpretation given to Clause 24 will lead to an wholly anomalous and unreasonable state of affairs. Floating of a tender and the response thereto cannot constitute an agreement contemplated by Section 7 and Section 11 of the Act.

6. The parties had specifically chosen to settle any dispute through arbitration under the provisions of the Arbitration and Conciliation Act, 1996 even though the dispute had arisen prior to the commencement of the new Act. The arbitrator appointed by the Supreme Court made the award under the new Act. The appellants challenged the order and wanted the award to be modified under the provisions of the old Act, i.e. the Arbitration Act, 1940. Do you agree? Give your comments.

The parties cannot do so. The facts in the given problem are based on the case **National Aluminium Co. Ltd. v. M/s Pressteel & Fabrications** where the parties had specifically chosen to settle their disputes through arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (New Act) even though the disputes had arisen prior to the new Act when the Arbitration Act, 1940 (Old Act) was in force. The arbitrator appointed by the Supreme Court made the award under the New Act. However, the appellant wanted to modify the award under the provisions of the old Act contending that since the dispute to arbitration were made prior to the coming into force of the New Act.

The Supreme Court rejected this contention and observed that by consent of the parties provisions of Arbitration and Conciliation 1996 Act have been made applicable to the proceeding which is in conformity with Section 85(2)(a) of Arbitration and Conciliation 1996 Act, hence, it is futile to contend that for the purpose of challenge to the award, 1940 Act will apply.

7. Ahmad & Co. appellant, and Vijay Engineering Ltd., respondent, were party to a contract, which did not provide for escalation. However, while deciding the dispute, the arbitral tribunal allowed escalation of price to the respondent. This was challenged unsuccessfully before the High court by the appellant, who ultimately approached the Supreme Court. Discuss the light of a decided case whether the petition will be allowed.

The petition will be allowed. In a similar case namely **Food Corporation of India v. M/S.A. M. Ahmed & Co.** The Supreme Court has held that Arbitrator can allow reasonable escalation. The Apex Court observed:

Escalation in our view is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator found that there was escalation by way of statutory wage revision and, there way of statutory wages revision and therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the corporation was liable for the consequences of the delay, namely increase in statutory wages. Therefore, the arbitrator in our opinion had jurisdiction to go into this question. He has gone into that question and has awarded



as he did. The Arbitrator by awarding wage revision has not misconduct himself. The award was, therefore made rule of the High Court rightly so in our opinion.

In our opinion, having considered the totality of the circumstances, we feel that it would be just and proper to award interest @9% p.a. throughout instead of 12% as awarded by the arbitrator for the period in question. The amount already received by the claimant will be adjusted towards the entire claim and the balance amount together with interest at 9% p.a. shall by the Vijay Engineering Ltd. within 2 months from the date of this order failing which the said balance amount shall carry interest @12% from the date of its due till realization. In view of this, order in this judgment the bank guarantee furnished by the respondent contractor shall stand discharged. The Supreme Court Registry is directed to do the needful immediately. The impugned order of the High Court is modified accordingly.

8. Gujarat Transports Ltd. entered into an agreement with Raja Textiles Ltd. which provided for settlement of disputes in terms of the rules of Indian Council of Arbitration. When the dispute arose, Gujarat Transports Ltd. approached the civil court for appointing an arbitral tribunal and the court appointed a retired judge as the arbitral tribunal. Raja Textiles Ltd. appealed to the High Court and the appeal was dismissed. The company wants to prefer an appeal to the Supreme Court. Advise.

The Company can file an appeal to the Supreme Court against the order of the High Court. The facts of the given problem are based on the case **Tata iron and Steel Co. Ltd. v. Tiwari Road Lines.**

The Supreme Court in this case allowed the appeal and held as follows

In the present case agreement executed between the parties contains an arbitration clause which clearly provides that all disputes and differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in accordance with the rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

The legislative scheme of Section 11 is very clear. If the parties have agreed on procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by sub-section (2) and there is no allegation that anyone of the contingencies enumerated in clauses (a) or (b) or (c) of sub-section (6) had arisen, the application moved by the respondent herein to the city civil Court, Hyderabad was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order. The order therefore, is not sustainable.

In the matter of settlement of dispute by Arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator.



- 9. An Indian company invited bids for the supply of equipments from a foreign company. The Indian company issued general conditions which were several times revised. The Indian company place letter of intent which stated that supply should be made once purchase order is placed. No purchase order was placed for the supply. The Indian company decided not to purchase from the foreign company. The foreign company commenced arbitration proceedings before Indian Council of Arbitration. Decided whether there was an arbitration agreement.**

The facts of the case are similar to those in **Dresser Rand SA v. Bindal Agro Chem LTD & Anr. K.G. Khosal Compressors Ltd.** In the case, the Trial Court and the Division Bench of the High Court held that there was no arbitration agreement as no purchase order was issued.

On appeal to the Supreme Court, the Supreme Court upheld the decision of the Lower Court and the Division Bench of the High Court stating that the decision of the learned Single Judge and the Division Bench of the High Court holding that there is no arbitration agreement does not suffer from any infirmity.

- 10. Discuss the scope and extent of objections under section 34(2) of the Arbitration and Conciliation Act, 1996 with reference to case law.**

Section 34 of the Arbitration and Conciliation Act, 1996 provides a remedy for setting aside an arbitration award. The arbitral award may be set aside by the Court only. If the party making the application furnishes proof that:

1. the party was under some incapacity; or
2. 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
3. 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
4. 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. However, 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
5. the composition of arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Thus, an arbitral award can only be set aside on the above mentioned grounds and not otherwise. But the Supreme Court in **ONGC Limited. v. SAW Pipes Limited** has held that the Court has jurisdiction Under Section 34 of the Act to set aside an award passed by Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any substantive law governing the parties or against the terms of the contract.

The Apex court further held that the arbitral tribunal cannot act in breach of some provisions of substantive law or the provisions of the Act. If the arbitral tribunal has not followed the mandatory procedure prescribed Under the Act would mean that it has acted beyond its jurisdiction and thereby the award would be patently, illegal and could be set-aside.



- 11. The government of a particular State and Sriam Holdings (P) Ltd. went to arbitration and the arbitrator passed an award on 12th October, 2003 against the appellant, copy of which was received by appellant on 23rd October, 2003. Review was sought on 2nd April, 2004 after 6 months from the date of award. Objections to the award were filed after 10 months from the date of the award. Will the appellant be entitled to the objections under the Arbitration and Conciliation Act, 1996? Support your answer with case law.**

The facts of the matter are similar to the case of **state of Arunachal Pradesh v. M/s Daman Construction Co.**

Dismissing the appeal the Supreme Court held that it was absolutely thoughtlessness on the part of the appellant to have written a letter after six months i.e. on 2.4.2004 seeking review of the interim award. The application moved under Section 33(1) of the Arbitration and Conciliation Act 1996 is not strictly covered under the said section, i.e. (seeking certain correction in computation of errors, or clerical or typographical errors. The application is however designed seeking review which the tribunal has no power. Secondly the prayer directing the respondent to furnish Bank Guarantee, as it is an interim award and not final is also not covered under section 33. Therefore the reply given by the arbitrator does not give rise to any cause of action to the appellant so as to move an appeal under section 34(3) of the Act. Hence the appeal is dismissed.

- 12. You, as an executive of Green Co. Ltd. have been appointed as arbitrator for resolving a dispute on inter-company transfer of goods for sale between Blue Co. (P) Ltd. and Yellow Co. (P) Ltd. subsidiaries of Green Co. Ltd. Assuming the facts of the dispute draft an arbitration award after completion of arbitration hearings.**

ANSWER

Award means the decision of the Arbitrator. The definition of arbitral award under Section 2(1) of the Arbitration and conciliation Act. 1996 does not give much details of an arbitral award. It says “arbitral award” includes an interim award.

AWARD BY THE ARBITRATOR

In the matter of the Arbitration and conciliation Act, 1996 and in the matter of an Arbitration Agreement dated....200 between Blue Co. (P) and Yellow Co. (P) Ltd. subsidiaries of Green Co. Ltd.

This is the award of the Arbitrator made this.....day of.....2015.

In pursuance of an agreement in writing dated....200 and made between the above named Blue Co. (P) and yellow Co. (P) Ltd. subsidiaries of Green Co. Ltd. the said Blue Co. (P) Ltd. and yellow Co. Ltd. referred to me, XY for my decision and award on the matter in dispute and difference between them. The dispute was as to whether yellow Co. (P) Ltd. carried five consignments of goods from Star Manufacturers to the place of Blue Co. (P) ltd. and delivered the same and whether yellow Co. (P) Ltd. is entitled to payment of carriage charges interest and costs.



Now I the said XY having and examined the parties and considered the statements in the pleadings and all allegations and counter-allegations made by them against each other and also examined all books, papers, writings and other evidences produced before me.

From the documents and evidence of Blue Co. (P) Ltd. it is established that yellow Co. (P) Ltd. carried the five consignments of goods from Star Manufacturers and delivered the same to Blue Co. (P) Ltd. I answer the claim in favour of yellow Co. (P) Ltd. and hold that Blue Co. (P) Ltd. received the five consignment of goods carried by yellow Co. (P) Ltd from Star manufacturers and delivered to the order of Blue Co. (P) Ltd. The yellow Co. (P) Ltd. has performed his part of the contract and is entitled to the Carrying charges of Rs.50 thousand as also interest and costs.

I award against Blue Co. Ltd. and in favour of yellow Co. (P) Ltd. Rs. 50,000 as carrying charges and interest at 4.5% per annum from.....200 till payment.

I award Rs. 10,000 against Blue Co. (P) and in favour of yellow Co. (P) Ltd. as Costs of the arbitration proceedings:

Dated...

Arbitrator

(XY)

13. Vishal filed a petition for the appointment of another sole arbitrator in place of the earlier arbitrators appointed under the agreement, to decide the dispute and claims of the petitioner. The petitioner contended that the arbitrators appointed under the agreement have failed to proceed in the matter for the last more than a year which demonstrates that they have failed to perform their functions. Whether court can replace an arbitrator? Discuss in the light of decided case law.

The court cannot replace the arbitrator. **In the case of Sarvesh Chopra Builders Pvt. Ltd. v. union of India**, it has been that it is well settled law that the parties are bound by the arbitration agreement. Who shall be the Arbitrators, is also the subject matter of agreement between the parties. It is not possible for one party to arbitration agreement to resile from the agreement and say that the matter be not adjudicated by the Arbitrators as provided in the agreement and other sole Arbitrator should be appointed. The court cannot without a reasonable cause replace an Arbitrator whom the parties have chosen under the terms of the contract. The court can only interfere where there is legal misconduct of the Arbitrator different from one as stated in the Government in those cases where the party for a valid reason do not agree to appoint the person named in the contract as Arbitrator unless the Arbitrators name in the arbitration agreement had refused to act an adjudicate the claim or he had neglected to enter upon the reference.

In the present case the Arbitrators were not allowed to act upon by filing one or another petition by the petitioner in the court. The petition is not maintainable and is hereby dismissed. However, the Arbitrators appointed under the agreement are directed to expedite and adjudicate upon the claim and pass an award, as far as possible, within four months of communication of this order to them



14. Write notes on the Arbitration agreement

ANSWER: Refer chapter 12

15. Write notes on the Award' under the Arbitration and Conciliation Act, 1996

ANSWER: Refer chapter 12

16. You, as an executive of Green CO. Ltd. Have been appointed as arbitrator for resolving a dispute on inter-company transfer of goods for sale between Blue Co. (P) Ltd. And Yellow CO. (P) Ltd. Subsidiaries of Green Co. Ltd. Assuming the facts of the dispute, draft an arbitration award after completion of arbitration hearings.

ANSWER: Refer chapter 12

17. In an arbitration award, the arbitral tribunal awarded interest pendente lite except in relation to claim no. 4 the petitioner in whose favour the award was made challenged it on the ground that interest was not awarded in claim no. 4 decide with reference to case law.

The facts of the given problem are more or less similar to the case of C.L. Gupta v. Delhi development authority while deciding the issue, the Supreme Court referred to the case of secretary, irrigation department of Orissa & Others v. GC Roy where the legal principle que awarding interest had been laid down as follows:

“Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute along with the claim (for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes or refer the dispute to interest as such to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within the discretion to be exercised in the light of all the facts and circumstances of the case, keeping ends of justice in view.

The Supreme Court dismissed the petition stating that the above mentioned principle itself makes it clear that it is not necessary that in every case the arbitrator should necessarily award interest pendente lite.



CHAPTER -13 **GUARANTEE, LOAN AND OUTSOURCING**

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. A guarantee may be either oral or written {**section 126 of the Indian contract act, 1872**}



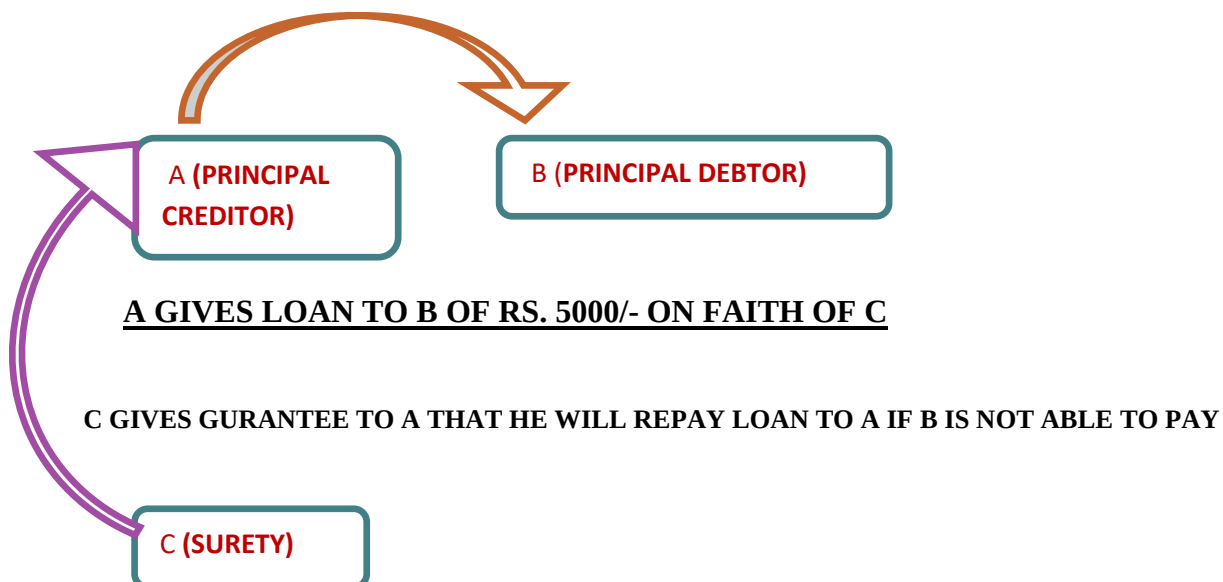
PARTIES INVOLVED IN GURANTEE

SURETY	PRINCIPAL DEBTOR'	CREDITOR
1. The person who gives the guarantee is called the Surety.	2. The person in respect of whose default the guarantee is given is called the ‘Principal debtor’	3. The person to whom the guarantee is given is called the ‘Creditor’

CONSIDERATION FOR A GUARANTEE

1. Section 127 of the Indian Contract Act, 1872 defines consideration for guarantee as “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”.
2. Consideration between the principal debtor and the creditor is good consideration for guarantee given by surety.

CONTRACT OF GUARANTEE



Practical Question

Bharat requests Ajay to sell and deliver to him goods on credit. Ajay agrees to do so, provided Chandan guarantees the payment of the price of the goods. Is this a sufficient consideration for Chandan's promise and is this arrangement a valid contract of guarantee?

This is a sufficient consideration for Chandan's promise and this arrangement is a valid contract of guarantee.

Section 127 of the Indian Contract Act, 1872 defines consideration for guarantee as "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."

TYPES OF GUARANTEE

S.NO.	PARTICULARS	PROVISIONS
1	FIDELITY GUARANTEE	A guarantee guaranteeing an employer against misconduct of an employee or to answer for the debt or default of another is called a fidelity guarantee". If the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to the guarantor, the surety is discharged. That is a basic principle implicit in the very nature of a fidelity guarantee.
2	CONTINUING GUARANTEE	Section 129 of the Indian Contract Act, 1872 lays down that a guarantee which extends to a series of transactions is called a "continuing guarantee" and according to section 130, a continuing guarantee may be revoked by the surety at any time as to future transactions, by notice to the creditor.
3	COUNTER GUARANTEE	A guarantee given by the principal debtor to the surety providing him continuing indemnity against any loss or damage that the surety may suffer on account of default on the part of the principal debtor is called "counter- guarantee".
4	PERFORMANCE GUARANTEE	A guarantee which ensures the contracted performance of another person and under which the surety undertakes to compensate the person in whose favour the guarantee is given, in the event of failure on the part of the person on whose behalf the guarantee is given, is known as "performance guarantee".
5	BANK GUARANTEE 	A "bank guarantee" is a guarantee given by a bank on behalf of its client or account-holder to another person with whom the client has entered into a contract to perform some job or to do and call upon the bank to pay the guaranteed amount in the event of the contingency, mentioned in the guarantee, happening or not happening, as the case may be.



SPECIMEN DEED OF GUARANTEE BY A BANK ON BEHALF OF A COMPANY FOR THE PERFORMANCE OF A CONTRACT IN FAVOUR OF STATE GOVERNMENT

DEED OF GUARANTEE

THIS DEED of guarantee made at this day of..... Two thousand between the (bank)..... (hereinafter called "the Bank") of the one part and the state of Represented by the Governor, Shri (Hereinafter called "the state") of the other part.

WHEREAS by acceptance of tender no Dated made between Ltd., a company incorporated under the Companies Act, 2013 having its registered office at agreed by the company with the state for the supply of plant, machinery and equipment **in accordance with the terms, specifications and conditions therein contained** which provides an advance money of% of the total value of the contract price such payment to be secured by a bank guarantee.

WHEREAS the bank has, at the request of the company, agreed to stand surety for and guarantee refund of the said advance in case plant, machinery and equipment of the value of Rs..... Aforesaid is not delivered to the state in accordance with the terms and conditions of the said agreement and the state agreed to make the said advance on such bank guarantee as aforesaid

NOW THIS DEED WITNESSES AS FOLLOWS:

1. In consideration of the state of having agreed to advance a sum of Rs..... to the company, through the bank for the purpose hereinafter indicated, the bank does hereby guarantee that in case the company shall fail and/or neglect to supply the state the plant, machinery and equipment of the value of Rs..... In accordance with the terms, specifications and conditions contained in the acceptance of tender dated the Subject to any amendments or modifications thereof, if any when made the bank shall repay to the state such amount or amounts as the bank may be called upon to pay subject to the maximum limit of Rs.....
2. This guarantee of the bank shall be effective immediately upon receipt of the sum of from the state for and on behalf of the company and shall continue in force until the supply of plant, machinery and equipment of the value of Rs Aforesaid is fully effected.
3. The guarantee hereinbefore contained shall not be affected by change in the constitution of the bank or of the company nor in the event of any winding up being made against the company.

In witness whereof the parties hereto have set and subscribed their respective hands and seals the day month and year first above-written

Witness

For and on behalf of the state

1.....

2.....

For and on behalf of Bank



MEANING OF LOAN AGREEMENT

A **loan agreement** is a contract between a borrower and a lender which regulates the mutual promises made by each party.

Prior to entering into a loan agreement, the "borrower" first makes representations about his affairs surrounding his character, creditworthiness, cash flow, and any collateral that he may have available to pledge as security for a loan. These representations are taken into consideration and the lender then determines under what conditions (terms), if any, they are prepared to advance money.



Loan agreements are usually in written form, but there is no legal reason why a loan agreement cannot be a purely oral contract (although oral agreements are more difficult to enforce).

SPECIMEN LOAN AGREEMENT

THIS LOAN AGREEMENT is made at on this the Day of,..... BETWEEN.....a company incorporated under the companies act, 2013 and having its registered office at Hereinafter called "the borrower" of the first part and, a banking company incorporated under the Companies Act, 2013 and having its registered office at Hereinafter called as the bank" of the second part.

WHEREAS the borrower had approached the bank for grant of term loan of Rs for financing the setting up of a

WHEREAS the bank has agreed to sanction the said term loan to the borrower on the following terms and conditions

NOW THIS LOAN AGREEMENT WITNESS AS FOLLOWS:

1. The bank hereby sanctions a term loan of Rs.....
2. The borrower hereby agrees to secure the said loan together with interest and other costs and expenses by hypothecation of all movables at the borrowers premises at And all stocks of raw materials goods in process, finished goods stores and spares:
3. The borrowers shall pay interest on the said loan at % of per annum.
4. The borrower shall repay the said loan in quarterly installments beginning months after the disbursement of the loan the first installment being of Rs the second of Rs..... and the last being of RS. The interest shall be payable at quarterly intervals.
5. In case of default penal interest at the rate of..... % per annum shall be payable.
6. The borrower shall get all the hypothecated goods insured and punctually pay the premium.



7. The borrower shall not without seeking the prior permission of the bank sell assign, mortgage or otherwise dispose of any assets charged to the bank.

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day month and year first above-written

WITNESS 1

BORROWER

WITNESS 2

BANK

OUTSOURCING AGREEMENTS

1. Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists it differs from contracting is that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best – its core competencies.
2. Two common types of outsourcing are information technology (it) outsourcing and business process outsourcing (BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll and finance functions and activities knowledge process outsourcing (KPO) includes outsourcing related to legal, paralegal and other highly skilled activities.
3. A good outsourcing agreement is one which provides a comprehensive road map of the duties and obligations of both the parties - outsourcer and service provider. It minimizes complications when a dispute arises.



SPECIMEN OF OUTSOURCING AGREEMENT FOR CONVERTING HARD COPIES OF A BOOK IN A COMPACT DISC (CD)

OUTSOURCING AGREEMENT

This agreement for the conversion of the book titled intellectual property protection in India is executed in..... on 2015 by and between

The golden law publishing Co. Pvt. Ltd. having their office at represented by Mr..... Manager, Golden Law Publishing Co. Pvt. Ltd. (hereinafter referred to as 'the GLP Pvt. Ltd.)

AND

M/s Bluetec web services Pvt. Ltd a company registered under the companies act having their office at and represented by Mr Director M/s Bluetec Web Services Pvt. Ltd. (hereinafter referred to as the M/s Bluetec Pvt. Ltd.)

WHEREAS the GLP Pvt. Ltd has published the book intellectual property Protection in India it has decided to convert the hard copies of above mentioned book into a soft copy version by getting the book



digitized and thereafter put the contents of the book in a CD (compact disc) along with a search engine. The GLP Pvt. Ltd. floated a tender for this book vide tender document with closing date 2015 and after evaluating the bids of various parties the GLP Pvt. Ltd. has decided to award the project to M/s Bluetec Pvt. Ltd. on the following terms and conditions

NOW THIS AGREEMENT WITNESS AS FOLLOWS:

1. M/s Bluetec Pvt. Ltd would perform the job of digitization of the book including Data Punching / Scanning, Proof – reading (at an accuracy level of 99. 9%).
2. M/s Bluetec Pvt. Ltd. would be developing a search engine as per the GLP's requirement. The search engine would be licensed to the search engine for any purpose and would not be liable to pay to m/s Bluetec Pvt. Ltd .any additional amount for such usage.
3. The copyright of the contents of the CD. Marketing rights and all other rights pertaining to the said CD would solely vest with the GLP Pvt. Ltd.
4. M/s Bluetec Pvt. Ltd. undertakes to complete the assignment within a period of 50 days from the date of execution of this agreement.
5. M/s Bluetec Pvt. Ltd. would hand over the digitized contents of the aforesaid book to the GLP Pvt. Ltd. after the completion of the job and the total project cost to be paid to M/s Bluetec Pvt. Ltd. would be as follows:
 - **Cost of developing the search engine- Rs. 50,000/- (rupees fifty thousand only)**
 - **Digitization cost for each page (in hard copy) – Rs. 12/- per page**
 - **Conversion cost for each page (in hard copy) – Rs. 10/- per page**
 - **Total cost of each CD including the manual jewel case packing printing and security features – Rs. 85/- per CD**
6. M/s Bluetec Pvt. Ltd. agrees to keep the hard copies of the book given for digitization in good shape.
7. All disputes claims and demands arising under or pursuant to or concerning this contract shall be subject to arbitration under the provisions of the arbitration and conciliation act, 1996.

IN WITNESS WHEREOF the parties hereto have set their respective hands to the agreement on the day, month and the year mentioned herein above.

WITNESS 1

On behalf of M/s Bluetec Web Services Pvt. Ltd

WITNESS 2

On behalf of GLP Pvt. Ltd.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. What is meant by consortium of financial assistance?

The concept on consortium lending has been in vogue for quite some time, which has simplified, to some extent the paper work and exercise a borrower has to do. Under the consortium system, the applicant-borrower has to submit only one application for total financial assistance proposed to be drawn from more than one financial institution or from more than one bank or jointly from more than one institution/bank.

The application is scrutinized by the prospective lenders at a consortium meeting of participating institutions/banks and thereafter representatives of the borrower company are invited to a consortium meeting for replying to their queries, submitting more information and/or supplying more documents, to enable the lender institutions/ bank to scrutinize in great detail the application and thereafter to put up an appropriate note to their respective boards of directors for a final decision.

2. Bharat requests Ajay to sell and deliver to him goods on credit. Ajay agrees to do so, provided Chandan guarantees the payment of the price of the goods. Is this a sufficient consideration for Chandan's promise and is this arrangement a valid contract of guarantee? Discuss.

This is a sufficient consideration for Chandan's promise and this arrangement is a valid contract of guarantee.

Section 127 of the India Contract Act, 1872 defines consideration for guarantee as "Anything done, or any promise made, for the benefits of the principal debtors may be a sufficient consideration to the surety for giving the guarantee".

3. Distinguish between Counter guarantee' and 'fidelity guarantee'

ANSWER: Refer chapter 13

4. Distinguish between the 'Counter guarantee' and 'performance guarantee'

ANSWER: Refer chapter 13

5. Distinguish between the 'Performance guarantee' and 'fidelity guarantee'

ANSWER: Refer chapter 13

6. What is meant by outsourcing? Draft a specimen of an outsourcing agreement

ANSWER: Refer chapter 13

7. Draft a specimen deed of guarantee to be provided by a bank on behalf of its client company for the execution of contract in favour of State government.

ANSWER: Refer chapter 13



CHAPTER -14

SERVICE AGREEMENT

MEANING OF A SERVICE CONTRACT

An agreement with specific terms between two persons in which there is a promise to do something in return for valuable benefit known as consideration. Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions



Important points regarding service contract

S.NO.	PARTICULARS	PROVISIONS
1	Content of a service contract	1. The time or period of employment 2. The remuneration and other perquisites 3. Duties of employment 4. Powers of the employee 5. Leave and the terms on which it will be granted
2	Determination of employment	The grounds for determination of employment should be clearly expressed in the agreement. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier it may also be determined at pleasure by notice without giving any ground. In the case of misconduct or neglect no notice is required, but provision may be made for framing charges and taking defense as in the case of government servants since as employee is entitled to damages for wrongful dismissal if the termination of the service is not properly made provision in this respect should be carefully worded.
3	Restrictive covenants	It is usual to include restrictive covenants in the agreement such as that the employer will not undertake any other or service or that he will not divulge the employer 's secrets or make improper use of his trade secrets or information about the employer's affairs.
4	Effect of labor laws	Many acts have been passed by the central or state legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities and of workers in factories and commercial establishments for e. g the factories act that industrial employment (standing orders) act the payment of wages act the workmen s compensation act etc. in drawing up a service contract for such an employee the provisions of the relevant acts must be kept in view. Any term of contract contrary the statutory provisions will be null and void as it is not peon to an employee to contract out of the safeguards provided by the legislature for his protection.



SPECIMEN AGREEMENT OF EMPLOYMENT OF MANAGER**SERVICE AGREEMENT**

AN agreement made on this day of Between AB, etc. (hereinafter called the “employer”) of the one part AND CD, etc, (hereinafter called the “manager”) of the other part.

WHEREAS

1. The employer wants to appoint a suitable to work as manager for his business concern; and
2. CD, the party of the other part, has agreed to serve as manager of the employer for his business concern.

NOW THIS AGREEMENT WITNESSES AS FOLLOWS

1. The manager shall work as such for a term of Years from the day of at or any other place as desired by the employer.
2. The manager shall give his whole time and attention to the said business and shall use his best endeavor to improve and expand the same and shall in all respects diligently and faithfully obey and observe all lawful orders and instructions of the employer in relation to the conduct of the said business.
3. The employer shall pay to the manager during the continuance of his engagements salary of Rs..... per month on the first day of every calendar month.
4. The employer shall during the continuance of the manager’s engagement provide him with a suitable furnished house for residence free of rent, rates and taxes.
5. The manager shall be entitled during his engagement to leave on full pay for a period equal to 1/20th of the period of service rendered.
6. Either party hereto may terminate the engagement of the manager at any time before the expiration of the said term of years on giving or sending by registered post to the other party three calendar months notice in writing.

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day month and year first above-written

WITNESS**EMPLOYER****WITNESS****MANAGER**

SPECIMEN AGREEMENT OF APPOINTMENT OF AN ADVOCATE ON ANNUAL RETAINER SHIP BASIS**RETAINERSHIP AGEEMENT**

This agreement is made on 1st day of April, 1999 between Alpha Industries Limited having its Registered Office at 707, Ram Mandir Lane, Prakask Deep Chambers, Shivaji Lane, Aurangabad of the one part (hereinafter called the "Company") and Ram Avatar & Co. carrying on the profession of Advocates in partnership in the town of Bhopal of the other part (hereinafter called the firm)

WHEREAS the company wants to appoint a legal firm for managing its legal affairs so company approach the firm and firm accept the same.

NOW THIS AGREEMENT WITNESSES AS FOLLOWS

1. That the company hereby appoints the firm as its legal adviser and the firm agrees to render legal services to the company on the terms and conditions mentioned hereunder for a period of one year, which shall deemed to continue unless terminated by a notice.
2. During the currency of this agreement and unless altered by mutual consent, the company shall pay Rs 1, 00, 000/- (Rupee One Lac only) per annum in two half yearly installments each year as remuneration for legal services rendered.
3. That the firm engages to attend all the legal works of the said company to send notices of demand or otherwise for recovery of outstanding dues correspondences and to defend such matters in the courts or before other authority in this behalf in the town of Aurangabad and to give opinion in writing on the facts stated to the said firm in writing.
4. That on termination of this agreement, the firm engages to return all papers documents or other proceedings belonging to and which are expected to be returned by the company on severance of the connection with the company.
5. The firm shall have lien on all the papers and other documents of the company in respect of arrear of remuneration and other expenditure legitimately incurred on behalf of the company by the firm

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day month and year first above-written

WITNESS

COMPANY

WITNESS

FIRM



EMPLOYMENT CONTRACTS

Employment agreement is an agreement that is entered into between two parties, i.e. the employer and employee. It is a document that describes the responsibilities and duties expected of an employee. It also describes the profile of the job and the title. The document ensures that the employee knows his place in the organisation and what is expected of him.

Employment agreements should be created in a way that is just and fair for all the employees. If this is followed, employees will do their tasks and responsibilities well and without any negative emotions toward their employers. Usually employment contracts contain only vague references to the “policies and procedures to which the employee will be bound”.

The employer should provide the employee with all of the company policies and other documents that relate to the contract or are referred to in the contract.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Management issues an appointment letter to a probationer and the relevant para of his appointment letter reads as follows:

Clause (I) – you are hereby appointed as a salesman....you will serve a probationary period of six months; this period of probation may be extended by a further period of three months or more in suitable cases in the absolute discretion of the company. The company has the right to terminate your services during the period of probation or extended period of probation or before confirmation in writing without notice and without assigning any reason whatsoever.”

The probationer joined the services of the company on probation. The management terminated his services after 2 months of joining by a FETTER SAYING “we regret to terminate your services with immediate effect in terms of clause (I) of your appointment letter”

Do you think what management did is correct? What are the remedies available to the probationer?

What management did is not correct as the service is terminated without any reason and wrongfully. In a similar case **Management Brooke Bond of India (P) Ltd v. Y. K. Gautam** the Industrial Tribunal directed the re-instatement and later the Supreme Court upheld the award of the Tribunal.

In a service contract the terms of employment should be definitely fixed and clearly expressed. Modes and grounds of determining the employment during the term is one of the important provisions, and the same should be clearly expressed in the service contract. The grounds on which the employment may be determined during the term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier, it may also be determined at pleasure by notice, without giving any ground. In the case of misconduct or neglect, no notice is required but provision may be made for framing charges and taking defense as in the case of Government Servants.

An employee is entitled to damages for wrongful dismissal or reinstatement if the termination of the service is not properly made as directed by courts depending upon the facts and circumstances of the case.

2. Briefly explain the contents of a service contract. Draft a specimen agreement of employment of manager of a business concern.

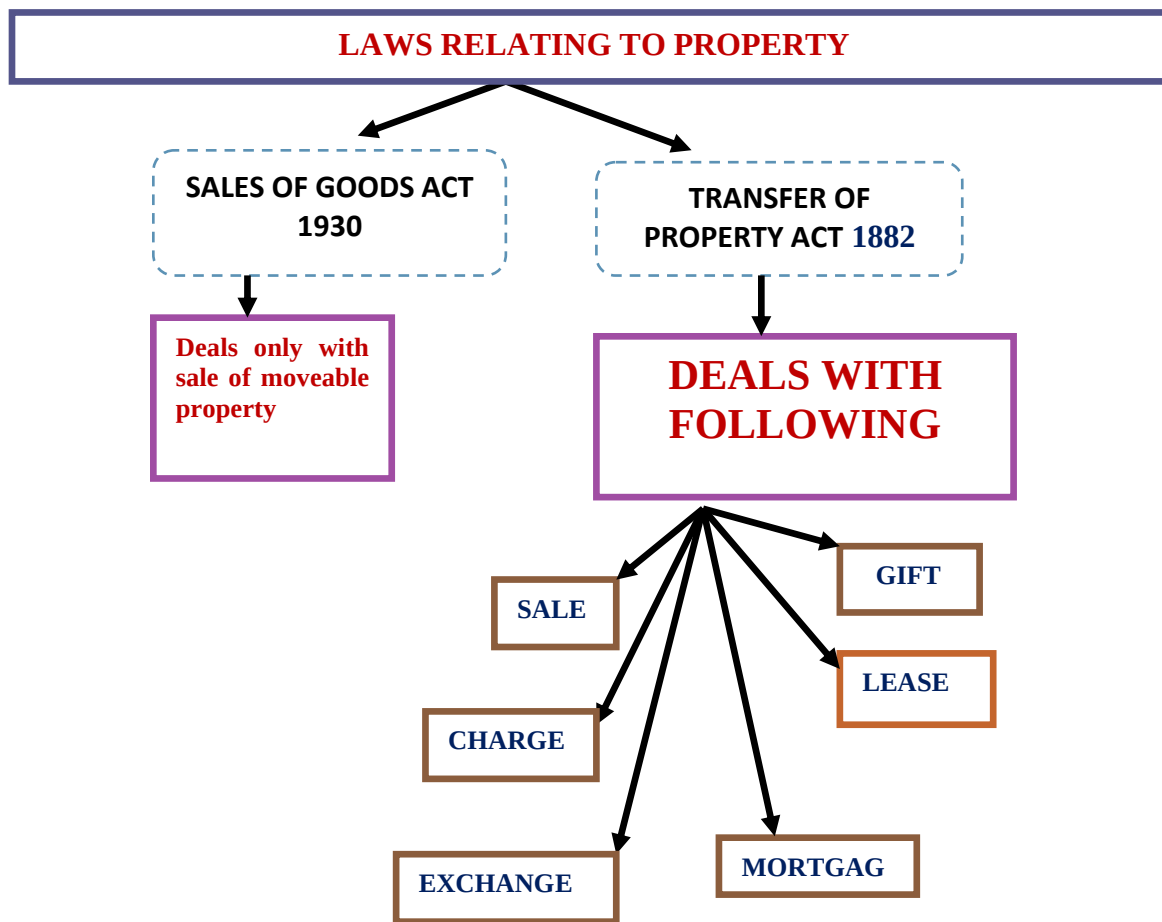
ANSWER: Refer chapter 14

3. Alpha Industries Ltd. Wishes to appoint Ram Avtar & Co. Advocates as their legal consultant on an annual retainerhip basis. Draft a suitable agreement assuming facts, wherever necessary.

ANSWER: Refer Chapter 14



CHAPTER-15 DRAFTING OF SALE OF IMMOVABLE PROPERTY



TRANSFER OF PROPERTY [SECTION 5 OF TPA ACT 1882]

The term “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.

In this section, "living person" includes a company or association or body of individuals whether incorporated or not.



Essential elements of valid transfer

Following conditions are required to be satisfied for valid transfer of any immovable property:

- Property must be **transferable**.
- **Transferor and transferee** must be competent.
- **Consideration and object** of transfer must be lawful.
- Transfer must take place as per method prescribed under the Act.

PROPERTIES WHICH CAN BE TRANSFERRED

Section 6 of provides that property of any kind may be transferred.

PROPERTIES WHICH CANNOT BE TRANSFERRED

General Rule says that every kind of property can be transferred but following property cannot be transferred.

1. CHANCE OF AN 'HEIR APPARENT' OR 'SPES SUCCESSION

Spes Successions' is a latin phrase which means the “**expectancy of succession**”. In other words, it is the possibilities of future interest in a property. The chance of an heir apparent succeeding to the estate of a deceased person cannot be transferred.

For e. g- Aman is the owner of the property and Rahul is his son. Rahul is the heir of Aman. During the life time of his father Aman, Rahul has **only a hope expectancy** that he will inherit the property of his father. This type of property which Rahul hopes to get after the death of the father cannot be transferred, during the life time of Aman.

2. RIGHT OF RE-ENTRY

The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may **re-enter** or **reclaim** is called the right of re-entry.

For e. g-, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person.

3. TRANSFER OF EASEMENT

An easement is a right enjoyed by the owner of **land over the land of another**. Such as, **right of way, right of light, right of support, right to a flow of air or water**.

For e.g. - if A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

As an easement confers **no proprietary right** on its owner, it cannot be transferred apart from the land itself.



4. RESTRICTED INTEREST OR PERSONAL INTEREST

An interest restricted in enjoyment to the owner personally is by its very nature and are not transferable. Restricted interest includes '**religious office**'.

Example:

Priest or religious preacher who has right to do worship and right to receive offering made at temple. He can't transfer his right.

5. RIGHT TO FUTURE MAINTENANCE

This again is a personal right in the property which the law says that it cannot be transferred. The right of a Hindu widow to maintenance is a personal right which cannot be Transferred. However, the arrears of past maintenance can be transferred.

6. MERE RIGHT TO SUE

A 'mere right to sue' apart from the interest from which such right accrues cannot be assigned (transferred). The 'right to sue' is a personal right annexed to the ownership of property and cannot be served, from it.

7. TRANSFER OF PUBLIC OFFICE AND SALARIES, STIPENDS, ETC.

It is against public policy to transfer the public office, salary etc. Pension and salary are given on **personal basis**, it can't be transferred

WHO CAN TRANSFER THE PROPERTY**[SECTION 7]**

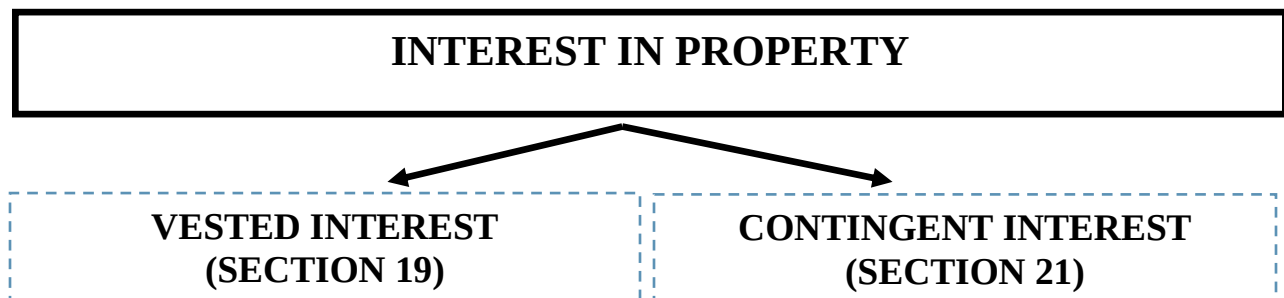
Every person

- (a) Who is competent to contract and
- (b) Entitled to transferable property, or
- (c) Authorised to dispose of property is competent to transfer such property.

Hence, every person **competent to contract and having ownership** can transfer property.

EXCEPTION

If a person holds himself out as the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. doctrine of feeding the grant by estoppel.

INTEREST IN PROPERTY

DISTINCTION BETWEEN A VESTED AND A CONTINGENT INTEREST

BASIS	VESTED INTEREST	CONTINGENT INTEREST
Fulfillment of Condition	Vested interest doesn't depend upon the fulfillment of any condition	Contingent interest depends upon the fulfillment of some condition
Right of Enjoyment	In vested interest, there is a person immediate right though its enjoyment may be postponed to some future date.	In a contingent interest, a right of enjoyment is to accrue on the happening of an event which is uncertain.
Effect of Transferee's Death	Vested interest is not defeated by the death of the transferee before he obtains possession	Contingent interest does not take effect in the event of the transferee's death before the fulfillment of the condition
Transferability and Heritability	Vested interest is both transferable as well as heritable.	Contingent interest is not transferable if the transferee of a vested interest dies; the interest passes on to his heirs. If the transferee of the contingent interest dies before obtaining possession, the int. fails and doesn't pass on to his heirs.

SALE OF IMMOVABLE PROPERTY

Generally, a sale is transfer of ownership of property by one living person to another living person for a mutually agreed price paid or promised or part paid or part promised.

The Contract Act, the Transfer of Property Act, the Registration Act, the General Clauses Act, govern sale of immovable property. It is transfer of all the rights, title and interest with easements and privileges of the seller to the buyer, for the latter's use of the property as the absolute owner.



Sale of Immovable Property is defined in Section 54 of the Transfer of Property Act, 1882 as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

SALE DEED

The instrument of sale perfected by execution and registration is called Deed of Sale. The word 'convey' is also understood as 'sale', thus a deed of sale is also known as deed of conveyance. And both the seller and buyer must execute the deed of sale.



ESSENTIAL REQUIREMENTS OF SALE OF IMMOVABLE

1. Subject-matter of sale shall be immovable property.
2. Transfer of ownership in exchange of price paid or promised or part paid or part promised.
3. Parties to transaction of sale are known as seller and buyer.
4. Subject-matter of sale is immovable property which is sold by seller and purchased by buyer.
5. Delivery of possession of property to the buyer by seller may be made as under:
 - **Property of the value of less than Rs. 100/- may be transferred merely by delivery of physical possession;**
 - **Property of the value exceeding Rs. 100/- may be transferred under a written instrument known as ‘Sale Deed’ which should be registered under the Registered Act, 1908.**
6. Sale of immovable property attracts stamp duty under the Indian Stamp Act.
7. Permission of RBI is required if the property acquired is owned by Non-resident as per the Provisions of FEMA.

DOCUMENTATION

Usually a transaction of a sale of immovable property involves two documents, e.g., Agreement to sell and the Conveyance Deed i.e. sale deed. But with only a Sale Deed the transaction of sale can be completed.

IMPORTANT DOCTRINES

DOCTRINE OF ELECTION

(SECTION 35)

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. It is, a general rule that **no one may approbate (Accept) and reprobate (Reject)**.

For e.g. - A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election.

The question of Election arises only when a transfer is made by the **same document**. If the transferor makes a gift of property by one deed and by another asks the Do need to part with his own property then there is no question of election.



DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL**(SECTION 43)**

As per **Section 43** of Transfer of Property Act Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

In order to invoke this section, the transferee must prove that:

- There was a representation, fraudulent or erroneous;
- It was to the effect that the transferor is entitled to transfer the immoveable property;
- The transferor is found to have subsequently acquired the interest which he professed to transfer;
- The transfer of property was for consideration;
- The transferee has not rescinded the contract;
- The transferee acted in good-faith for consideration and without notice of the rights under the prior transfer.

DOCTRINE OF FRAUDULENT TRANSFER**(SECTION 53)**

Section 53 of Transfer of Property Act Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer.

Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor **shall be voidable** at the option of any creditor so defeated or delayed.”

Section 53(2) provides that the rights of a transferee in good faith and consideration are protected

DOCTRINE OF PART-PERFORMANCE**(SECTION 53A)**

Section 53A of 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. 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.

Followings are the **essential conditions** for the operation of the doctrine of part-performance according to Section 53A:-

- There must be a contract to transfer immoveable property.
- It must be for consideration.
- The contract should be in writing and signed by the transferor himself or on his behalf.



- The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
- 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.

The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

DOCTRINE OF LIS PENDENS (SECTION 52)

Lis means dispute, Lis Pendens means a pending suit, action, petition or the like.

Doctrine of Lis Pendens states that during the pendency of a suit in a Court of Law, property which is subject to litigation cannot be transferred and if transferred, the transferee will be bound by the result of the suit/proceedings.

For 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.

IN ORDER TO CONSTITUTE A LIS PENDENS, THE FOLLOWING ELEMENTS MUST BE PRESENT:

1. There must be a suit or proceeding in a Court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immoveable property is directly and specifically in question.
4. There must be transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must effect the rights of the other party that may ultimately accrue under the terms of the decree or order.

AGREEMENT OF SALE OF IMMOVABLE PROPERTY

AGREEMENT TO SELL

THIS AGREEMENT OF SELL executed at on ____ the ____ Day of ____, ____ (.....),
BETWEEN S, son of SF, resident of _____ Hereinafter called vendor) of the one part AND
P son of PF resident of ____ hereinafter called the purchaser of the other part.

WHEREAS the vendor is the sole and absolute owner of the property more fully set out in the schedule hereunder.

WHEREAS it is agreed that the vendor shall sell and the purchase the said property for the sum of Rs. _____ (Rupees _____) free of all encumbrances.



NOW THIS AGREEMENT OF SALE WITNESSES AS FOLLOWS

1. The price of property more fully set out in the Schedule is fixed at Rs. _____ free of all encumbrances.
2. The purchaser has paid to the vendor this day the sum of Rs. ____ (Rupees _____) by way of earnest money for the due performance of the agreement, the receipt of which the vendor hereby admit and acknowledge.
3. The time of performance of the agreement shall be _____, months from the, and it is agreed that time fixed herein for the performance shall be the essence of this contract.
4. The purchaser shall pay to the vendor the balance sale price of Rs. _____ (Rupees _____) before registration of the sale deed.
5. The vendor agrees that he will deliver vacant possession of the property to the purchaser before registration of the sale deed.
6. The vendor shall execute the sale deed in favor of the purchaser or his nominee as purchaser may require.
7. If the vendor's title to the property is not approved by the purchaser, the vendor shall refund the earnest money received by him under this agreement and on failure of the vendor to refund the earnest money within _____ days he shall be liable to repay the same with interest thereon at _____ Percent per annum.

IN WITNESS WHEREOF the parties aforementioned have signed this agreement on the date month and the year aforementioned.

**WITNESS
WITNESS**

**VENDOR
PURCHASER**

SALE BY LIQUIDATOR OF A COMPANY IN VOLUNTARY LIQUIDATION

Liquidation means winding of the company and Liquidator is the officer appointed to conduct the winding up of a company .Winding up is proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realized and applied in payment of its debts and when these are satisfied, returning to its members the sums which they have contributed to the company or paying them other moneys due to them in their character of members.



A SPECIMEN OF DEED OF SALE BY LIQUIDATOR OF A COMPANY IN VOLUNTARY LIQUIDATION**SALE DEED**

THIS SALE DEED is made at on the day of by voluntary liquidator of Co. Ltd. (in voluntary liquidation) (hereinafter called “the vendor”) of the one part, in favour of Shri son of Shri (Hereinafter called “the Purchaser) the other part, under the terms and conditions mentioned below.

WHEREAS by a special resolution passed by the shareholders of Co. Ltd. at an Extraordinary General Meeting held on the day of of which notice as prescribed by law had been duly given, and it was resolved that the company be windup voluntarily:

WHEREAS the said vendor was appointed its voluntary liquidator on The notice of was duly submitted to the Registrar of Companies as prescribed by law, on the day of

WHEREAS in a meeting of the shareholders of the said company it was resolved that the properties mentioned in the Schedule annexed hereto be sold by the vendor after publishing a notice for sale English and Hindi daily newspapers twice within a period of a fortnight and pursuant to such resolution, the vendor had duly advertised the sale of the said properties in newspapers and pursuant thereto have received offers, the highest whereof was that of the said purchaser

WHEREAS the said vendor agreed to sell and the said purchaser agreed to purchase the said properties on the terms and conditions mentioned herein and incorporated in an agreement to sell dated between the said vendor and the said purchaser.

NOW THIS DEED IS WITNESSED AS FOLLOWS

That pursuant to the agreement dated Aforementioned and in consideration of the sum of Rs. (Rupees) paid by the purchaser before the sub-Registrar,.....on presentation of this Deed of sale for registration thereof the receipt where of the vendor hereby acknowledges) the vendor hereby transfers by way of sale and conveys on behalf of the said company all those items of the property mentioned more particularly in the schedule attached hereto, the said purchaser, his heirs and assigns to have and to hold the same absolutely and forever.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness:
Witness:

Vendor
Purchaser



DEEDS OF SALE OF JOINT FAMILY FOR LEGAL NECESSITY

THIS DEED OF SALE made on this.....day of.....between AB for self and as Karta of and representing all other coparceners, all constituting a Hindu Undivided Family of etc. (hereinafter called the vendor) and CD of etc. (hereinafter called the purchaser) of the other part.

WHEREAS the said joint family for several years past owned and still owns and possess inter alia the lands described in schedule A.

WHEEREAS the said joint family also carried on and still on business as dealers and suppliers of at no.....under the name and style of.....which suffered a heavy loss of its capital and reserves estimated at.....in the years.....owing to outbreak of fire.....at its godown at no.....on the day.

WHEREAS the joint family could not also pay its income-tax and other capital and revenue liabilities of the said business aggregating to for the years.....and also its business debts estimated at.....

WHEREAS the said joint family has not any other resources to make up the deficit as regards capital loss and to pay liabilities of the family regards the said income tax except by the sale of one of its properties.

WHEREAS the said AB for sell and as Karta of said joint family has by on agreement in writing dated.....agreed with the said CD for sale of the properties fully mentioned and described in the scheduled here to at and for sum of.....

NOW THIS DEED WITNESSETH AS FOLLOWS

In pursuance of the said agreement and in consideration of the sum of.....paid by the said CD to the said AB simultaneously with the execution do hereby grant, sell, convey, transfer, assign assure the said property together with all houses, building fixtures etc.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness:

Witness:

Vendor

Purchaser



A Specimen of Deed of Sale by an Administrator under Orders of the Court

THIS DEED OF SALE is made on the day of between Administrator in Administration Suit No of in the Court of (hereinafter called “the vendor”) and Shri son of resident of(hereinafter called “the purchaser”)

WHEREAS D, son of Shri of died on having an estate comprising movable and immovable properties but without appointing a successor under his will dated

WHEREAS in Administration Suit No of decided by the Court, the vendor was appointed as Administrator to administer the estate of the said D in accordance with the terms of the will aforementioned;

WHEREAS the said vendor as such Administrator obtained sanction for the sale of the properties more particularly described in the Schedule I annexed hereto, in an Order dated a copy whereof is also attached as Schedule II hereto;

WHEREAS the vendor advertised for receipt of tenders for the purchase of the said properties

WHEREAS the said vendor has, pursuant to such tenders agreed to sell and purchaser as one of the tenders to the property mentioned in the Schedule I, agreed to purchase the Items Nos of the properties mentioned in Schedule I on the terms and conditions mentioned in the advertisement for sale agreed to be embodied in this Deed.

NOW THIS DEED OF SALE W ITNESSES AS FOLLOWS:

That in consideration of Rs paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges) the vendor hereby transfers by way of sale and conveys unto the said purchaser, all that property mentioned in Schedule I to have and to hold the same as an absolute owner thereof forever.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed of Sale on the date, month and the year first above mentioned.

W-1
W-2

VENDOR
BUYER



PREVIOUS YEAR QUESTIONS AND ANSWERS



- 1. Anand sells a property to Karan. After completion of the conveyance, Karan discovers that under a decree for partition, a portion of the property had been allotted to Chandan and Anand's omission to disclose the decree is fraudulent. Discuss the rights and course of action available to Karan.**

This is a case of non-disclosure of material fact in title. **Section 55 of the Transfer of Property Act, 1882** prescribes the rights and liabilities of buyer and seller which can be modified by the parties to a contract by mutual consent and contract to the contrary of these provisions. One of the liabilities of the seller under section 55(1) of the Act is that he is bound to disclose to the buyer any material defect in the property or in his title to such property before the completion of the execution of the sale deed.

In other words, seller is liable to disclose latent defects in the property or in his title known to him before the completion of the execution of the sale deed. Such a latent defect should be material i.e. it should be such as would influence the buyer's decision if he knew about it. A latent defect is one which a purchaser would not be able to discover by ordinary diligence. If it could be, then it is a patent defect and there is no obligation on the part of the seller to disclose it.

Allotment of property to another co-owner under a partition deed not known to the purchaser is one of the examples in defects in the title. If A agreed to sell a property to B and puts B in possession, but B discovers defect in A's title before the sale deed is executed, in such a case B may sue for damages for breach.

In the given problem also there is no-disclosure of material defect in title. Karan i.e. the buyer has accepted the title and he discovers that fraud. He may sue to set aside the sale and claim damages.
Gajapathi v. Alagia

- 2. Arvind mortgages his houses at Delhi and Gurgaon to Suresh. Arvind then mortgages the Delhi house to Navin. On default, Navin brings Delhi house to sale in enforcement of his mortgage and he himself purchases Delhi house. Suresh then obtains an order for sale on his mortgage. What are the rights and remedies available to Navin?**

The given problem is governed by **section 81 of the Transfer of Property Act**. A mortgage acquires certain rights and incurs certain obligations in the property mortgaged. One of those rights is the rights of marshalling. According to section 81 of the Transfer of Property Act "if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgage is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties".

In this case Navin is entitled to have mortgaged debt satisfied out of the property not mortgaged to him (i.e. house at Gurgaon) so long as the same will extend but not so to prejudice the rights of the Suresh.
Inderdawan v. Govind

- 3. Mention important aspects which should be kept in mind while drafting a sale deed of an immovable property by a limited company.**



Company can validity acquire or dispose of an immovable property if its memorandum and articles of Association so provide and its Board of Directors pass the requisite resolution in conformity with the provisions of the Companies Act, 2013.

The important aspects to be kept in mind while drafting a sale deed of an immovable property are:

- **Lawful consideration and objects:** the property must be purchased as a part of legal transaction having paid the consideration as required under the provisions of the Indian contract act, 1872 for a valid contract, besides, the objectives for which property is being purchased by the company should be lawful.
- **Competence of person to transfer:** for a company the test of competence to enter into a transaction of sale or purchase is that its board of directors should authorize a person under the resolution passed in their meeting held in conformity with the articles of association and having objects clause to sell or purchase immovable property under memorandum of association.
- **Transfer of all interest in the property:** all interests which a transferor is capable of passing should be explained in the document. For example, if it is transfer of lands, the easement annexed thereto, the rents of profits thereof things attached thereof etc.
- **Absolute transfers:** the transfer should be free of any conditions or limitations which may inhibit the other party to make full use of the property in exercise of legal rights.
- **Justification:** cogent reasons for transfer should be given so as to establish bonafide base for the transaction. Property should be free from any rights or obligations which a third party can enforce legally against transferee for enjoying any benefit.

4. **Hurry Burry Ltd. went into liquidation and its assets were put to sale by the court. The terms and conditions of the sale stated that the sale would be of the assets on 'basis where is and whatever there is' basis and the bidders had to satisfy themselves as to any encumbrance on the property. On 15th September, 2006, the company judge confirmed the sale of an immovable property in an auction in favour of Ravi. Later on, Ravi received a notice from the municipal corporation authorities claiming the payment of arrears of property tax for the period prior to 15th September, 2006 with interest. The municipal corporation had not filed its claim before the official liquidator. It was argued by the municipal corporation authorities that the sale was made on 'basis where is and whatever there is' basis and the buyer was deemed to have full knowledge as to the defects in the description, quality and quantity of the assets sold. Decide whether Ravi is liable to pay the arrears of property tax with interest. Support your answer with decided case law.**

The facts of the case given are similar to the case **Champdany Industries Ltd., v. Official Liquidator**. The above Case was decided by the Supreme court and it was held that the purchaser was not liable to pay the taxes prior to the date 15th September, 2006. The Supreme Court held:

1. Under Section 55(1)(g) of the Transfer of Property Act, 1882, the seller is bound to pay all public charges due in respect of the property up to the date of sale, when the property is sold in an auction.
2. The fact that the company went into liquidation was given due publicity, the advertisement did not specify that all public charges have to be paid. The municipal authorities did not file their claims before the official liquidator.
3. Neither the company nor any other law imposed any additional obligation upon the purchaser to make any enquiry with regard to the liabilities of the company other than those which would impede its value. An encumbrance must be capable of being found out either on inspection of property or at the Registrar's office or a statutory authority.
4. In the light of the above decision, Mr. Ravi is not liable to pay the taxes prior to 15th September, 2006.



8. Koncept Ltd. was under liquidation. The official liquidator sold 4.68 acres of its land to Affluent Ltd. by auction. Possession of the land was handed over to Affluent Ltd., but without any conveyance deed in their favour. Affluent Ltd. served legal notice on the official liquidator demanding conveyance deed, but in vain. After the expiry of the period prescribed under section 80 of the Code of Civil Procedure, 1908, Affluent Ltd. instituted a civil suit seeking a decree of specific performance. After due hearings, the civil court decreed the suit and directed defendant official liquidator to convey 4.68 acres of land to plaintiff Affluent Ltd. after considering any objections in response to a notice to be published in newspapers.

The official liquidator complied with the decree and published notices in newspapers. No objections were received. Still the official liquidator did not execute conveyance deed, on the pretext that along with Koncept Ltd., Kite Co. was also under liquidation and had common boundary wall with Affluent Ltd. Kite Co.'s land had already been sold. Therefore, the official liquidator was willing to execute conveyance for 3.16 acres of land only and not 4.68 acres of land as claimed by Affluent Ltd., the judgment creditor. This plea was not pressed in written statement or hearing in the court of civil judge.

Decide the official liquidator's liability to execute conveyance deed for the entire area. Cite case law, if any.

The facts of the case are similar to **Shivarpan Engineering (P) Ltd. v. Official Liquidator**

The point to be decided in the above mentioned case was whether the Official convey 4.68 acres of land in favour of the applicant. No application for the variation or modification of the earlier order had been filed by the Official Liquidator. No person had publication of notice, as directed by the Court.

Therefore, Official Liquidator was bound to give effect to the earlier orders by conveying 4.68 acres of land in favour of the applicant. In the event, the Official Liquidator was unable to deliver 4.68 acres, he was at liberty to execute the conveyance for the area that he could convey and was to refund the sum accordingly to the applicant. In view of the decision of the Calcutta High Court in the aforesaid case, the Official Liquidator in the given problem is bound to give effect to the earlier orders by conveying 4.68 acres of land in favour of affluent Ltd.

9. Ravinder and Kishore exchanged their properties, but there was no registered document. They took possession of their respective properties. After some months, Ravinder wants to get back his property given to Kishore. Advise Ravinder.

Under **section 53 A** of the Transfer of property Act, 1882 if two persons exchange property under a written document not registered and the parties takes possession of each other's property in pursuance of the exchange, neither party will be afterwards entitled to eject the other on the ground that the document has not been registered and has not passed any title. In such cases, the conditions laid down in section 53 A of the transfer of property Act must be fulfilled. In the above circumstances, Ravindra cannot get back his property.

10. Deep entered into an agreement of sale of certain land with vipul and upon payment of consideration, vipul took the possession of the suit land. However, deep did not execute the sale deed. Further, deep and his family members obstructed vipul from cultivating the suit land, can vipul file a suit for permanent injunction restraining deep from disturbing the possession of the suit land? Discuss in the light of provisions of the transfer of property etc. 1882 and decided case law.



The facts of the given problem are quite identical with the facts of the case **sadashiv chander bhamgare v. eknath pandharinath nangude,**

In this case, the trial court dismissed the suit on the ground that a suit simplicitor for injunction seeking protection under section 53A of the transfer of property act is not maintainable. On appeal the appellate court reversed the order of the trial court. The appellant appealed to the high court challenging the appellate order.

Appeal was dismissed and the case was remanded to trial court for trial on the following grounds.

Section 53A imposes a statutory bar on the transferor to seek possession of the immovable property from the transferee in possession. It disentitles the transfer from seeking possession from the proposed transferee in possession. Therefore, if the transferor, though he has been denied that right by section 53A tries to take possession forcibly; the proposed transferee in possession would be entitled to institute suit to enforce the bar of section 53A against the transferor in such a situation, when the proposed transferee in possession comes to the court seeking a decree of perpetual injunction restraining the transferor from disturbing his possession, he does not come to the court for enforcement of any rights conferred on him, but he comes to the court for enforcement of the bar created by section 53A against the transferor if the proposed transferee in possession then the proposed transferee in possession would be rendered remedies. When it is said that the proposed transferee in possession can use section 53A as a shield. But not as sword, it means that he can use section 53A either as a plaintiff or as a defendant to protect his possession, but he cannot use section 53A either for getting title or for getting possession if he is not actually in possession, to put it other words when the transferee in possession comes to the court as a plaintiff seeking a decree of perpetual injunction against the transferor he is using section 53A as a shield to protect his possession. Thus the proposed transferee in possession cannot use section 53A to sue the transferor for a declaration of title, but he can avail of benefits of section 53A as a shield to retain his possession.

It is thus clear that in such a situation where a suit for a decree for specific performance is barred by the law of limitation, the prospective purchaser in possession would not be in position to institute a suit for decree of specific performance, but section 53A creates an equity in his favour, as a result of which he is entitled to continue in possession. If it is held that though his possession is protected, he cannot institute a suit in case he finds that his possession has been threatened would amount to denying a remedy for enforcing the equity which is created in his favour by section 53A in a case where the prospective purchaser has a live cause of action for instituting a suit for specific performance. He omits to institute such a suit and instead files a suit only for perpetual injunction for protection of his possession in that situation it is for the court to consider whether to grant him a decree of perpetual injunction or not. But that will be in the realm of exercise of the jurisdiction it will not be a case of absence of jurisdiction to entertain the suit. Therefore, there is nothing in the specific relief act also which can be said to have barred the jurisdiction of the civil court to take cognizance of such a suit even by necessary implications.

From what has been observed above, it becomes clear now that there can be no doubt that a proposed transferee can institute a suit for protection of his possession which is threatened.



CHAPTER -16

LEASE AND LICENSE DEED

DEFINITION AND MEANING OF LEASE

The term lease has been defined under Section 105 of the transfer of Property Act 1882.

As per this lease is a transaction whereby one person (i.e. lessor) transfers the right to enjoy in an immoveable property to another person (i.e. lessee) either for a certain time or in perpetuity, in return of a consideration.



IMPORTANT PROVISIONS REGARDING LEASE

S.NO.	PARTICULARS	PROVISIONS
1	Essentials elements of a lease transaction:	1. There must be transferor (lessor) and a transferee (lessee), both of whom have agreed for the construction. 2. There must be for a certain time or in perpetuity. 3. The transaction must be in consideration of a price paid or promised (known as premium pagdi, salami or Nazarene) 4. The transaction must be in consideration of money to be paid periodically or on specified occasions to the transferor by the transferee called rent).
2	Difference between lease and agreement to grant a lease	An instrument is usually construed as a lease if it contains words of immediate demise .An instrument is construed as an agreement to grant a lease if certain things have to be done by the lessor before the lease is granted such as the completion on repair or improvement of the premises, or by the lessee such as the obtaining of sureties.
3	Kinds of lease and notice to quit	Unless the contract otherwise provides, lease for agricultural and manufacturing purposes shall be demand to be on year basis and all other leases shall be deemed to be on month to month basis A lease from year to year can be terminated either by the lessor or the lessee by giving to the other 6 months notice expiring with the end of the year of the tenancy.
4	Registration of lease deed	Lease Deed is required to be registered in the following cases ➤ Lease on year to year basis ➤ Lease for any term exceeding 1 year. ➤ Lease which reserves a yearly rent
5	Stamp duty on lease deed	Stamp duty on a lease deed is chargeable as per Article 35 Schedule 35, Schedule I of the Indian stamp Act 1899. Stamp duty shall be payable as per respective state stamp law and hence it will vary from state to state.



SUB LEASE & ASSIGNMENT

SUB LEASE	ASSIGNMENT
A sub-lease is demise by a lessee for lessor term than he himself has	If the demise is for the whole term or for a period beyond the term, it amounts to assignment
It is always allowed unless prohibited	It is always prohibited unless allowed

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Hunsrai v. Bejoylal A ND Akshoy Kumar v. Akman Molla	The Privy Council pointed out in Hunsrai v. Bejoylal that in India a sub-lease is not an absolute assignment and it was further held in Akshoy Kumar v. Akman Molla , that there is no privity of estate as between the lessor and the sub-lessee, who does not step into the shoes of the lessee. A sub-lease is not prejudiced by the surrender of the head lease (Section 115 of Transfer of Property Act) but the position is different in the case of forfeiture which annuls all sub-leases except in case of fraud as between the lessor and lessee. A sub-lessee is entitled to relief against forfeiture under Section 114 of the Transfer of Property Act, 1882, which is applicable only in the case of non-payment of rent. No relief is open to the sub-lease in case of transfer of breach of covenant in restraint of transfer.

DRAFTING OF A LEASE

A deed of lease should be drafted as a deed between the landlord and the tenant. They should be called “the lessor” and “the lessee” as these are the terms used in the Transfer of Property Act, 1882. While drafting a lease, following points may be noted

1. Generally recitals are not necessary and material facts are mentioned in the operative part.
2. Consideration Reserved rent is mentioned in the beginning of the Testatum. The entire consideration, including premium, etc., should be mentioned.
3. Operative Part – It shows clearly the lessor divesting himself of possession and the lessee coming into possession, e.g. by the use of such words as “The lessor hereby lets, or demises or grants a lease of, etc., etc. with effect from the day of”
4. Habendum – The nature of the lease, commencement and duration of the term are specified here.
5. Reddendum – This is peculiar to a deed of lease. Here is mentioned the mode and time fixed for payment. It begins with the word rendering or paying with reference to the reserved rent. Rent is payable during the term of the lease. Place where payable and installments are mentioned. If there is apportionment of rent that is also mentioned.



SURRENDER OF LEASES

1. Surrender of lease is not a transfer but mere yielding up by the lessee of his interest under the lease to the lessor by mutual agreement.
2. The person who surrenders is called the surrenderer and the person to whom surrender is made is called the surrenderee.
3. It may be expressed or implied. Except in a case of some special kinds of lease as required by special Act, no writing or registration is necessary. A surrender may be oral, if accompanied by delivery of possession.

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Makhanlal v. Nagendranath	It is in effect merger of the estate of the lessee into the reversion. It is not a transfer or an assignment of any right or estate within the meaning of Section 5 of the Transfer of Property Act
2	Misri Lal v. Durga Narain	Surrender must be made with clear intention to yield up as mere non-payment of rent for years together or abandonment of the site does not amount to surrender

Notice of determination of a tenancy-at-will on behalf of the landlord
(Under section 106 of T.P. Act, 1882)

Dated.....
The 20....

To
The

Dear Sir,

1. Under instructions from my client..... (name, description and address) I call upon you to deliver up possession of the premises, detailed below, within 30 days hereof which you now hold of my client as a tenant.
2. In default of your compliance your occupation of the premises, after the period allowed hereinabove, will be wrongful and an act of trespass and you will be liable to pay damages to my client at the rate of Rs.....per each day of your wrongful occupation of the same till you are ejected there from and that my client will sue you for your eviction and for recovery of damages.
3. A copy of this notice is being kept in my office for future use, if necessary. Schedule of premises.

Yours faithfully



Notice by Tenant to His Landlord to Determine the Tenancy

Dear Sir,

Under instructions from my client A. B. of etc., your tenant, I hereby give you notice that in pursuance of a power contained in the lease dated..... day of made between you of the one part and the said A. B. of the other part, it is his intention to determine the said lease with the expiry of the 15th day from the date of receipt of the legal notice by you and that he shall deliver up to you the possession therein comprised on the next day after such 15th day. Dated.....day of.....

Signed.....
Advocate for the said A.B.

(C.D. landlord)

DEED OF LEASE

THIS DEED OF LEASE made at _____ on _____ day of _____, between AB _____ (Hereinafter called "the lessor") of the one part and CD _____ (hereinafter called "the Lessee") of the other part.

WHEREAS AB is desirous of letting his immovable property situated at _____ to CD for residential purpose on the below mentioned terms and conditions and CD is desirous of taking the aforesaid property on rent.

NOW THIS DEED IS WITNESS AS FOLLOWS

1. The lessor hereby demises to the lessee all that dwelling house with the land fully described in schedule hereto together with all out houses, wells, motor garage, kitchen, pathways, passage, garden and other appurtenances thereof situate at _____ to hold the same to the lessee from the _____ day of _____ for the term of _____ years (or year to year) paying therefore during the said term the monthly rent of Rs. _____ payable on the first day of the month succeeding that for which for rent is due.

2. LESSEE'S OBLIGATION

- the lessee hereby agrees that he will, during the said term (tenancy), pay all rents, taxes and other charges excluding the house tax which now are or may hereafter become payable in respect of the demised property;
- Pay Municipal charges including water bills and electric bills etc.
- That he will not without the previous consent in writing of the lessor transfer on sublet or otherwise part with the possession of the demised premises.
- That he will, without the consent in writing of the lessor, use the demised premises for residential purposes and for no other purpose.



3. LESSOR'S OBLIGATIONS

- That he will during the said term(tenancy), maintain the demised premises in good and habitable condition.
- That he will during the said term (tenancy), maintain the electronic installation in the said premises and supply at his own expense such electric fans as may be required by the lessee.
- That he will carry out all immediate necessary repairs to the said premises to the entire satisfaction of the lessee.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness: lessor

Witness: lessee

DEED IN MODIFICATION OF AN EXISTING LEASE

THE SUPPLEMENTARY DEED OF LEASE is made the day of, 20..... BETWEEN A. B. etc. (Hereinafter called "the landlord ") of the one part AND C.D. of, etc. (hereinafter called "the Tenant" of the other part of the other part.

WHEREAS the above named Landlord and Tenant had entered into a Lease, dated, (hereinafter called "the Original Lease" in respect of the property consisting of a dwelling house known under the name and style of Ivy cottage, situate at No.....on the Road, in the city of

WHEREAS the said cottage was not fitted with electricity and the property had no garage;

WHEREAS the Landlord has at the earnest request of the Tenant built a garage and got the electricity fitted in the premises

WHEREAS the cost of such additional facilities amount to Rs.

WHEREAS the Tenant in consideration of the said facilities is agreeable to pay enhanced rent.

NOW THIS SUPPLEMENTARY DEED OF LEASE WITNESSES AS FOLLOWS:

1. That the tenant shall in consideration of the exclusive use of the garage and the added facilities of electric installation pay a rental of rupees per month instead of the old rent of Rs..... As from the 1st of, 20.....
2. That the rest of the covenants contained in the original lease continue to govern the relation of the Landlord and Tenant.



IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness: _____ Landlord

Witness: _____ Tenant

DEED OF SURRENDER OF LEASE

THIS DEED OF SURRENDER OF LEASE made at the day of..... BETWEEN AB of etc. (the lessee), of the one part and CD of, etc. (the lessor) of the other part.

WHEREAS by a Deed dated made between the parties hereto and registered in..... it was witnessed that the said CD, granted and demised by way of lease the property fully mentioned and described in the schedule hereto for a term of years.

WHEREAS such lease is in full force and the lessee is presently in possession of the property since the execution of the lease.

WHEREAS for personal reasons and consideration, the said AB approached the said CD for a surrender of the said lease and delivery of the possession of the property.

WHEREAS the said CD has agreed to accept from the said AB a surrender of the aforesaid lease of the said premises.

NOW THE DEED THEREFORE WITNESSES THE FOLLOWING

1. That in pursuance of the said agreement the said AB as beneficial user of the said property do hereby give up and relinquish all his leasehold estate and interest in and surrender and deliver possession to the said CD of the premises comprised in and by the said deed of lease to hold the same as before execution of the lease by the said CD.
2. The said CD do hereby release and discharge the lessee AB, his successor and estate from all claims, demands and liabilities on account of future rent and or arising out of performance or non-performance of lease.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness: _____ lessor

Witness: _____ lessee



DEED OF SUB LEASE

THIS LEASE made this day of 2015 between AB of etc. (hereinafter called “the sub-lessor”) of the one part, and CD of etc, (hereinafter called “the sub-lessee”) of the other part.

WHEREAS By a lease (hereinafter referred as “the original lease”) dated the day of and made between XY as owner and AB as lease and registered in the Office of sub-registrar of etc., the premises (for etc.) described in the original lease were demised to the said original lease for a period of years with effect from the day of on a yearly rent and subject to the covenants and conditions to be performed and absorbed as therein contained.

WHEREAS the original lessee had agreed to grant and the sub lessee has agreed to accept a sub-lease of the premises (or, etc) hereinafter described upon the conditions hereinafter contained

NOW THIS DEED WITNESSES AS FOLLOWS

The original lessee do hereby grant to the sub-lessee a lease of all that premises to hold the same and to use of the sub-lessee for the period of Years, commencing with effect from the day of at the monthly rent of Rupees subject to the following conditions:

1. To pay the said rent, clear of all deductions, on the day of.....every current month in advance during the term of the lease.
2. To pay all taxes and outgoings now payable or hereafter to become payable in respect of the leased premises.
3. To perform all the covenants, conditions and stipulations contained in the original lease.
4. The original lessee shall duly and punctually pay the rent reserved, observe and perform all the covenants and conditions contained in the original lease and keep the same alive and in full force and virtue and will further keep the sub-lessee and his estate indemnified against all actions, claims, proceedings and demands on account of any breach of any of the conditions and covenants contained in the original lease.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness: sub lessor

Witness: sub lessee



LEASE AGREEMENT FOR PLANT AND MACHINERY

THIS DEED OF LEASE made at _____ on _____ day of _____, between AB _____ (Hereinafter called "the lessor") of the one part and CD _____ (hereinafter called "the Lessee") of the other part.

WHEREAS The lessor hereby agrees to lease to Lessee and the Lessee hereby agrees to take on Lease from Lessor, subject to the terms of this Lease Agreement

NOW THIS DEED WITNESSES AS FOLLOWS

1. The Lessee shall take the equipment for its use on lease for the term to commence from the date of payment by the Lessor to the supplier and to terminate at the end of 30 months from the date of such commencement.
2. The Lessee shall pay to the lessor, Lease rent at the rate-----
3. No right, title or interest in the Equipment shall pass to Lessee by virtue of this deed.
4. The equipment hereunder leased, will be delivered by the manufacturers/suppliers to the location specified by Lessee.
5. Lessor shall not be responsible for any damage incurred to the Equipment during delivery.
6. Lessee agrees to comply with all laws, regulations and orders relating to the possession, operation, and use of the Equipment and assumes all risks and liabilities arising from or pertaining to the possession, operation or use of the Equipment.
7. Lessee does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessor from and covenants and undertakes to defend Lessor against any and all claims, costs, expenses, damages and liabilities whether civil or criminal, of any nature whatsoever, arising from or pertaining to the use, possession, operation or transportation of the Equipment.
8. Lessee will cause the Equipment to be operated in accordance with manufacturers' manuals or instructions, if any, and in so far as applicable by competent and duly qualified personnel only and in accordance with applicable Government regulations, if any, and for business purposes only.
9. Lessor shall have the right from time to time during the normal business hours on any working day to enter upon Lessee's premises or elsewhere after prior notice for the purpose of confirming the existence, condition and proper maintenance of the Equipment.
10. Lessee shall obtain and maintain for the entire term of this Agreement at its own expense, comprehensive insurance against loss or destruction or damage to the Equipment

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness: lessor

Witness: lessee



LICENCE

DEFINITION AND MEANING OF LICENSE

SECTION 52 OF THE INDIAN EASEMENTS ACT

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right be unlawful, and such right does not amount to an interest in the property, the right is called a license.



Thus, if a document gives only a right to another to come on the land or premises and use that in some way or the other while it remains in the possession and control of the owner, it will be a license.

IMPORTANT PROVISIONS REGARDING LICENSE

S.NO.	PARTICULARS	PROVISIONS
1	Transferability of license	A license ordinarily carries with it the incident of non-transferability. A license cannot be transferred by the licensee or exercised by his servants or agents. This only exception to this rule is that, unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee.
2	Leave and license agreements	1. Leave and License Agreements are preferred by the parties to get out of the rigorous of landlord tenant relationship. Many types of agreements are made for the occupation of property like lease deeds, lease or tenancy agreements, rental agreements etc. 2. Despite these agreements, most owners prefer to give their premises. Generally it is being witnessed that a person having a vacant apartment will never rent in out fearing what if the tenant decides not to vacate and makes the apartment his own. That is why tenancy has been put on the backburner and Leave and Licensees now the most popular option. 3. In a Leave and License Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus, a leave and License does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.



3	Factors to be considered while giving out premises on leave & license basis	1. Possession: In a leave and license agreement, the owner is deemed to be in legal or judicial possession of the premises and the licensee is in constructive possession of the premises. 2. Income Tax: In a leave and license agreement the owner has to pay the applicable rate of tax. 3. Municipal Tax: In a leave and license agreement the Municipal Authorities may charge taxes as applicable in the area and if there is a security deposit amount sometimes the Municipal Authorities may calculate a notional interest on the securities deposit amount and charge tax thereon.
4	Registration of licence deed	A mere deed of license need not be registered unless any right, title or interest in immovable property of the value of Rs. 100 or more is created or assigned.
5	Stamp duty on licence deed	A license which is contained in a deed such as a sale deed or a mortgage deed needs no separate stamp duty, however, if a separate deed of licensees executed, stamp duty will be chargeable as per Article 5 schedule I of the Indian Stamp Act, 1899.

Lease, License and Rental Agreements

The license is not a lease. The lease and the license both are different. The word “License” under Section 52 of the Indian Easement Act, 1882 is a grant by one person to another or to a definite number of persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

A lease of immovable property as per Section 105 of the Transfer of Property Act is a transfer of a right to enjoy such property. It may be for a specified period, express or implied. The price or payment of money is usually referred to as the “rent”.

In a Leave and License Agreement, the juridical possession of the premises is deemed to remain with the licensor and the licensee is said to be in constructive possession of the said premises. Thus, a leave and License does not create any interest in the premises in favour of the licensee but gives the licensee the mere right to use and occupy the premises for a temporary period.

A Rental Agreement between the landlord and tenant sets down the terms which will be followed while the tenant lives in the rental unit. Month-to-Month Agreement is commonly called a “Rental Agreement”. This agreement is for an indefinite period of time, with rent usually payable on a monthly basis. The agreement itself can be in writing or oral, but if any type of fee or refundable deposit is being paid, the agreement must be in writing



DIFFERENCE BETWEEN LEASE AND LICENCE

BASIS	LEASE	LICENCE
Interest in Property	In case of Lease transfer of a right to enjoy immoveable property	In case of licence does not transfer any interest in the property.
Possession	Possession is always given to the transferee	licensee has no right to possession
Revocation	A lease cannot be revoked any time at the will of lessor	It can be revoked by the grantor at any time
Transfer	In case of lease death is not affected by the right of lessor.	In case of death of licensor, licence terminates.
Transferee obligation	The transferee of the lessor is bound by the lease.	The transferee of the licence is not bound by the licence.

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	RAJBIR KAUR & ANR. V. M/S S CHOKESIRI & CO.	In order to determine whether a document created a license or a lease the real test is to ascertain the intention of the parties i.e. whether they intended to create a license or a lease. If the document creates an interest in the property entitling the transferee to enjoyment, then it is a lease; but if it only permits another to make use of the property without exclusive possession, then it is a license.

KINDS OF LICENSE**TWO KINDS OF LICENSE****BARE LICENSE**

A Bare License merely gives the Licensee the right lawfully to do something on that property which it would otherwise have been unlawfully to do. **A bare license is non-heritable.**

LICENSE COUPLED WITH INTEREST

When a license is coupled with a grant for raising permanent structures on the land, the license is permanent and heritable.



REVOCATION OF LICENSE**2 KINDS OF REVOCATION****EXPRESS REVOCATION**

The general rule that subject to the agreement between the parties, all license are revocable at the will of the licensor. However, following are the two exceptions to this rule

1. A license which is coupled with a transfer of property and such transfer is in force; and
2. A license, acting upon which the licensee has executed a work of permanent character and incurred expenses in the execution

DEEMED REVOCATION

Section 62 of the act provides that licensees deemed to be revoked in following cases

- a. when, for a cause proceeding the grant of it, the grantor ceases to have an interest in the property affected by the license
- b. the licensee releases it, expressly or impliedly, to the grantor or his representative
- c. where it has been granted for a limited period or acquired on condition that it shall become void on performance or non-performance of a specified act, and the period expires, or the condition is fulfilled
- d. where the property affected by the license is destroyed
- e. where the licensee becomes entitled to the absolute ownership of the property affected by the license
- f. where the license is granted for a specified purpose and the purpose is attained or abandoned, or becomes impracticable

DEED OF LICENCE

THE DEED of license made at on day of between AB son of by occupation herein after referred to as the “owner” of the one part and CD represented by its secretary being signatory to this agreement having its registered office at present at hereinafter referred to as “occupiers“ of the other part

WHEREAS the occupiers approached the owner for permission for using a portion of his property viz. premises situate at fully mentioned and described in the Schedule hereto for a period not exceeding months only from the date of signing of this agreement which the owner has agreed to grant reserving for himself the care, maintenance and service to property and on the basis of leave and license only.

NOW THIS DEED IS WITNESSED AS FOLLOWS

1. This writing shall never be construed as any tenancy agreement or lease nor otherwise creating any other right or interest in the property in favour of the occupiers which is not at all the intention of the parties but on the contrary merely a temporary agreement or arrangement simply to allow the occupiers to use and occupy portion of the premises for their office accommodation under the control



and supervision of the owner for which purpose the owner shall retain rooms, viz., ... in the ground floor and in the first floor. The owner shall have his own staff on the said rooms for the care and supervision and maintenance of and services to the property.

2. The occupiers shall, in consideration of such accommodation as hereunder provided pay to the owner a fixed sum of Rs. as charges for such temporary occupation for the period of months.
3. The occupiers shall on expiry of the period of and license hereunder granted or earlier revocation thereof, surrender the property and deliver the same to the owner.
4. The occupiers shall have no right to make any addition or alteration to the property except temporary removable walls by way of adjustments but shall be entitled to make interior decoration only by temporary wooden partitions.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness:

Owner

Witness:

Occupier

Deed of License for use of wall of a Building for publicity and advertisement for goods, etc.

THIS DEED OF LICENSE is made on the..... day of 2013 BETWEEN AB of, etc. (the Licensor) of the one part and CD of, etc. (the Licensee) of the other part.

WHEREAS the said CD has applied to AB for the use of the eastern outside wall of his building being premises No..... for the purposes of utilising the same for publicity and advertisement of his goods, a specimen copy whereof with type and design shall be delivered to the licensor, for a period of two years.

WHEREAS the said AB has agreed to grant the license on the following terms and conditions:

NOW THIS DEED IS WITNESS AS FOLLOWS

1. That the said CD shall be entitled to use the said outer wall of premises No..... for the purpose of advertisement of his goods by coloured signs, marks, letters or other representations for two years from the date, in dimensions measuring..... and not contrary to any regulations of the Municipality or other public body or authority.
2. That the said CD shall pay Rs..... as such advertisement charges per month in advance within the 5th day of every current month.
3. That in the event the said outer wall or the plaster thereof is damaged on account of any act, default or negligence or omission on the part of CD, he shall forthwith execute all the necessary repairs thereto or in the alternative pay adequate compensation to AB on that account.
4. That the said CD shall pay for all taxes and impositions on account of such advertisement.

IN WITNESS WHEREOF the parties aforementioned have signed this Deed on the date month and the year aforementioned.

Witness:

AB

Witness:

CD



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Draft a clause of events of default in a lease deed?

An event of default shall occur hereunder if Lessee

- a. Fails to pay any installments of lease rentals thereof or other payment required hereunder when due and such failure continues for a period of 10 days after letter is sent from Lessor; or
- b. Fails to perform or observe any other covenant condition or agreement to be performed or observed by it hereunder or
- c. Without Lessor's consent, attempts to remove (except for repairs), sell, transfer, encumber, part with possession or sublet any item of Equipment or
- d. Shall suffer an adverse material change in the financial condition from the date hereof, and as a result thereof Lessor deems itself or any of its equipment to be insecure.

2. Write a brief note on 'sub-lease'?

ANSWER: Refer chapter 16

3. Draft the Forfeiture clause in a lease deed:

Forfeiture clause provides that if the lessee does not pay the rent or commits default in observing or performing other terms, the lessor may avoid the lease and enter into possession. The forfeiture clause must be read in the light of provisions of Section 114 of the Transfer of Property Act, 1882 according to which court has discretion to grant relief to the lessee under certain circumstances. Section 114-A of the said Act requires the lessor before enforcing such a clause in other cases to serve the lessee with notice specifying the particular breach complained of and requiring him remedy it is capable of remedy and it is only when he fails, that a suit for enforcing such a condition can lie.

That if the rent hereby reserved is not paid for 21 days after the same have become due (whether formally demanded or not) or if the lessee fails to observe or perform any of the covenants of the agreement or on any act of bankruptcy the lessor may at any time thereafter re-enter upon the premises and determine the tenancy.

4. Write notes on the Necessary clauses in a sub-lease deed?

ANSWER: Refer chapter 16

5. Write notes on the Surrender of lease?

ANSWER: Refer chapter 16

6. In the light of case law on the subject distinguish in what respects should a lease deed be different from leave and license agreement?

ANSWER: Refer chapter 16



7. Draft a deed of sub-lease with the permission of Vijay, the original lessor between Amar (sub-lessor) and Binod (the sub-lessee) in respect of Survey No. 786, Part I, being used as agricultural land and measuring 50 acres situated on the eastern bank of Varuna river in Varanasi District (UP) demised to the original lessor, Vijay, for a period of 30 years w.e.f. 1st January 2012 and covenanted for renewal for three consecutive periods of 30 years each; though the sub-lease to be initially valid for 30 years only

ANSWER: Refer chapter 16

8. All licences are revocable at the will of the licensor.

ANSWER: Refer chapter 16

9. Habendum and reddendum mean the same thing in a lease agreement.

No. in Habendum the nature of the lease, commencement and duration of the term are specified.

Reddendum is peculiar to a lease deed. Here is mentioned the mode and time fixed for payment it begins with word rendering or paying with reference to the reserved rent. Rent is payable during the term of the lease. Place where payable and installments are mentioned. If there is apportionment of rent, that is also mentioned.

10. A lease is a transfer of a right for use of equipment/real property for a consideration.

According to **section 105 of the Transfer of Property act, 1882** a lease of immovable property is a transfer of a right to enjoy property. It is the method of acquiring the right to use equipment or real property for consideration lease is a contract between lessor and lessee for the fixed term for the use on hire of a specific asset selected by lessee. Lessor retains ownership of the assets and lessee has possession and use of the asset on payment of specified rental over a period. It is a sort of contractual arrangement between

The two parties whereby one acquires the right to use the property called “lessee” and the other who allows the former the right to use his owned property. Called the “lessor”. Thus it is a contractual arrangement originates from a contract between the lessor and lessee and is regulated by the terms conditions and covenants of such contract. In other words leasing arrangement provides an enterprise with the use and control over assets without receiving title to them.

Essential Points to be observed for Drafting of Lease Documents

- The parties i. e. lessor or lessee
- The subject matter of lease i.e. the property to be leased
- Demise or partial transfer of such property
- The term and period of lease
- The consideration or rent. Law requires that the lease of real estate should be expressed and duration of the lease should be pre-settled under the written contract.

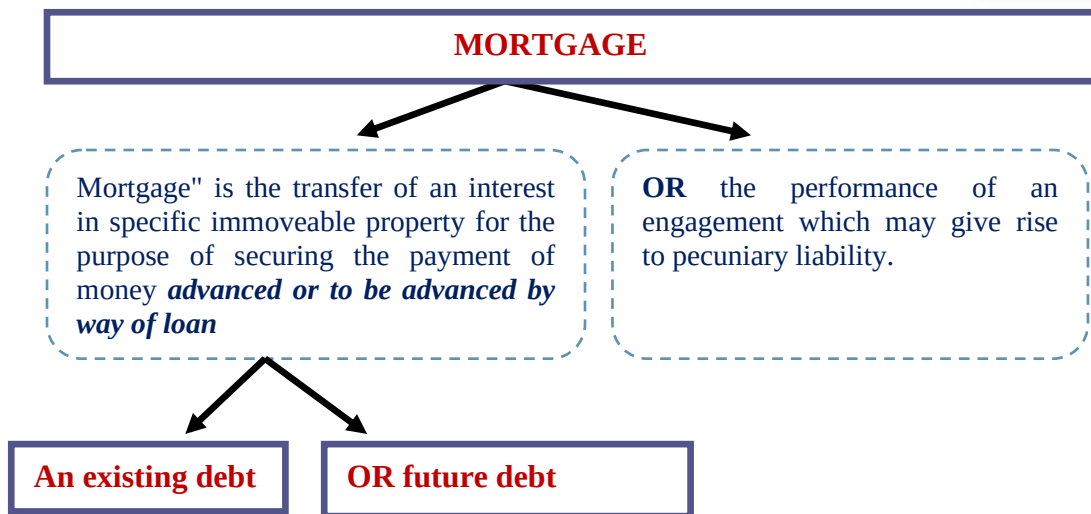


CHAPTER-17

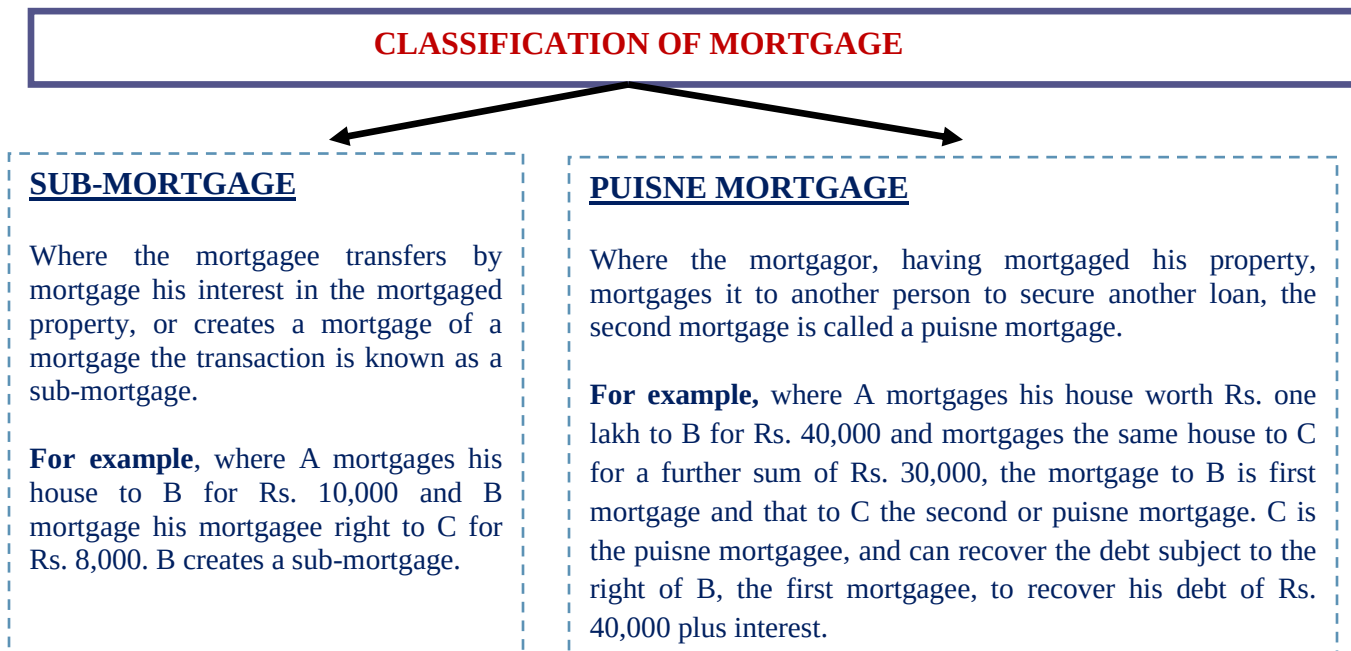
Mortgage, Charges and Hypothecation

MEANING 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.



CLASSIFICATION OF MORTGAGE



KINDS OF MORTGAGES

There are in all **six kinds** of mortgages in immoveable property.

Simple mortgage 58(b):	When the mortgagor, without delivering possession of the mortgaged property, gives a personal undertaking to the mortgagee to repay the amount due under the mortgage. Features - • There is twofold security (a) Personal security of mortgagor and (b) The mortgaged property. • The possession of property is kept by the mortgagor. • The mortgagee can sell the mortgaged property subject to decree of court. (i.e. An express or implied power is given to the mortgagee to cause the Property to be sold through the intervention of the Court.) • Reg. is compulsory. • There is no transfer of ownership. • No right of possession or foreclosure is available to the mortgagee.
Mortgage by conditional Sale (Section 58(c))	Where the mortgagor ostensibly (apparently) sells the mortgaged property on any of the following conditions: Features- • If the loan is repaid, the sale becomes void. • If the loan is not repaid at the stipulated time, the sale will become absolute and binding; • When the debt has been repaid at the stipulated time, the mortgage shall re-transfer the property to the mortgagor. Unlike in the case of a simple mortgage, <i>the mortgagor in this case does not bind himself personally to repay the debt.</i> The mortgagee is <i>not given the possession of the property</i> in this type of mortgage. In a mortgage by conditional sale, <i>the mortgagee's remedy is 'foreclosure'</i>, 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.
Mortgage with possession (Usufructuary mortgages. 58(d):	Where the mortgagor <i>delivers possession of property</i> to mortgagee and authorises him to retain such possession until payment of the mortgage money, and to receive profits accruing from the property and to appropriate the same in lieu of interest or in payment of the mortgage money, the transaction is called a Usufructuary mortgage. It is also called a mortgage with possession. Where the mortgagor- (1) Deliver possession of mortgaged property to the mortgagee; and (2) Authorised the mortgage a) To retain such possession until payment of the mortgage money; and b) To receive the rents and profits accruing from the property or any part of such rents and profits for the interest or in payment of mortgage money etc. c) The mortgagee in this case has <i>no remedy</i> either by fore closer or by sale



English Mortgage (Section 58(e))	This type of mortgages have features of both, (i) simple mortgage and (ii) mortgage by conditional sale. It is a combination of both. Here the mortgagor <i>transfers the ownership of the property</i> as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time. <i>There is also a personal covenant as the mortgagor promises to repay within a certain date. The remedy of the mortgagee is sale of the property to recover the debt.</i> <u>The following are the main characteristics of an English mortgage:</u> • English mortgage is followed by delivery of possession. • There is a personal covenant to pay the amount. • It is effected by an absolute transfer of property, with a provision for retransfer in case of repayment of the amount due.
Mortgage by deposit of tile deeds (Section 58(f))	Where a debtor delivers to a creditor or his agent documents of title to property, with intent to create a security thereon, the transaction is called a mortgage by deposit, of tile deeds or equitable mortgage.
	<u>Features</u> 1. Where mortgagor delivers to mortgagee documents of title of property with intent to create security thereon, the transaction is known as mortgage by deposit of title deed. 2. <u>The following are the main elements of a mortgage by deposit of title-deeds:</u> a) It is created in specific towns by deposit of title-deeds, even though the property is situated outside those towns. b) It is effected by deposit of material title-deeds. It is not necessary that all the deeds should be deposited. It is sufficient if material documents are deposited. c) Delivery of possession of property does not take place. d) This mortgage is made to secure a debt or advances made, or to cover future advances. e) This mortgage prevails against a subsequent transferee who takes under a registered instrument. f) This mortgage prevails against all who are not bona fide purchasers for value without notice.
Anomalous mortgage – (Section 58(g))	A mortgage, which doesn't belong to any on the above categories, is called an anomalous mortgage. It is generally combination of two or more mortgages e.g. a combination of a simple and a Usufructuary Mortgage.

RIGHTS OF MORTGAGOR

Right of redemption (Section 60)	Right to redeem means the right to take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment. The mortgagor is entitled to any accession (addition) to the mortgaged property, during the continuance of the mortgage unless there is a contract to the contrary.
Right against	Any condition which prevents the mortgagor from redeeming the property is



clog on redemption	called a “clog” on the right of redemption and is void. Right of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void. A mortgage deed provided that if the mortgage money was not paid at a certain time, the mortgagee might enter into possession for a period of twelve years and that mortgagors right to redeem would remain suspended for that period. It was held the condition was a clog and therefore unenforceable (<u>Mohd. Sher Khan v. Seth Swami Dayal</u>) A mortgage deed provided that in case the payment was not made by the mortgagor within the stipulated period, the mortgagee would become the absolute owner of the property. It was held to be a clog on the equity of redemption

DRAFTING OF DEED OF MORTGAGE

The following points should be borne in mind while drafting a Deed of Mortgage:

S.NO.	PARTICULARS	PROVISIONS
1	Parties	There should be two parties, the mortgagor and the mortgagee. The former is usually defined as the borrower. The Indian practice of having a deed of mortgage executed by the mortgagor only is unscientific, because the mortgage deed usually contains covenants by both the parties.
2	Covenant for re-payment	This clause usually recites that in pursuance of the said agreement and in consideration of the receipt of the mortgage money the mortgagor covenants to pay the mortgage money with interest at the stipulated rate in the manner agreed upon.
3	Covenant to insure	The mortgagor covenants to insure the mortgage property in the name of the mortgagee of an insurance office approved by the mortgagee. In default the mortgagee is entitled to insure and the costs incurred are to be charged to the mortgagor.
4	Covenant to pay outgoings	The borrower undertakes to pay and discharge and indemnify the mortgagee against all rates, taxes, duties, charges, assessments, outgoings, whatever.
5	Power of sale	Under this clause, the mortgagee is entitled to recover his dues by sale of the mortgaged property, and if the sale proceeds are insufficient, to recover the balance from the person and other property of the mortgagor.
6	Power to appoint Receiver	Under this clause, the mortgagee is given power to appoint a Receiver of the mortgaged property in case the payment of interest for two or more installments is in arrear under Section 69A of Transfer of Property Act.
7	Proviso for redemption	Under this clause, the mortgagee covenants and declares that on payment of his dues, he shall re-transfer the mortgaged property to the mortgagor or his nominee at his expense.
8	Possession	In English mortgage, the mortgagee has a right to take possession of the property. In usufructuary mortgage, the possession of the property



		is given to the mortgagee.

MARSHALLING**(SECTION 56)**

According to Section 56, if the owner of two or more properties mortgages them to one person and then sells one of the properties to another person, the purchaser is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee.

It may be noted this right of the purchaser cannot prejudice the rights of the mortgagee or persons claiming under him. Nor this right can be enforced, if there is a contract to the contrary. For example, A, the owner of three properties X, Y, Z, mortgages them to B. Subsequently A sells the property X to C. Here C has the right of marshalling i.e., he can compel B to satisfy his mortgage- debt out of the properties Y and Z, not sold to him.

It may be noted that doctrine of marshalling is also dealt under section 81 of TOPA. Section 81 projects the rights of **subsequent mortgagee** in the same manner as Section 56 protects the rights of **subsequent purchaser**.

Exception of principal of marshalling

- (a) In case of owner holds only single property.
- (b) Marshalling is not applicable where right of mortgage is greater than right of purchaser.
- (c) If mortgage has put a 'clog' on the application and marshalling, in such case shall not be applicable.

SUBROGATION**(SECTION 92)**

Section 92 incorporates the principle of "subrogation". It provides that any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this Section is called the "right of subrogation", and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

FURTHER CHARGE

Sometimes the mortgagee advances further sums of money to the mortgagor on the same security and on the same condition. The deed executed to secure the advance of further sums of money is called "Deed of Further Charge".



The deed so executed would make a reference to the first mortgage and would also set out the new loan/s, terms of its/their repayment and would make the principal and interest further charged on the same security to be endorsed in the same manner as per the original mortgage.

APPOINTMENT OF RECEIVER

1. Appointment of Receiver under Mortgage under Section 69A of the Transfer of Property Act, a mortgagee having the right to exercise the power to sell is entitled to appoint by writing signed by him or on his behalf a Receiver of the income of the mortgaged property or any part thereof.
2. Any person who has been named in the mortgage deed and is willing and able to act as a Receiver may be appointed by a mortgagee. If any person has been so named or if the person or persons are not capable and unwilling to act or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees.
3. Failing such an agreement the mortgagee shall be entitled to apply to the Court for appointment of a Receiver and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

Receiver is required to apply all money received by him as follows:

1. In discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
2. In keeping down all annual sums or other payments, and the interest on all principals sums, having priority to the mortgage in right whereof he is Receiver;
3. In payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
4. In payment of the interest falling due under the mortgage;

RELEASE AND RECONVEYANCE OF MORTGAGED ASSETS

1. Release of any of the mortgaged assets or reconveyance of the mortgaged property could be done by a registered document in case the mortgage has been created in the form other than equitable mortgage by deposit of title deeds by a registered deed of mortgage.
2. In those cases where release or reconveyance of mortgaged property covered under equitable mortgage is sought by the mortgagor, the same could be done by releasing the relevant title documents and repositing the remaining title deeds by rewriting the memorandum for creation of equitable mortgage.
3. On redemption of equitable mortgage all the title deeds could be released by the mortgagee to the mortgagor by personal hand delivery and against accountable receipts from the mortgagor.



REGISTRATION OF MORTGAGES

- | |
|---|
| 1) A simple mortgage can only be made by a written instrument signed by the mortgager attested by at least two witnesses and registered. |
| 2) For a mortgage by Deposit of Title Deeds, no formalities are prescribed. It can be either oral or written. When such a mortgage is reduced in writing, it must be attested by at least 2 witnesses and registered if the money secured is Rs. 100 or more. |
| 3) The other kinds of mortgages can only be effected by a written instruments signed by the mortgagor attested by at least two witnesses and registered, if the amount secured is Rs. 100 or more. |

STAMP DUTY OR MORTGAGES

Stamp duty on mortgage deed is chargeable as per Article 40, Schedule I of Indian Stamp Act 1899.

DEED OF MORTGAGE BY CONDITIONAL SALE

THIS DEED of Mortgage made at _____ on _____ day of _____, _____ Between 'AB' of _____ etc. (hereinafter called "the Mortgagor") of the one part and 'CD' of etc. (hereinafter called "the Mortgagee") of the other part.

WHEREAS the mortgagor is absolute owner of property mentioned in schedule free from encumbrances.

WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs.....to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed.

NOW THIS DEED IS WITNESS AS FOLLOWS

1. In consideration of the sum of Rs. _____ paid to the Mortgagor by the Mortgagee the Mortgagor do hereby grant, transfer, covey, assign and assure to the Mortgagee all the interest in his property and to have and to hold the same absolutely and forever.
2. If Mortgagor repay or cause to be repaid the said sum of Rs. _____ with interest thereon at the rate of _____ percent per annum on or before _____ day of _____. Mortgagee shall at the costs of the Mortgagor reconvey and retransfer the said property to mortgagor.
3. If mortgagor neglect to repay the said sum with interest at the said rate on or before the said date the Mortgagee shall be entitled to foreclose the mortgage and become absolute owner.
4. The Mortgagor shall remain in possession of the said property and pay all rents, taxes, imposed on the said property.



5. The Mortgagor hereby covenant with the Mortgagee that he has good title to the property and is free from all encumbrances.

IN WITNESS WHEREOF the parties herein under have set their hands on the date and year hereinabove mentioned.

Witness

- 1.
- 2.

MORTGAGOR 'AB'
MORTGAGEE 'CD'

Parcel:

As per the Schedule attached to the Mortgage Deed

DEED OF SIMPLE MORTGAGE

THIS DEED of Mortgage made at.....the.....day of 2015 between 'AB' of etc. (hereinafter called "the Mortgagor") of the one part and 'CD' of etc. (hereinafter called "the Mortgagee") of the other part.

WHEREAS the mortgagor is absolute owner of property mentioned in schedule free from encumbrances.

WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs.....to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed.

NOW THIS DEED IS WITNESS AS FOLLOWS

1. In consideration of the sum of Rs.....paid to the mortgagor the Mortgagor do hereby agree with the Mortgagee that the Mortgagor will on or before the day of 2015, pay or course to be paid to the Mortgagee the sum of Rs. with interest for the same in the meantime at the rate of percent per annum.
2. Interest to be paid monthly and every month on the 7th of each following month without any delay or default.
3. The mortgagor do hereby charge, assure and mortgage, by way of simple mortgage in favour of mortgagee all property specifically described in the Schedule for the repayment of the said sum of Rs.....together with interest thereon at the rate of percent, per annum.
4. It is hereby agreed and declared by and between the parties that in case the said sum of Rs. with interest thereon at the stipulated rate is not paid within the time it shall be lawful for the Mortgagee to enforce this Mortgage and to cause the property or any portion sold and appropriate the proceeds towards satisfaction of the Mortgage debt.



5. In the event of any short fall or deficiency, the Mortgagee shall be entitled to recover the balance personally as against the Mortgagor.

IN WITNESS WHEREOF the parties herein under have set their hands on the date and year hereinabove mentioned.

Witnesses:

1.	MORTGAGOR
2.	MORTGAGEE

DEED OF USUFRUCTUARY MORTGAGE

THIS MORTGAGE, made at on day of 2015, BETWEEN 'AB' of etc. (hereinafter called "the Mortgagor") of the One Part, and 'CD' of etc. (hereinafter called "the Mortgagee") of the Other Part,

WHEREAS the mortgagor is absolute owner of property mentioned in schedule free from encumbrances.

WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs.....to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed.

NOW THIS DEED IS WITNESS AS FOLLOWS

1. In consideration of the sum of Rs. now paid to the Mortgagor by the Mortgagee the Mortgagor hereby conveys to the Mortgagee all property specifically described in the Schedule and the Mortgagee shall be in possession of the Mortgaged property for securing payment of the said sum of Rs.....together with interest thereon at the rate of percent, per annum.
2. Mortgage money will be set off against the profit of the mortgaged property, and the Mortgagee does hereby promise to keep clear accounts thereof.
3. Mortgagee shall retain possession of the mortgaged property until the principal sum together with the interest due to paid off out of the proceeds of the property.
4. On payment of the aforesaid sum, the Mortgagee shall execute and register a release of the mortgaged property in favour of the Mortgagor.
5. The Mortgagor shall pay all rents, taxes, imposed on the said property

IN WITNESS WHEREOF the parties herein under have set their hands on the date and year hereinabove mentioned in the presence of:



Witnesses:

1. MORTGAGOR 'AB'
2. MORTGAGEE 'CD'

Mortgage by a Limited Company in favour of a Bank for Securing the Amount due on Cash Credit Account

THIS MORTGAGE made the..... day of..... 2013, Between 'AB' a Limited Company, having its Head Office at..... (hereinafter called "the borrower") of the One Part and the..... Bank Limited, having its Head Office at..... (hereinafter called "the Mortgagees") of the Other Part.

WHEREAS the borrowers are a Limited Company having their Head Office at..... and are carrying on the business of Sugar Manufacturers at their factory known as..... and situate at..... in the State of.....

WHEREAS the borrowers are absolute owners of the said factory free from encumbrances.

WHEREAS the borrowers have a cash credit account with the mortgagees for the purposes of their business.

WHEREAS the mortgagees have already granted and may hereinafter grant accommodation to the borrowers, and it has been agreed that all moneys now owing and which shall hereafter become owing on the said cash credit account or otherwise from the borrowers to the mortgagees should be secured in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH AS FOLLOWS

1. The borrowers hereby covenant with the mortgagees that the borrowers will on demand pay to the mortgagees the balance which shall be owing on the said cash credit account or any other account or for bills or drafts accepted, paid or discounted or advances made for the accommodation of the borrowers up to the limit of Rs..... together with interest at the rate of..... per cent per annum from the date of the said loan or advance until payment.
2. The borrowers as beneficial owners hereby mortgage their property known as..... Sugar Mill, situate at..... together with all the machinery, engine, boiler etc., and buildings, land attached and appurtenant thereto, and more particularly described in the schedule attached hereto as security for payment of the mortgagees of all principal moneys and interest at the aforesaid rate and other moneys hereby secured.
3. The borrowers further covenant with the mortgagees that all accessories to the mortgaged property shall be liable for the amount due under this Deed from the borrowers to the mortgagees.
4. The borrowers further covenant with the mortgagees that the borrowers shall not lease the mortgaged property for any term exceeding one year or accept, surrender of any existing lease without the previous consent in writing of the mortgagees.
5. And it is hereby further agreed and declared that if the borrowers fail to pay the mortgage money with interest as agreed upon, the mortgagees shall be entitled to realise their dues by sale of the mortgaged property and, if the sale proceeds thereof are insufficient to satisfy the mortgagees' dues, to recover



the balance from the person and other property of the mortgagors.

6. It is hereby further agreed and declared that if interest for any two installments remains in arrears, the mortgagees shall be entitled to have a Receiver appointed of the mortgaged property.

IN WITNESS WHEREOF the parties hereunder have set their hands on the date and year hereinabove mentioned.

*For and on Behalf of 'AB Co. Ltd.',
Director For and on Behalf of
the..... Bank Ltd., Secretary*

Deed of Redemption or Reconveyance of Mortgaged Property

THIS DEED is made the..... day of..... 2013 between 'A' of etc. (hereinafter called "the mortgagee") of the One Part and 'B' of etc. (hereinafter called "the mortgagor") of the Other Part. WHEREBY by a mortgage deed dated..... the property mentioned in that deed was mortgaged by the said 'B' in favour of the said 'A' to secure payment of the amount of Rs..... with interest @..... per cent per annum.

NOW THIS DEED OF RECONVEYANCE WITNESSETH:

That in consideration of all principal moneys and interest secured by the said mortgage deed dated..... having been paid, the receipt whereof the said 'A' hereby acknowledges.

The said 'A' as mortgagee hereby redeems or reconveys unto the said 'B' all the property comprised in the said mortgage deed to hold the same up to and to the use of the said 'B' as absolute owner discharged from all principal money and interest secured by and from all claims and demands under the aforesaid mortgage deed.

CHARGE

A charge is created when immovable property of one is made security for the payment of money to another. No interest in the property is transferred. The concept of charge is regulated by the provisions of Transfer of Property Act, 1882 and Companies Act 2013

WHAT IS A CHARGE

AS PER COMPANIES ACT, 2013

Section 2(16) of the Companies Act, 2013 defines charges so as to mean an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

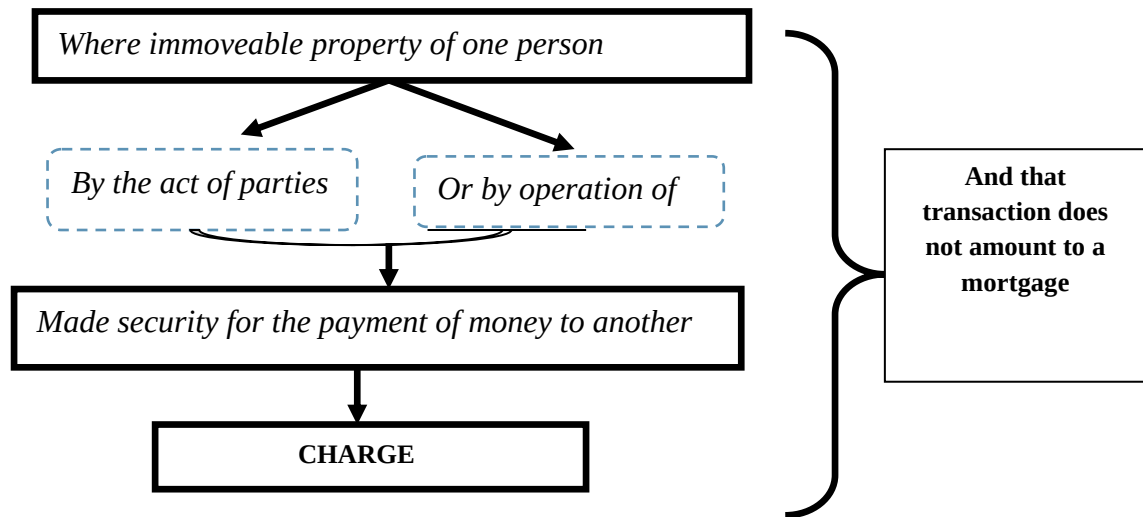
AS PER TRANSFER OF PROPERTY ACT, 1882

According to Section 100 where immovable property of one person is by 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, it is called charge.

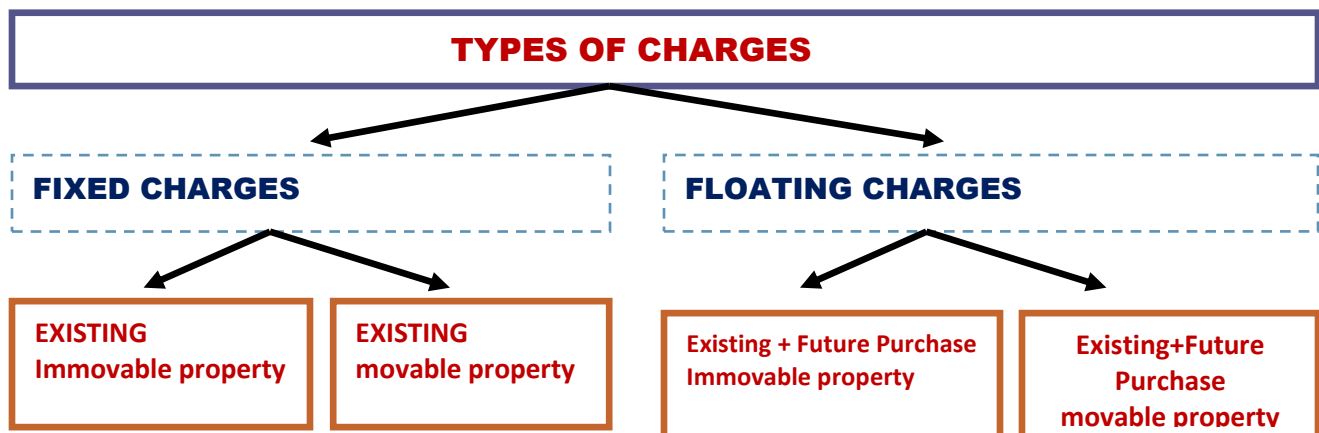


CHARGE AS PER TPA 1882 (SECTION 100)

Charge" has been defined under Section 100 as follows: "Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property".'

**VARIOUS FORMS USED UNDER THIS CHAPTER**

1. CHG-1	Creating or modifying the charge (for other than Debentures)
2. CHG-2	Certificate of registration
3. CHG-3	Certificate of modification of charge
4. CHG-4	intimation of the satisfaction to the Registrar
5. CHG-5	Memorandum of satisfaction of charge
6. CHG-6	Notice of appointment or cessation of receiver or manager
7. CHG-7	Register of charges
8. CHG-8	Application for condonation of delay shall be filed with the Central Government
9. CHG-9	Creating or modifying the charge in (for debentures)



Fixed Charge: A charge is fixed or specific when it is made specifically to cover assets, which are ascertained and definite or are capable of being ascertained and defined, at the time of creating charge e.g., land, buildings, or heavy machinery. A fixed charge, therefore, is against security of specific property, and the company loses the right to dispose off that property as unencumbered.

Floating Charge: A floating charge is a charge on a class of assets present and future, which in the ordinary course of business is changing from time to time and leaves the company free to deal with the property as it sees fit until the holders of charges take steps to enforce their security. A floating charge is not attached to any definite property but covers property of a fluctuating type e.g. stock – in – trade, debtors, etc. and is thus necessarily equitable.

CRYSTALLISATION OF A FLOATING CHARGE

(CONVERSION OF FLOATING CHARGE INTO FIXED CHARGE)

Meaning of crystallization

Crystallization means that the right of the company to deal in the assets, which are subject of floating charge, comes to an end.

Cases in which crystallization Takes place

- Where the company is ordered to be wound up.
- Where the company ceases to carry on business.
- Where the company makes a default in payment of interest or repayment of principal to the charge holder in accordance with the terms of the charge, and the charge holder brings an action to enforce his security.

DIFFERENCE BETWEEN MORTGAGE AND CHARGE DISTINCTION BETWEEN MORTGAGE AND CHARGE

BASIS	MORTGAGE	CHARGE
Meaning	A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan	Charge is not the transfer of any interest in the property though it is security for the payment of an amount.
Section	Section 58	Section 100
Mode of creation	A mortgage can only be created by act of parties	charge may be created by act of parties or by operation of law
Attestation	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
Right of foreclose	In certain types of mortgage, the mortgagor can foreclose the mortgaged property	In case of charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage
Right in rem	In charge, no right in rem is created. Rem means right against the whole world.	In mortgage, right in rem is created.



PLEDGE**(Regulated by Indian contract act 1872)**

1. Pledge is a contract whereby some article or goods is deposited, with a lender of money or promise, as security for the repayment of a loan or performance of a promise. The person who deposits the goods is called the “Pledgor or Pawnor”; and the person with whom the goods are deposited is called the “Pledgee or Pawnee”.
2. It may be noted that pledge is also a kind of bailment or it is a particular species of bailment. It means that pledge is that kind of bailment in which the purpose is to secure the repayment of any debt or performance of promise.
3. Thus, pawnor in a pledge is equivalent to bailor in a bailment and similarly, Pawnee in a pledge is equivalent to bailee in a bailment.
4. For example, if A borrows Rs. 200/- from B and deposits his watch with B, as security for the repayment of the debt. This is a transaction of pledge, where ‘A’ is the pawnor and ‘B’ is the Pawnee.

**HYPOTHECATION**

1. Hypothecation is a form of transfer of property in goods. Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass.
2. This form of transfer is not regulated in India by any statute. Neither the Transfer of Property Act, 1882, nor the Indian Contract Act, 1872, nor the Sale of Goods Act, 1930, recognize the non-possessory hypothecation of movables and the rights and remedies of the parties are regulated by the courts according to the general law of contract.
3. In hypothecation, there must be an intention of the parties to create a security on the property on which the money has been lent. If that intention can be established, equity gives effect to it.

**DIFFERENCE BETWEEN MORTGAGE, HYPOTHECATION AND PLEDGE**

S.NO	MORTGAGE	PLEDGE	HYPOTHECATION
1.	It is a security on immovable property	It is a security of movable goods.	It is a security of movable goods.
2.	It is governed by Transfer of Property Act, 1882.	It is governed by Indian contract Act, 1872.	Not governed by any specific Act in India.
3.	In case of default, the mortgage may sell/foreclose/possess the property.	In case of default, the pledgee can sell the goods after giving notice of sale.	The creditor has no right to sell the goods, as he has no possession. He can only file a suit for recovery of his debt and for the sale of hypothecated goods.
4.	Possession may or may not be transferred.	The possession of goods is transferred from the pawnor to the pawnee.	The possession of goods remains with the borrower. Only a charge is created upon the goods by agreement.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write a note on 'release and re-conveyance' of mortgaged assets.

ANSWER: Refer chapter 17

2. Write short notes on Usufructuary mortgage

ANSWER: Refer chapter 17

3. Distinguish between English mortgage' and 'simple mortgage'

ANSWER: Refer chapter 17

4. What is difference between Mortgage, Hypothecation and Pledge

ANSWER: Refer chapter 17

5. Write a short note on Hypothecation?

ANSWER: Refer chapter 17

6. Hypothecation is a form of transfer of property in goods.

Hypothecation agreement is a document by which legal property in goods passes to the person who lends money on them, but the possession does not pass. This form of transfer is not regulated in India by any statute. Neither the transfer of property act, 1882 nor the Indian contract act, 1872 nor the sale of goods act, 1930, recognize the non-possessory hypothecation of immovables and the rights and remedies of the parties are regulated by the courts according to the general law of contract. In hypothecation there must be an intention of the parties to create a security on the property on which the money has been lent. If that intention can be established, equity gives effect to it.

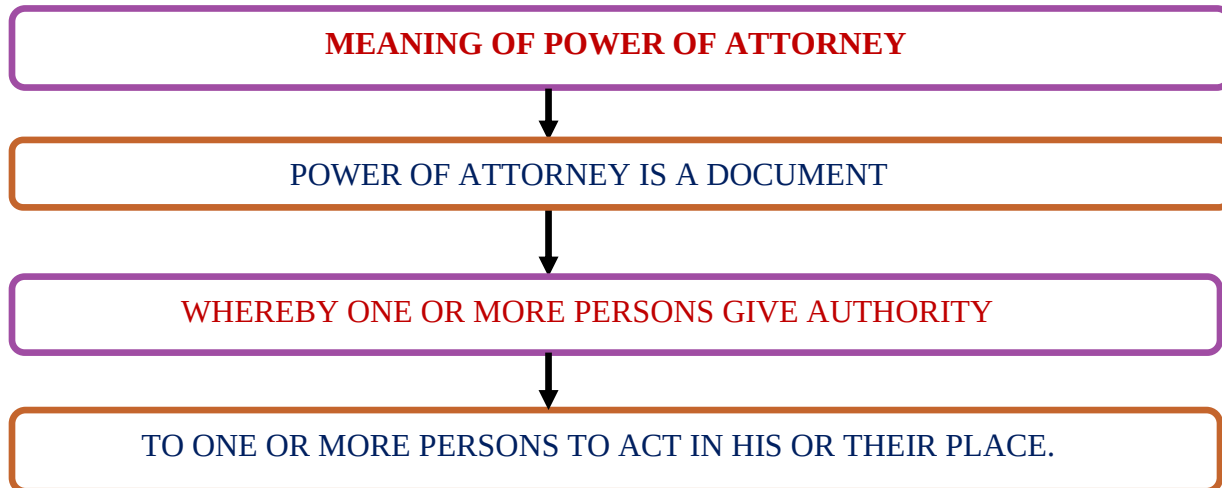
A hypothecation not merely of moveable existing on the premises at the time but also in respect of moveable which might be subsequently acquired and brought there, is valid though it is not governed by the transfer of property act or by the Indian contract act, 1872. An oral or written hypothecation is permitted under the law in India. Hypothecation agreements usually cover moveable machinery, equipments, stocks of finished and semi-finished goods, raw materials consumable stores present and future available in factories and godowns of the borrower and also enroute to the borrower's factories and book debts. While these items as moveable assets, remain in the possession of the borrower and he has absolute right to convert them, sell them and deal with them in any manner the borrower likes in the course of his business, the legal title vests in the lending institution by virtue of the hypothecation agreement, pledge, which is regulated by the Indian contract Act. 1872 as stated above, technically speaking cannot exist without bailment or possession.



CHAPTER -18

POWER OF ATTORNEY

DEFINITION AND MEANING OF POWER OF ATTORNEY



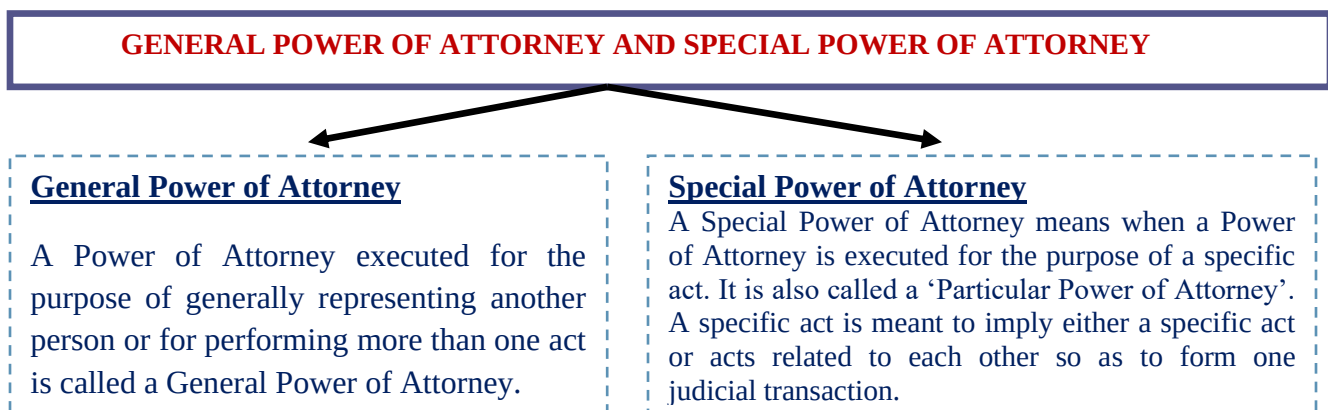
SECTION 2(21) OF THE INDIAN STAMP ACT, 1899

Power of Attorney includes any instrument empowering a specified person to act for and in the name of the person executing it.

Hence, Power of Attorney is delegation of authority in writing by which one person empowers another to act on his behalf. The person who gives the authority is called the 'donor' and the person who accepts the authority is called the 'donee'.

A Power of Attorney can be executed by any person who is competent to contract.

A Power of Attorney can be executed by or in favor of one or more persons. When executed in favor of more than 1 person, it is desirable to state whether the donees will act only jointly or severally and jointly



REGISTRATION OF POWER OF ATTORNEY**REGISTRATION OF POWER OF ATTORNEY****REGISTRATION WHEN NECESSARY**

In general, registration of Power of Attorney is not compulsory even if it deals with immovable property.

TWO ALTERNATIVES OF REGISTRATION

1. Registration as per Registration Act.
2. As per Power-of-Attorney Act, 1882, where a Power of Attorney is deposited in a concerned High Court or a district Court along with an affidavit verifying its execution, it is as good as the registration of Power of Attorney.

However, registration of Power of Attorney is compulsory in the following cases

1. Power of Attorney which authorizes the donee to recover the rents of immovable property belonging to the donor for the donee's own benefit.
2. Power of Attorney which authorizes the donee to create a charge on certain immovable property belonging to the donor in his favor.

In the aforesaid two cases, since the donee has got the personal interest, registration of power of attorney is required and it is irrevocable in nature. In other words, if the donee does not have any personal interest, registration of power of attorney is optional and it is revocable in nature.

REVOCABLE AND IRREVOCABLE POWER OF ATTORNEY

1. A power of attorney executed in favour of a person can always, at the discretion of the donor thereof, be revoked.
2. The donee of a power of attorney is an agent of the donor. If a donee himself has an interest in the matters covered by the power of attorney, which forms the subject matter thereof, the power of attorney in the absence of express contract cannot be terminated to the prejudice of such interest.
3. In other words, agency coupled with interest cannot be terminated without the consent of the other party (**Section 202 of the Indian Contract Act, 1872**).
4. Therefore, a power of attorney executed, in which the donee himself has an interest, is irrevocable.



Such irrevocable powers of attorney are executed in favour of the financial institutions by a company who offer financial assistance to the latter.

STAMP DUTY ON POWER OF ATTORNEY

1. Stamp duty on Power of Attorney is governed by Article 48 of Schedule I of Indian Stamp Act, 1899. In this regard, States have been given the power to fix the stamp duty payable on the Power of Attorney and thus, this duty varies from State to State.
2. Deficiency in the stamp duty has to be paid if Power of Attorney was subjected to higher duty in the State where such Power of Attorney was to be used.
3. Section 18 of Indian Stamp Act, 1899 deals with those documents which have been executed out of India. As per this provision, if a Power of Attorney has been executed out of India, then it must be stamped within 3 months after it has been first received in India and vice-versa.

LETTERS OF AUTHORITY

Letters of authority is nothing but a power of attorney. They are executed on plain paper and not on stamp paper. Letters of authority are usually issued for collecting some documents or papers, dividend, interest, etc. on behalf of another. By and large, the law relating to the powers of attorney will apply to letters of authority.

DURATION OF POWER OF ATTORNEY

1. Unless expressly or impliedly limited for a particular period, a general power of attorney will continue to be in force until expressly revoked or determined by the death of either party.
2. In the case of a company, the power of attorney executed by the directors ceases to be operative as soon as an order for winding up is made as the directors cease to function.
3. A special power of attorney to do an act is determined when the act is done.
4. In case it is desired that the power should continue for a particular period or until a certain event happens, an express provision to that effect should be made in the deed itself.

POWER OF ATTORNEY BY A COMPANY

A company being an artificial person can act through agents i.e. its officers. Powers are delegated by companies to the agents through Board resolutions or through powers of attorney. Delegation of powers through a power of attorney is resorted to in view of the fact that it will be very easy to prove the execution thereof.

In the case of a resolution it would be necessary to produce the Minutes Books etc. to prove the passing of the resolution of delegation of the powers. Further, under Section 22 of the



Companies Act, 2013, a company may, by writing under its Common Seal (If Any), empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in India or outside India, and a deed signed by an attorney on behalf of a company and under his seal where sealing is required shall bind the company and have the same effect as if it were under its Common Seal.

SPECIMEN OF GENERAL POWER OF ATTORNEY

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THIS POWER OF ATTORNEY

WHEREAS _____, a Company registered under the Companies Act, 2013, and having its registered office at _____ (hereinafter called the 'Company') has from time to time to institute and defend civil, criminal and revenue suits, appeals, revision and other legal proceedings in various courts, offices and before other authorities in India and outside;

WHEREAS the Company has to enter into various agreements and contracts and execute various sorts of documents, including lease, guarantee and counter guarantee, indemnity bond etc.;

WHEREAS it is considered necessary and expedient to execute a General Power of Attorney in favor of Mr. _____, Managing Director of the Company.

WHEREAS the Board of Directors of the Company, by resolution No. _____ passed in their meeting held on _____ have resolved to execute and register a General Power of Attorney in terms of the draft placed before the Board in favor of Mr. _____, Managing Director of the Company and have authorized Mr. _____, Director, to execute, sign, seal, register and deliver the said Power of Attorney:

NOW THIS POWER OF ATTORNEY WITNESSES AS FOLLOWS

1. The Company hereby appoints Mr. _____ (hereinafter called "the Attorney") so long as he is the Managing Director of the Company to do, the following acts, deeds and things in the name and on behalf of the Company
2. To take decision for instituting and defending legal proceedings and to institute and defend legal proceedings – civil, criminal or revenue, including Income-Tax, Sales Tax and Excise and confess judgment or withdraw, compromise, compound or refer any matter or dispute to arbitration, as they enter or either of them may think fit
3. To sign, verify and file in all or any Courts and offices in India and outside, in all or any cases, whether original or appellate revision or review, complaints, written statement, affidavits, applications, review or revision petitions.
4. To engage and appoint advocates, solicitors, pleaders as the case may be



5. To appear in all or any courts and offices to represent the Company in all proceedings and make statement on oath or otherwise for and on behalf of the Company
6. To file in and receive back from any or all courts or offices documents of all kinds and to give receipts therefore
7. To execute, sign, seal and where necessary to register all documents including deeds, leases, agreements, contracts, letters of appointments, powers of attorneys
8. To execute, endorse and negotiate Bills of Exchange, Hundies, Promissory Notes and negotiate or otherwise deal with Government Promissory Notes or any securities of the Central or State Government or any local authority
9. And generally to do all acts, deeds or things as may be necessary or proper for the purposes mentioned above.

IN WITNESS WHEREOF this deed has been signed and sealed by Mr. _____, Director, authorized in this behalf vide Board Resolution No _____ dated _____ on this _____ day of _____, _____, in presence of:

WITNESSES:

For (Name of the Company)

Signature:

Name:

Designation:

SPECIMEN OF SPECIAL POWER OF ATTORNEY FILED WITH THE REGISTRAR OF COMPANIES AT THE TIME OF INCORPORATION OF A COMPANY

SPECIAL POWER OF ATTORNEY

Mr. _____ a Practicing Company Secretary, having its office at _____ to represent us before the Registrar of Companies in connection with the incorporation of our Company under the name of _____. He is authorized to make any modification, alteration, correction, additions, in the Memorandum and Articles of Association and other documents filed with the Registrar of Companies for the registration of the Company. He is also authorized to collect the Certificate of Incorporation.

Place:

Date:

Subscribers to Memorandum

Signature of the Secretary

Name:



SPECIMEN OF POWER-OF-ATTORNEY TO PRESENT DOCUMENT FOR REGISTRATION

BY THIS POWER OF ATTORNEY I, AB of etc, do hereby appoint CD of, etc., my attorney for me and on my behalf to appear for and represent me before the Sub-Registrar of Of all times as may be necessary and to present before him for registration the deed dated the days of made between, etc., to admit the execution of the said deed by me (if necessary to admit the receipt of consideration), to do any act, deed or thing as may be necessary to complete the registration of the said deed in the manner required by law and when it has been returned to him after being duly registered, to give proper receipt and discharge for the same.

And I, the said AB, do hereby agree and declare that all acts, deeds and things done, executed or performed by the said CD shall be valid and binding on me to all intents and purposes as if done b me personally which I undertake to ratify and confirm whenever required.

Signed sealed and delivered

Witnesses

AB

SPECIMEN OF POWER-OF ATTORNEY TO SELL A PARTICULAR PROPERTY

BY THIS POWER OF ATTORNEY I, AB, of etc., hereby appoint CD of, etc. my attorney, in my name and on my behalf to do inter alia the following acts, deeds and things, viz.

1. To negotiate on terms for and to agree to and sell my house no..... (or, etc.,) situate at, etc., fully mentioned and described in the Schedule hereto to my purchaser or purchasers at such price which my said attorney, in his absolute discretion, thinks proper, to agree upon and to enter into any agreement or agreements for such sale or sales and/or to cancel and/or repudiate the same.
2. To receive from the intending purchaser or purchasers any earnest money and/or advance or advances and also the balance of purchase money, and to give good, valid receipt and discharge for the same.
3. Upon such receipt as aforesaid in my name and as my act and deed, to sign, execute and deliver any conveyance or conveyances of the said property in favour of the said purchaser or his nominee or assignee.
4. To sign and execute all other deeds, instruments and assurances which he shall consider necessary and to enter into and/or agreement to such covenants and conditions as may be required for fully and effectually conveying the said property as I could do myself, if personally present.

IN WITNESS WHEREOF I, the said AB, have hereto signed (or, put my signature, or, set hand and seal at.....this.....day of.....

Schedule of the property to be sold

Signed, sealed and delivered



SPECIMEN OF IRREVOCABLE POWER-OF-ATTORNEY

THIS POWER OF ATTORNEY granted at this.....day of.....2015 by A limited' a company within the meaning of the Companies Act, 2013, and having its registered office at (Hereinafter referred to as 'the Borrower') in favour of.....a corporation constituted by.....and having its Head office at..... (Hereinafter referred to as the lender).

WHEREAS by an Agreement dated the day of 2015 (hereinafter referred to as "the said Agreement") made between the "Borrower" and the 'lender'. Lender' has agreed to grant the "Borrower financial assistance by way of a term of Rs. (Rupees) (Hereinafter referred to as "the financial assistance)

NOW THIS POWER OF ATTORNEY WITNESSES AS FOLLOWS

1. In consideration of the Lender having sanctioned the said financial assistance to the Borrower, the Borrower hereby irrevocably appoints the Lender to be the true and lawful attorney of the Borrower in the name and for and on behalf of the Borrower to do, execute and perform the following acts, deeds and things.
2. To make, execute, sign, seal and deliver in favour of the Lender, at the expense of the Borrower in all respects, a first legal mortgage in English from of all immovable and movable properties, presents and future, for the purposes of securing to the lender all the moneys payable by the Borrower's under the said Agreement.
3. To do or cause to be done all such acts deed and things as may be necessary or proper for the effectual completion and registration of said mortgage.
4. The Borrower hereby agrees that all or any of the powers hereby conferred upon the Lender may be exercised by any officer or officers of the Lender nominated by the Lender in that behalf.
5. The Borrower does hereby declare that this power of attorney shall be irrevocable.

IN WITNESS WHEREOF the Borrower Company has caused its Common Seal to be hereunto affixed the day and year first hereinafter.

The Common Seal of the Borrower Company was hereunto affixed pursuant to the resolution of its Board of Directors passed on the in the presence of Shri Director who have signed these presents in token thereof.



POWER-OF-ATTORNEY TO ADVOCATE FOR COURT CASE

In the Court of etc.

Suit (or Case) No of 2018

Plaintiff (or Applicant, Complainant) -

AB, son of, of, etc. versus

Defendant (or Non-applicant, or Accused), -

CD, son of, of, etc.

Claim for (or, in the matter of), etc.

BY THIS POWER OF ATTORNEY, I, CD, defendant (or, etc.), in the above suit (or case), do hereby nominate, constitute and appoint EF, advocate etc., my attorney, for me, in my name and on my behalf to appear, act and plead in the said case, to make or present written statements, applications or petitions to the court, to withdraw and receive documents and any money from the court or from the opposite party, either in execution of the decree or otherwise, and on receipt thereof, to sign and deliver for me proper receipts and discharges for the same, and to do all other lawful acts, deeds and things in connection with the case as effectually as I could do the same, if I were personally present; to engage and appoint any other advocate or advocates whenever my said advocate thinks proper to do so.

Provided, however, that, if any part of the advocate's fee remains unpaid before the first hearing of the case (or, etc.), or if any hearing of the case be fixed beyond the limits of this town, then and in such an event my said advocate shall not be bound to appear before the court;

Signed, sealed and delivered

CD

Accepted, subject to the aforesaid conditions.

EF, Advocate.



POWER-OF-ATTORNEY FOR LEASING CONTRACTS**KNOW ALL MEN BY THESE PRESENTS**

WHEREAS 'A LIMITED' a Company registered under the Companies Act, 2013, and having its registered office at (hereinafter called the "Company");

WHEREAS the Company proposes to install plant and machinery through Leasing arrangements

WHEREAS it is desirable to authorise Shri of the Company to negotiate the lease arrangements, finalise and sign the Lease Deeds and other relevant papers for getting machinery for installation at the works of the Company;

WHEREAS the Board of Directors of the Company vide Resolution No passed in their meeting held on have resolved to execute and register a General Power of Attorney in terms of the draft placed before the Board in favour of Shri, of the Company and have authorised Shri, director, to execute, sign, seal and if necessary register and deliver the said Power of Attorney.

NOW THIS POWER OF ATTORNEY WITNESSETH AS FOLLOWS:

That the Company hereby appoints Shri of the Company as its 'Attorney' so long as he is in the services of the Company and notwithstanding any change in his designation to do severally the following acts, deeds or things in the name on behalf of, and at the expenses of the Company:

1. To negotiate with any Leasing Company for leasing arrangements for taking plant and machinery on lease basis for installation at the Works of the Company
2. To finalise, settle, execute and sign, and where necessary seal Lease Arrangements, other deeds and papers in connection therewith
3. To do all acts, deeds and things, as may be necessary for the above purpose

IN WITNESS WHEREOF this Power of Attorney has been signed and sealed by Shri , director,

authorised in this behalf vide Board Resolution No dated on this

day of 2017, in respect of:

WITNESSES:

1. DIRECTOR



PREVIOUS YEAR QUESTIONS AND ANSWERS



- 1. Projects Construction Engineering Co. (PCEC) has been awarded four project works by Karnataka Medical Suppliers Corporation Ltd. (KMSCL) for Rs. 500 lakh each. They have sought financial assistance from a commercial bank who agrees to provide the loan but wants a power of attorney from KMSCL to recover dues on the above contracts on behalf of PCEC, including right to sue for realizing dues for KMSCL. Prepare a power of attorney.**

We, M/s Projects Construction Engineering Co. _____(address) _____through Shri _____S/o _____aged _____proprietor of the firm do hereby appoint _____Bank _____to act as our attorney in our name and on our behalf and do all things hereinafter mentioned in connection with four civil construction project work undertaken by us on (Address) _____for Rs. 500 lakhs each.

Whereas our attorney has agreed to extend financial assistance to us in carrying out the execution of the said work effectively.

And whereas to secure the interests of said attorney in the execution of the above work, the said Bank has requested us to appoint it as our attorney for the project and subject to the terms and conditions on our behalf and to do all matters relating to receipt of all payments due to un under the said agreement other than payments of any kind herein specified.

NOW THIS POWER OF ATTORNEY WITNESS AS FOLLOWS:

1. We hereby further authorize our said attorney to receive any amounts due to us under the terms and conditions of the agreements and to receive payments of all kind of bills other than those specified hereunder for us payable to us under the said agreement in our name which will be accepted and signed by us and encash and receive the amounts and appropriate such receipts to itself towards financial assistance extended or to be due to it all the moneys agreed to be payable to it under the arrangements between us and to grant receipt on our behalf in respect thereof.
2. We do hereby undertake that we shall treat all payments made to the Bank as payments made to us.
3. We further do hereby authorize the bank to take all steps against the Karnataka State Medical Suppliers Corporation if necessary, for the recovery of amounts due under the agreement and payable to us for work done by us.
4. We hereby ratify all legal acts of said attorney holders as our acts and deeds.

IN WITNESS WHEREOF this deed has been signed and sealed by Mr._____, proprietor of the firm dated _____ on this _____ day of _____, _____, in presence of:

WITNESSESS:

For and on behalf of (PCEC)

Signature:

Name:

Proprietor



2. Write short notes on Power of attorney and letter of authority.

ANSWER: Refer chapter 18

3. Write notes on the following:**➤ Irrevocable power of attorney**

ANSWER: Refer chapter 18

4. What are the Principal governing the construction of a power of attorney?

The Principles governing the construction of a power of attorney are :

- 1) The operative part of the deed is controlled by the recitals:
- 2) Where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts;
- 3) A power of attorney is construed so as to include all incidental powers necessary for its effective execution.

5. ABC Corporation (Pvt.) Ltd. Incorporated under the Companies Act 2013 purchased a five-room double-storey flat in XYZ locality of Chennai for providing company accommodation to its company secretary on the first floor and company guest house on the ground floor. For facilitating its registration the chairman-cum CEO (CCEO), executed the following special Power of attorney:

“By this power of attorney, IXXX, the chairman of the ABC Corporation Ltd. Do hereby appoint and authorise CD, an MBA, LLB and ACS – to be my agent and attorney for the purpose of executing registration of our company flat address: (XXXY, XYZ locality of Chennai) purchased by us for 80 lakh only from KLN builders (Pvt.) Ltd. On this.....day of September, 2014 to all concerned authorities. Upon presentment, the sub-registrar, Chennai refused its bearer, Cd to allow him to complete the registration procedure, holding the power of attorney to be void.

Answer the following:

Is the sub-registrar’s refusal legally tenable?

As per section 22(2) of the companies act. 2013 “Company may, by writing under its common seal, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India

Thus, a power of attorney by a company must be:

- Under common seal of the company
- executed in the specific manner where company will be the principal

Thus, the refusal by sub-registrar is legally tenable as the special power of attorney is not in the prescribed manner.



If not, in what form or manner should the power of attorney be framed?

BY this power of attorney IXXX, the chairman of the ABC corporation (Pvt.) Ltd. Of etc. do hereby appoint CD of, etc. my attorney for me and on my behalf to appear for and represent me before the sub-registrar of.....of all times as may be necessary and to present before him for registration the.....deed dated the.....day of.....made between etc. to admit the execution of the said deed by me (if necessary to admit the receipt of consideration), to do any act, deed or thing as may be necessary to complete the registration of the said deed in the manner required by law and when it has been returned to him after being duly registered to give proper receipt and discharge for the same.

And I, the said XXX the chairman of the ABC corporation (Pvt.) Ltd. Do hereby agree and declare that all acts, deeds and things done, executed or performed by the said CD shall be valid and binding on me to all intents and purposes as if done by me personally which I undertake to ratify and confirm whenever required.

Signed, sealed and delivered witnesses XXX the chairman of the ABC Corporation Ltd.

How is it to be executed?

A power of attorney of attorney can be executed by any person, who can enter into a contract i.e. a person of sound mind who has attained majority. A power of attorney can be executed only in favour of a major. While functioning as an attorney the donee is acting as an agent of the donor i.e. the executor of the power of attorney, who is the principal. Thus, in such cases there is relationship of agent and principal and such relationship can be entered into by majors and not by minors.

Section 2 of the powers-of attorney act, 1882 in its operative part provides that the donee of a power of attorney may execute or do any assurance instrument or thing in his own name and signature and an instrument or thing so executed or done shall be as effectual in law as if it had been executed or done “by the donee of the power in the name and with the signature and seal of the donor thereof”. Simply stated, the section provides that the signature of the agent will be deemed to be the signature of the principal.

Company being an artificial person can act through agents i.e. its officers. Powers are delegated by companies to the agents through board resolutions or through powers of attorney. Delegation of powers through a power of attorney is resorted in view of the fact that it will be very easy to prove the execution thereof. However, in the cases of a resolution it would be necessary to produce the minutes books etc. to prove the passing of the resolution of delegation of the powers. Further section 22(2) of the companies act, 2013 provides the manner of execution of the power of attorney.

Will it make any difference if the CCEO is a married woman aged 45 years?

CCEO being a married woman aged 45 will not make any difference as the power of attorney is executed in the capacity of chairman – cum-CEO of the company ABC Corporation Ltd. (Pvt.) and not in the capacity of individual. Further. Even if the same would have been executed in individual capacity there would have been no effect as section 5 of the powers-of-attorney act,



1882, relating to married women's power to execute a power of attorney that married woman of full age shall. By virtue of this act. Have power, as if she were unmarried. By a non-testamentary instrument to appoint an attorney on her behalf for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this act relating to instruments creating powers-of-attorney, shall apply thereto.

6. 'B' has filed a title suit against 'A' in the court of city civil judge (S.D.) as a long-cause suit, pending its hearing, 'B' executed a power of attorney in favour of 'D' and got it registered. Later on, without consulting 'D' 'B' signed a compromise deed with 'A', 'D' challenged the compromise as it was entered into without informing him or obtaining his consent and so it prejudiced his rights. Would 'D' succeed? city case law.

In the present case 'B' is principal and 'D' is attorney D being an attorney cannot claim and independent capacity in the proceedings. When the principal B signed compromise petition, in the law it amounts to implied revocation of power of attorney in favour of D vide illustration to section 207 of the Indian contract act. The principal B is not bound to consult his attorney D before signing a compromise petition.

The above case is similar to the case of deb ratan biswas & other v. anand moyi devi and the Hon'ble Supreme Court held that it is well settled even after execution of a power of attorney the principal can act independently and does not have to take the consent of attorney. The attorney is after all only agent of the principal even after executing a power of attorney the principal can act on his own.



CHAPTER -19

DRAFTING OF DEBENTURE TRUST DEED

DEBENTURE TRUST DEED

Companies in the course of their normal business borrow funds by various modes, one such mode being the issue of debentures. An issue of debentures is usually secured by a trust deed, where under movable and immovable properties of the company are mortgaged in favour of the trustees for the benefit of the debenture holders. The trust deed so created, as in the case of a trust, should specify all the details which have been mentioned earlier. In addition, the usual important conditions/clauses of debenture trust deeds may be stated as follows:

- | |
|---|
| • The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favor of the trustee on behalf of the debenture holders. |
| • The trust deed gives in details the conditions under which the loan is advanced. |
| • The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property. Section 71 of the Companies Act, 2013 specifically provides that any provision contained in a trust deed for securing an issue of debentures, which has the effect of exempting a trustee or indemnifying him against any liability for breach of trust shall be void. |
| • It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon. |

INSTRUMENT OF TRUST: HOW IT IS DRAFTED

1. An instrument of trust is drafted either as a **DEED POLL OR A REGULAR DEED** between the author of trust and the trustee.
2. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees.
3. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll. No specific words are necessary, but, whatever the words used, the deed should contain with reasonable certainty the matters mentioned under the heading 'Creation of Trust'.
4. While drafting a trust deed, every clause in the deed should be clear in its meaning.
5. The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in **unequivocal language** and with reasonable certainty.

DEBENTURE TRUST DEED

THIS TRUST DEED is made at _____ this _____ day of _____ 200, between _____ incorporated under the Companies Act, 2013 with its registered office at _____ (hereinafter called "the Company") of the One part, and _____ (hereinafter called "the Trustees") of the Other part.



WHEREAS by Sub-clause _____ of Clause _____ of its Memorandum of Association, the company is authorized to borrow or raise and secure the payment of money by the issue of debentures charged upon any of the company's property.

WHEREAS the directors of the company have decided by a resolution passed in pursuance to Section 179 of the Companies Act, 2013 in the meeting of the Board held on _____ to raise a sum of Rs. _____ by issue of _____ Debentures of Rs. _____ each, bearing interest at _____ per cent per annum and to secure the same by mortgaging with the trustees the properties described in the Schedule hereto.

WHEREAS the trustees above mentioned have consented to act as trustees for the debenture holders.

NOW THE DEED WITNESS AS FOLLOWS:-

- (1) The debentures entitled to the benefit of these presents shall consist of a series of number of debentures of Rs. _____ each, aggregating to Rs. _____ in all to rank Pari Passu without any preference or priority by reason of the date of issue or otherwise and secured by the mortgage hereby created on the mortgaged premises.
- (2) The company hereby covenants with the trustees that the company will on the _____ day of _____ pay the debenture holders the amounts secured by their debentures and in the meantime will pay interest to the debenture holders on the day of _____ 2015 _____ in each year,
- (3) In consideration of the debentures hereby authorized aggregating to Rs. _____ the company, as the beneficial owner, hereby charges unto the trustees on the fixed plant and machinery and fixture at present existing at the company's factory and described in Schedule hereto.
- (4) The company shall hold and enjoy all the mortgaged premises and carry on therein and therewith its business until the security hereby constituted shall become enforceable under the terms of these presents, in which case the trustees may, in their discretion, enter upon or take possession of the mortgaged premises.
- (5) As soon as the principal money shall become payable and the security enforceable, the trustees shall enter upon and take possession of the mortgaged premises and shall forthwith take steps to consult the debenture holders for the purpose of determining whether the business of the company may be allowed to be carried on or whether the mortgage premises shall be realized by sale or otherwise.

IN WITNESS WHEREOF THE COMPANY has caused its Common seal to be affixed to these presents and the trustees have here to set their hands the day and year above written.

Common Seal of the _____

Witnesses:

affixed in the presence of

(DIRECTOR)
(TRUSTEES)

Schedule of Description of Property



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write notes on Creating of 'trust' in respect of immovable property?

ANSWER: Refer chapter 19

2. Write notes on the Extinction of a trust?

ANSWER: Refer chapter 19

3. Distinguish between Public 'Trust' and 'Private Trust'

ANSWER: Refer chapter 19

4. Distinguish between Revocation and Extinction of Trust.

ANSWER: Refer chapter 19

5. What are the important clauses of a "debenture trust deed?"

ANSWER: Refer chapter 19

6. Discuss the contents of a debenture trust deed.

ANSWER: Refer chapter 19

7. Draft specimen of debenture trust deed?

ANSWER: Refer chapter 19



CHAPTER -20

DRAFTING OF GIFT DEED

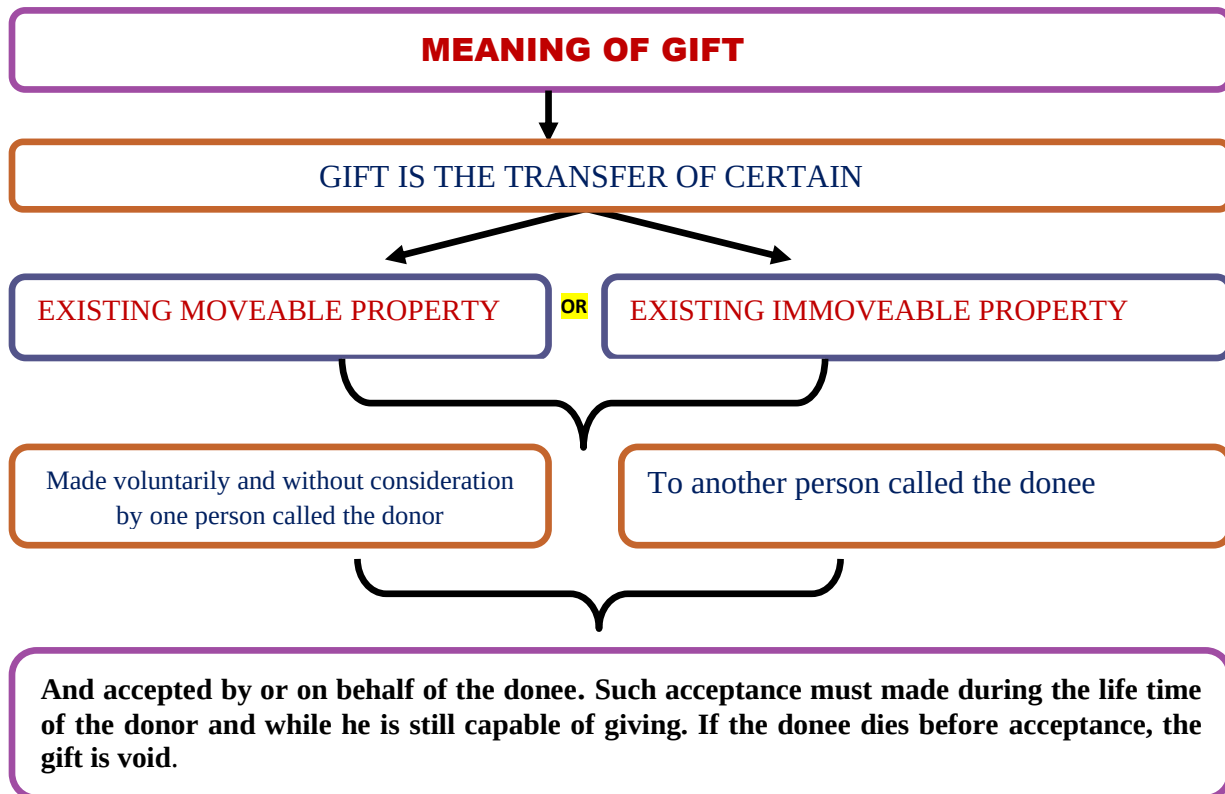
MEANING OF GIFT

SECTION 122 OF THE TRANSFER OF PROPERTY ACT DEFINES "GIFT" AS FOLLOWS

Gift is the transfer of certain existing moveable property or existing immovable property made voluntarily and without consideration by one person called the donor to another person called the donee and accepted by or on behalf of



the donee. Such acceptance must 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.



SOME IMPORTANT POINTS AREGARDING GIFT

S.NO.	PARTICULARS	PROVISIONS
1	Essentials for gift	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.
2	For gift there shall be existing property	Gift should be made only for the existing property as gift of future property is void under Section 124 of the Transfer of Property Act, 1882. Because gift of future property is mere promise and cannot be enforced.
3	Liabilities of donee	Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of property comprised therein.
4	Gift by company	A company can make gift of its movable and immovable property provided it had been vested with requisite power of doing so in objects clause in its Memorandum of Association and Articles of Association.
5	Revocation of gift	Section 126 of T.P. Act, 1882 prescribes the circumstances when a gift may be suspended or revoked. As per Section 126, the donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void, wholly or in part as the case may be. <u>Under Hindu Law</u> a gift once completed is binding upon the donor and it cannot be revoked by him unless it was obtained by fraud or undue influence <u>Ganga Baksh v. Jagat Bahadure</u>. But the rules of Muslim Law are different. Section 126 of T.P. Act, 1882 for revocation of gift cannot be applied to <u>Muslims</u>. A Muslim can revoke a gift even after delivery of possession except in following cases 1. when the gift is made by a husband to his wife or by a wife to her husband 2. when the gift is Sadaka (made to a charity or for a religious cause) 3. when the donee is dead 4. when the thing given is lost or destroyed 5. when the thing given has increased in value
6	Onerous gift (a gift which is burdened by some obligation)	1. Sec. 127 states that where a gift is in the form of a single transfer to the same person of several things of which one is and the others are not, burdened by an obligation,



		2. The donee can take nothing by the gift unless he accepts it fully. 3. Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.
7	Stamp duty and registration	The value of the property gifted must be set forth in the deed of gift. Stamp Duty is payable on gift deed as on the conveyance as per amount of value of the property as mentioned in the deed or as per market value of such property whichever is greater as per Article 23 of the Indian Stamp Act, 1899. If the value of the property is intentionally omitted or under-valued with a view to defraud the revenue, prosecution may be invited under Section 64 of Indian Stamp Act (Muhamad Muzaffar Ali). Further, penalty provisions under Gift-tax Act may also be attracted. Gift deed of immovable property is compulsorily registrable as per Section 123 of the Transfer of Property Act and Section 17(i)(a) of the Registration Act, 1908, whatever may be the values.

Deed of Gift for Love and Affection

THIS GIFT is made on the day of..... BETWEEN AB, etc. (called “the donor”) AND CD, etc. (called “the donee”).

WHEREAS the donor is owner of the property described in the Schedule and out of his paternal affection for his daughter, (the donee), is desirous of making a gift of the said property to the donee at the time of her marriage.

NOW THIS DEED WITNESSES AS FOLLOWS:

1. In consideration of the natural love and affection of the donor for the donee, the donor transfers to the donee free from encumbrances ALL the property described in the Schedule TO HOLD the same to the donee absolutely forever.
2. The donee accepts the transfers.

IN WITNESS WHEREOF the parties a fore said have sat their respective hands in the presence of the witnesses here under.

Witness: AB

Witness: CD

DEED OF GIFT OF PROPERTY FOR PARTICULAR PURPOSE

THIS GIFT is made..... day of..... BETWEEN AB of, etc. (hereinafter called “the Donor”) of the one part, and CD of, etc. (hereinafter called “the Donee”) of the other part.

WHEREAS the donee intends to start a school in his village for the education of girls
WHEREAS the donor is desirous of donating the land fully mentioned and described in the Schedule hereto to be used as a site for the said School.



NOW THIS DEED IS WITNESS AS FOLLOWS

1. The donor do hereby freely and voluntarily grant, convey, transfer, give to the use of the donee and his successor all property mentioned in schedule to be used exclusively for the purpose of a girls' school.
2. The donee accepts the gift of the said property hereunder made solely and exclusively for the purpose.
3. That it is expressly agreed and understood by and between the parties that this gift of land will stand *ipso facto* revoked in the event the land hereunder given is not used for the purpose of the intended school for which the same is given within a period of one year from the date of these presents.

IN WITNESS WHEREOF the parties a fore said have sat their respective hands in the presence of the witnesses here under.

Witness: AB

Witness: CD

GIFT OF BUSINESS GOODWILL

This deed of gift is made day of..... Between (donor) of etc. (hereinafter called donor) of the one part and (donee) of etc. (hereinafter called the donee) sons of the other part.

WHEREAS:

1. Grantor has for many years past carried on the trade or business of at..... (Hereinafter called the donor's business) and in connection therewith is the registered proprietor of the trade marks relevant particulars of which are set out in the first schedule hereto.
2. With a view to setting up the donee in the partnership business the donor is desirous of assigning the goodwill of his business and the said trademarks to the donee and granting to them the license hereinafter contained.

NOW THIS DEED WITNESSETH AS FOLLOWS

1. In consideration of his natural love and affection for the donee the donor hereby assigns the donee all that the goodwill of the donor in his business and also all the trade marks specified in the first schedule to hold the same absolutely.
2. The donee accepts the gift of the said property.

In Witness Whereof I have executed this deed of gift which has been accepted on behalf of the donee.

Witness: DONOR

Witness: DONEE



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. ABC Ltd. Employees 600 employees including 380 workers it manufactures plastic durables in its factory premises. Fifty acres vacant land is laying surplus to company's requirements. The workers have formed a religious public charitable trust registered under the Indian trusts act. 1882 and the Bombay public trusts act. 1950 as most of them profess secular "Anaamensh Radhaswami" sect. they require a suitable site near their quarters to worship adyashakti and holy mentor, hold satsangs and meditate as required in their creed. For this the managing trustee has approached the chairman and managing director, Omkar requesting for grant of 25 acres of surplus land for building a temple as a gift for the welfare of employees the board of directors, in their meeting accepted the request and decided to grant 25 acres plot from surplus land situated adjacent to the western gate of the factory premises, subject to following main conditions.	
i)	Gift of land to be in perpetuity.
ii)	Temple to be constructed by the trust to be named anaamensh ashram and open to all, subject to temple discipline and practical requirements
iii)	The chairman and managing Director/Company secretary/nominee of the board to be the president of the temple management committee.
iv)	The donor company will defray 50% of annual recurring expenses of the temple out of employee's welfare fund.
v)	No political or commercial or unlawful activity shall be allowed inside temple complex. But few stalls selling pooja articles, flowers eatables or ladies trinkets may be allowed to be put up. Besides the holy mentor manager of the temple and necessary staff may be allowed to reside in the temple precincts.
vi)	These terms can be varied through the chairman and managing director's order if contingencies so require, including demise of this gift in case of malpractices or unlawful activities or similar breach of the conditions of grant. In that event the plot shall revert to the donor.
vii)	All decisions in this regard shall be final and unchallengeable and binding on all concerned.
The chairman and managing director, omkar asks you, as the company secretary, to draft a suitable gift deed containing above conditions assume supplemental data if required.	

GRANT OF LAND FOR BUILDING A TEMPLE

This DEED OF GIFT is made at Mumbai this 10th day of January, 2014 between M/s ABC Ltd. Having its registered office at F-350, skylark apartments, andheri (west) Mumbai, Maharashtra through its chairman cum managing director Mr. Omkar (hereinafter referred to as the donor) of the one part and Mr. B. Managing trustee, anaamensh Radhaswami Trust (hereinafter referred to as the DONEE') of the other part.

WHWEREAS the DONOR is in possession of the land admeasuring 25 acres bearing rectangle no. 13/2 kila no. 4(5-6) rectangle no. 18 kila no. 5(6-0) 5(2-3) located in suburban industrial estate, Mumbai, where the manufacturing plant of the company is located and workers of the company resides.

WHEREAS the DONEE has requested the DONOR for grant of said land for the purpose of construction of a temple thereon.



WHEREAS the DONER has agreed with the DONEE to gift the aforementioned land for the said purpose.

WHEREAS the DONEE has accepted the gift for the said purpose and on the terms and conditions hereinafter contained.

NOW THIS DEED WITNESSES AS FOLLOWS:

1. That the donor now has in himself good right, full power and absolute authority to grant the said piece of land.
2. That the said land and premises are free from encumbrance.
3. The donor hereby grants and transfers to the donee ALL THAT plot of land etc. TO HOLD the same to the donee and his successors according to the custom of succession in the management of religious for the purpose, of a temple and for no other purpose in accordance with the covenants hereinafter contained:
4. That the trust with in 3 years from the date hereof erect a temple of the value of 25 lakhs only on the said premises and will not use the said premises for any other purpose.
5. That the proposed temple to be constructed by the trust in the name of anaamensh ashram on the said land is open to all subject to temple discipline and practical requirements as may be decided by the trust from time to time.
6. That the chairman and managing director/company secretary/nominee of the board is to be the president of the temple management committee.
7. That the donor shall defray 50% of annual recurring expenses of the temple out of employees welfare fund.
8. That no political or commercial or unlawful activity shall be allowed inside temple complex. However, few stalls selling pooja articles, flowers eatables or ladies trinkets may be allowed to be put up.

IN WITNESS WHERE OF the donor as well as the donee (by way of acceptance of the said gift) have put their respective hands the day and year first hereinabove written.

Witness: 1

For M/s ABC Ltd.

Chairman cum managing director-Sd/

Witness: 2

For Anaamensh Radhaswami Trust

Mr. B. Managing Trustee-Sd/



CHAPTER -21 **BYE LAWS & STANDING ORDERS**

DRAFTING OF BYE-LAWS OF SOCIETIES

SOCIETY

A society may be defined as an association of persons united together by mutual consent to deliberate, determine and act jointly for same common purpose.

When a charitable organisation intends to have an open participation of large number of people in its functioning and decision making, it must be registered as a Society. Societies have been envisaged as welfare and charitable associations of people having a broad based membership and comparatively more democratic and transparent set up as compared to such set ups as public charitable trusts.

According to Section 20 of the Societies Registration Act, 1860, the following societies can be registered under the Act

charitable societies, military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collection of natural history, mechanical and philosophical inventions, instruments or designs.’

The main instrument of any society is the memorandum of association and rules and regulations. All promoters should sign each page of the memorandum and the signature should be witnessed by competent officers/professionals with their rubber/official stamp and complete address.

The Memorandum should contain name, registered office, area of operation, objects, name of members of governing body and names of promoters.

The Rules and Regulations should include all the provisions that would regulate functioning of the proposed Society; it should comprise membership, powers and responsibilities of office-bearers, meetings, quorum of meetings, termination of membership, operation of bank account and financial year, procedure of dissolution or merger of Society if so required, and other general rules required to manage the society.

DRAFTING OF STANDING ORDERS

The Act makes it obligatory for employers of an industrial establishment where 100 or more workers are employed to clearly define the conditions of employment, by way of standing orders/services rules and to make them known to the workmen employed. However in the N.C.T.



of Delhi, the Act applies to an industrial establishment where 50 or more workmen are employed or were employed in the preceding 12 months.

The employer is required to prepare draft standing order, which he propose to adopt and submit the same to the Certifying Officers for certification. The employer is required to act in conformity with the certified standing orders in dealing with the day today affairs of the workmen. Certified standing orders have the force of the law like any other enactment.

ADMINISTRATIVE MACHINERY

All Deputy Labour Commissioners of the Labour Department have been appointed Certifying Officers for the purpose of certification of the proposed standing orders of the respective areas under their control. Industrial Tribunal-I is the Appellate authority under the Act.

PENALTY

The Act provides that in case the employer fails to submit the draft standing orders, a fine up to Rs. 5,000/- can be imposed and in case of contravention of the standing orders, a fine up to Rs. 100/- and in case of continuance of the offence, further fine up to Rs. 25/- for each such day can be imposed.

Draft Model Standing Orders

1. Short title, extent and commencement.-

(1) These Model Standing Orders may be called the Model Standing Orders for Service Sector, 2020;

(2) They extend to all States and Union territories within India to the industrial establishments employing three hundred or more number of workers who are working in the industrial establishments and which are covered under the Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020) and the rules made thereunder under the control of Central Government or the State Government engaged in service sector;

(3) These Standing Orders shall come into force on the day of its publication in the Official Gazette.

2. Definition.-

(1) In these Model Standing Orders, unless there is anything repugnant to the subject or the context,-

(a) “Aadhaar” means the Aadhaar referred to in Section 142 of the Code on Social Security, 2020 (36 of 2020);

(b) ‘Code’ means the Industrial Relations Code, 2020 (35 of 2020);



(c) 'Form' means a form set out in Schedule appended to these standing orders;

(d) 'Habitual' means with respect to indiscipline, a worker shall be habitual if the worker found guilty of any misconduct three or more times in preceding twelve months; and

(e) "Standing Order" with its grammatical variation and cognate expressions, means the standing order of these model standing orders.

3. (1) Classification of Worker.- For the purposes of these standing orders, the workers are classified as

below, namely:-

(a) Permanent;

(b) Temporary;

(c) Apprentices;

(d) Probationers;

(e) Badlis; and

(f) Fixed Term Employment.

4. Identity Badge or Card.-

(1) All workers belonging to any categories under the Code on Industrial Relations, 2020 (35 of 2020) shall be issued an identity badge or card bearing his full name, employee number, blood group, mobile number, if any, and a recent photograph.

(2) A worker should always wear his identity badge or card during the working hours of the industrial establishment and produce the same to the authorized security guard or personnel to allow him the right of entry and stay in the premises of the industrial establishment.

(3) Such identity badge shall not be transferable to any other persons or workers. Safe custody of the identity badges or cards shall be ensured by the concerned workers.

(4) Every Worker, who ceases to be in employment of the industrial establishment or is suspended from services, shall surrender his identity badge or card to the Department Head or the designated officer of the industrial establishment for such purpose.

5. Publication of Working Timings.-

(1) The periods of hours of work for all categories of workers shall be exhibited on the notice board or Electronic Notice Board and on the Human Resource Portal/IT Application of the industrial establishment, if any, from time to time in Hindi, English and in local language



majority of workers in the industrial establishment are conversant. Provided that in case of IT Sector, the working hour shall be as per agreement or conditions of appointment between employer and workers.

(2) Any change in periods of hours of work, number of shifts, shift timings, work on all the days of the week with staggered weekly holidays system or like other matters, shall also be displayed on notice board or electronic notice board of the industrial establishment.

6. Publication of Holidays, Pay days and Wage rates.-

(1) Notices specifying the days observed by the industrial establishment as holidays, and pay days shall be posted on the Electronic notice board or notice board and website or Human Resource portal of the industrial establishment, if any.

(2) A list of national and Festival Holidays shall be displayed on the Electronic notice board or notice board and website or Human Resource portal of the industrial establishment, if any.

7. Publication of wage band.- Wage bands payable to all categories of workers shall be displayed on the Electronic notice board or notice board and website or Human Resource portal of the industrial establishment, if any in Hindi, English and local language majority of workers in industrial establishment are conversant.

8. Shift working:-

(1) More than one shift may be worked in a department or departments or any section of a department of the industrial establishment at the discretion of the employer. If more than one shift is worked, the worker shall be liable to be transferred from one shift to another. No shift working shall be discontinued without twenty one days' notice being given in writing to the workers prior to such discontinuance: Provided that no such notice shall be necessary if the closing of the shift is under an agreement with the workers affected or mutually agreed between employer and worker. If as a result of the discontinuance of the shift working, any worker is to be retrenched, such retrenchment shall be effected in accordance with the provisions of the Industrial Relations Code, 2020 (35 of 2020) and the rules made thereunder. If shift working is re-started, the workers shall be given notice and re-employed in accordance with the provisions of the said Code and the said rules.

9. Notice of changes in shift working.-Any notice of discontinuance or of re-starting of a shift working required by this Standing Order, shall be in form II appended to these standing orders and shall be served in the following manner, namely :-

(a) The notice shall be displayed conspicuously by the employer on a notice-board or electronic notice board and Human Resource portal of the industrial establishment if any; and



(b) Where any registered trade union of workers exists, then, a copy of the notice referred to in clause (a) shall also be served electronically or by registered post to the Secretary of such union.

10. Work from home.- Subject to conditions of appointment or agreement between employer and workers, employer may allow a worker to work from home for such period or periods as may be determined by employer.

11. Attendance and Late Coming.–

(1) All workers shall be at work at the time fixed and notified under paragraph 5. Worker attending late will be liable for deduction provided for in the Code on Wages, 2019 (29 of 2019).

(2) All workers shall comply with the regulations related to hours of work for the time being in force.

(3) Workers shall register their attendance at the start of the shift and at the close of the shift after and before change of uniform, if any, respectively.

(4) Workers shall use identity card or biometrics or any other system as has been notified to register their attendance.

(5) No worker shall use or punch the Identity badge other than his own under any circumstances.

12. Leave.–

(1) Holidays with pay will be allowed as provided for in the Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020), and other holidays in accordance with law, contract, custom and usage applicable.

(2) Leave cannot be claimed as matter of right.

(3) A worker who desires to obtain leave of absence shall apply to the employer or any other officer of the industrial establishment specified in this behalf by the employer at least seven days in advance from the date of proposed date of leave. The employer or any other officer of the industrial establishment, who is responsible for issuing the order, shall issue the same within a week of its submission or two days prior to the commencement of the leave applied for, whichever is earlier. If the leave has been applied and the leave is to commence on the date of the application or within three days thereof, then the worker shall mention the reason for late submission of application for leave. The order on such leave shall be given on the same day. If the leave is refused or postponed, the fact of such refusal or postponement and the reasons therefor shall be communicated to him in writing.

13. Casual Leave.- A worker may be granted casual leave of absence with or without pay not exceeding ten days in the aggregate in a calendar year. Such leave shall not be for more than three days at a time except in case of sickness. Such leave is intended to meet special



circumstances which cannot be foreseen. Ordinarily, the previous permission of the head of the department in the industrial establishment shall be obtained before such leave is taken, but when this is not possible, the head of the department shall, as soon as may be practicable, be informed in writing of the absence from and of the probable duration of such absence.

14. Payment of Wages. –

(1) All payment including wages to the workers shall be paid by crediting in the bank account of worker on electronic mode or digital form. Intimation to the payment made to a worker shall be sent to him through SMS or e-mail or social media communication, such as, WhatsApp or by issuing a slip.

(2) Notice of wage period and payment date in Hindi, English, and regional language familiar to the majority of workers at a factory, shall be displayed on the notice board or electronic notice board and on the Human Resource portal of the industrial establishment, if any.

(3) Any wages, due to the worker but not paid on usual pay day on account of there being unpaid shall be paid by the employer on an unclaimed wage pay day in each week, which shall be notified on the notice boards as referred to in sub-paragraph (2); and

(4) All worker will be paid wages on a working day before the expiry of the seventh day after the last day of the wage period in respect of which the wages are payable.

15. Service Record:-

(1) Matters relating to service card, certification of service, change of residential address of workers and record of their age shall form part of service record and –

(i) Every industrial establishment shall maintain a service card in respect of each worker electronically or in manual form, wherein particulars of that worker shall be recorded with the knowledge of that worker in Form I. In case of manual maintenance of service card, the record shall be duly attested by an officer in this behalf together with date;

(ii) Every worker shall be entitled to a service certificate, specifying the nature of work, designation and the period of employment (indicating the days, months, years) at the time of discharge, termination, retirement or resignation from service to be issued by an employer;

(iii) A worker shall notify the employer immediately on engagement, the details of his permanent and local residential address, mobile number and digital communications details like e-mail address and thereafter promptly communicate the change in the same, if any. In case, the worker has not communicated to his employer the change in his residential address, his last known address shall be treated by the employer as his residential address for sending any communication;



16. Confirmation.- The employer shall, in accordance with the terms and conditions stipulated in the letter of appointment, confirm the eligible worker and issue a letter of confirmation to him. Whenever, a worker is confirmed, an entry with regard to the confirmation shall also be made in his service card within a period of thirty days from the date of such confirmation.

17. Age of retirement.- The age of retirement or superannuation of a worker shall be such as may be agreed upon between the employer and the worker under a written agreement or as specified in a settlement or award which is binding on both the worker and the employer. Where there is no such agreed age, retirement or superannuation shall be on completion of fifty eight years of age by the worker.

18. Transfer.—

(1) There shall be a transfer policy of the industrial establishment and same shall be known to all workers. The details of transfer policy shall be available on the Human Resource (HR) portal.

(2) A worker may be transferred according to the transfer policy and exigencies of work from one shop or department to another or from one station to another or from one industrial establishment to another under the same employer: Provided that the wages, grade, continuity of service and other conditions of service of the worker shall not be adversely affected by such transfer: Provided further that a worker shall be transferred from one job to another, which he is capable of doing: Provided also that where the transfer involves moving from one State to another such transfer shall take place, either with the consent of the worker or where there is a specific provision to that effect in the letter of appointment and transfer policy in accordance with such provision and policy: Provided also that unless –

(a) reasonable notice is given to such worker, and

(b) reasonable joining time is allowed in case of transfers from one station to another and the worker concerned shall be paid traveling allowance including the transport charges and fifty per cent thereof to meet incidental charges, such transfer shall not be effected,



CHAPTER-22 DRAFTING OF VARIOUS NOTICES

REPLY OF SHOW CAUSE NOTICES

Show Cause Notice by Court (Reply)

If the Court sends a Show Cause Notice, the person to whom such notice is given must give it the highest priority. The show cause notice must not be taken lightly and its seriousness should be understood. The reason being that by sending a reply to the show cause notice, he/she can avoid criminal charges put on him and also the liabilities which arise from them. Points to be kept in mind while writing a reply to show cause notice:

- | |
|--|
| 1. A proper explanation has to be provided at the earliest. |
| 2. It should be kept as brief as possible. |
| 3. It must be written in such a manner that the Court is satisfied with the fact that he/she is aware of the gravity of the situation. |

Some more points to be kept in mind

When you are filling a reply to a show cause notice it must always be kept in mind that you must give a reasonable excuse. Any individual must draft his/her reply in such a way that if any layman would read it he should find the same as reasonable. Moreover, always sound humble in your reply and also sound sorry for the same. Lastly, be always very careful to file the reply within the specified time limit mentioned in the notice.

In case of Meenakshi v. State of Haryana, Considering the chain of facts and highlighting the reply filed by the petitioner to the notice under Section 340, the Court clarified that there was nothing illegal in it and did not amount to miscarriage of justice at all, for the opportunity of being heard was given to the petitioner as she was allowed to file reply to the show-cause notice. It is the non-acceptance of the forgiveness sought that has led to the filing of the complaint in the Court. Inderjit Singh, J accordingly held that there is no merit in the case and accordingly, dismissed the petition

NOTICES UNDER THE NEGOTIABLE INSTRUMENTS ACT

According to Section 138 of Negotiable Instruments Act, 1881, 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 section 143 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 payment of 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 the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt of other liability” means a legally enforceable debt or other liability.

Notice under Section 138 of the Negotiable Instruments Act

LEGAL NOTICE

Dated _____ To, Name- XYX Address _____, Royal Tower Sec _____ G.B Nagar Noida- 201301 Mob- _____ Sir, Under the instructions from and on behalf of my client _____ s/o _____ r/o _____ :- _____

_____. I do hereby serve upon you with the following legal notice :-

That you and my client are having business relation with each other since last 9 years. That in the month of July to October 2017, you have purchased goods on a credit of Rs. 6,00,000/- and for which you approach and demanded the same, my client after thoughtful consideration and having good business relation with you had extended line of credit of Rs. 6,00,000/- (Six lakh only) for very short time. That my client approached you time to time for the given said amount Rs.6,00,000/- but you noticee, always assured my client that I will pay the entire amount and you noticee demands some time. That after the 10 months my client has been approached to above said noticee to return above said amount 6,00,000/- than you noticee demanded some more time of i.e.: – 9 to 10 month. After the completion of 9 to 10 month my client again approach to you, noticee with humble request for the above said amount. you, noticee had assured that my client that I will paid 6,00,000/- with interest and other charges and again demanded some more time i.e.: - one and half month. After the completion of one and half month to you noticee and the noticee had been given Rs. 1,00,000 in cash, and issued three cheques respectively i.e.: – (i) cheque no – _____ dated 20-12-2019 of Rs. 50,000/-, drawn on _____ bank of India branch _____. (ii) cheque No- _____, Dated on -30-11-2019 of Rs 1,00,000/- , drawn on _____.



_____ bank of India _____. (iii) Cheque No. _____ dated on 31-12-2019 of Rs. 6,00,000/- , drawn on bank of India , Branch _____, in favor of my client. At that time my client had asked to you about of remaining balance amount Rs. 3,00,000/-, The noticee again assured my client that I will pay within near future.

As per your permission my client presented single cheque no _____ amount of Rs. 1,00,000/- on 16-12- 2019 in his banker Kotak Mahindra bank, branch A- 000, address.....- Delhi- 92 to your banker however, to the utter dismay to my client the above said single cheque dishonored by your banker for the reason “ Funds Insufficient” vide return memo dated on 18-12-2019.

That after the dishonored the above said cheque (Cheque no _____), my client some time approached to you the noticee, but you have not returned the above said cheque amount of Rs. 1,00,000/- of my client.

That you are required to take a notice of demand under section 138 of the negotiable instrument Act., 1881 and to pay the amount within the period of 15 days from the receipt of this notice failing which you shall become liable to be prosecuted under the penal provision of the said section.

It is therefore, call upon you through this notice to pay the cheque of Rs. 1,00,000/- (One lakh only), along with counsel fees of 10,00/- to my client within a period of 15 days from the receipt of this notice failing which you shall become liable to be prosecuted U/S 138 N. I. Act and other penal provision of the IPC.

It is therefore, call upon you through this notice to pay the cheque of Rs. 1,00,000/- (One lakh only), along with counsel fees of 10,00/- to my client within a period of 15 days from the receipt of this notice failing which you shall become liable to be prosecuted U/S 138 N. I. Act and other penal provision of the IPC.

(Advocate)

REPLY TO LEGAL NOTICE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT

Reply to Legal Notice under Section 138 of Negotiable Instruments Act, 1881

Name of the Advocate XXXXX

Advocate New Delhi-110019 Ph.011- 2437XXXX Dt. 21.07.2015

To, Sh. Advocate,



....., Delhi High Court,

New Delhi-110001

SUB: REPLY TO YOUR LEGAL NOTICE U/S 138 NEGOTIARLE INSTRUMENT ACT, 1881 DATED 02.04.2023 Dear Sir, Your legal notice dated 02.04.2023 has been placed before me by my client Sh..... at Connaught Place, New Delhi -110001 and I, the undersigned, have been instructed to reply to your said notice by my client on his behalf as under:

A. That, at the outset you are being informed that the notice under reply, you have sent on behalf of your above said client, contains false and frivolous facts provided by your said client against my client, thereby your notice under reply deserves to be withdrawn, with unconditional apology by your client, because the claim made by you is without any basis and is based upon concocted facts, as no claim is made out against my client and in favour of your client.

A. That, at the outset you are being informed that the notice under reply, you have sent on behalf of your above said client, contains false and frivolous facts provided by your said client against my client, thereby your notice under reply deserves to be withdrawn, with unconditional apology by your client, because the claim made by you is without any basis and is based upon concocted facts, as no claim is made out against my client and in favour of your client.

which was subject to the condition that payment would be made only after those machines were sold out. However, those machines were not only outdated, but were also mechanically faulty, because of which till date they are lying with my client, which your client is at liberty to take back with two days' prior notice. It is pertinent to mention here that the cheque in question was handed over by my client blank and the same was to be used only upon instructions of my client, after he could sold out your all those machines.

C. That, however, your client has cheated my client by misusing that cheque which is not in the handwriting of my client. As a matter of fact, your client has committed fraud in the matter and, consequently, is liable to be proceeded under the relevant provisions of law.

D. That, therefore, it is denied that the cheque in question was issued by my client to your client in discharge of any liability. Rather, your client has misused that blank cheque with ulterior motives, after forging the same.



Reply on merits

1. That the contents of para 1 of your legal notice are wrong and denied and whatsoever is stated above is reiterated. It is denied that my client purchased from you client any machines whatsoever. Rather, my client helped your client to keep your machines in his godown/shop for disposal. Therefore, it is denied that the cheque in question was issued in discharge of any liability towards my client, as alleged in this para.
2. That the contents of para 2 are denied for want of knowledge. However, it is reiterated that my client ever issued any cheque, in the manner as alleged by you.
3. That, in reply to para 3 of your legal notice, what is stated above is reiterated. It is submitted that your client was not entitled to use that cheque for encashment and deposit the same in his bank.
4. That the contents of para's 4 & 5 are denied for want of knowledge. However, it is reiterated that any cheque was issued in discharge of any liability towards my client to your client.
5. That the contents of para 6 need no comments. However, it is denied that my client committed any offence whatsoever.

In view of aforesaid facts and circumstances, you are being advised to further advise your client to withdraw the said notice under reply and further advise him not to drag my client in any frivolous litigation, failing which my client shall be constrained to contest the same, besides proceeding against your client under the relevant provisions of law, at the costs, risks and consequences of your client only. Copy kept for future record and reference.



DRAFTING UNDER COMPANIES ACT 2013



Start Career As A Company Secretary



CHAPTER-23

Drafting of Underwriting Agreements

When shares are offered to the public, a company would naturally like to ensure success of the issue. It may, therefore, make an agreement with financial institutions, bank, etc., who in consideration of a commission, agree to subscribe for the shares to the extent to which the shares are not taken by the public. This is called **underwriting agreement**.

SECTION 40 (6) OF COMPANIES ACT 2013

A company may pay commission to any person in connection with the subscription to its securities subject to such conditions as may be prescribed.

RULE13 of Companies (Prospectus and Allotment of Securities) Rules, 2014

A company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely:

- A. The payment of such commission shall be authorized in the company's articles of association
- B. The commission may be paid out of proceeds of the issue or the profit of the company or both
- C. The rate of commission paid or agreed to be paid shall not exceed, **in case of shares, five percent** of the price at which the shares are issued or a rate authorised by the articles, whichever is less, **and in case of debentures**, shall not exceed **two and a half per cent** of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;
- D. The prospectus of the company shall disclose
 - the name of the underwriters;
 - the rate and amount of the commission payable to the underwriter; and
 - the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
- E. There shall not be paid commission to any underwriter on securities **which are not offered to the public for subscription**;
- F. A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

UNDERWRITING VS BROKERAGE

UNDERWRITING	BROKERAGE
It is a contract entered into between the company and underwriters whereby the underwriter agree to subscribe the shortfall in minimum subscription.	Broker Merely undertakes 'to place shares' i.e. finds person who will buy shares for an agreed brokerage . (Brokerage is the sum paid by company for placing its shares)
Underwriter is liable to take the shares when there is failure by public to subscribe.	Broker does not have any liability to subscribe to the shares he merely finds buyers.
The risk associated with underwriting is the devolvement of underwriters in case of failure of public to subscribe.	No risk because broker does not undertake to subscribe for the shares
Risk is suitably compensated by way of	Broker gets Brokerage only when he places



underwriting commission	the shares, else, no brokerage.
Commission is payable only when there is an express authority in the AOA	Brokerage may be paid even if the AOA is silent about it.

UNDERWRITING CONTRACT

An agreement made the day of 20 between of (Hereinafter called the underwriters) of the one part, and Ltd., a company incorporated under the provisions of the Companies Act, 2013, having its registered office at (Hereinafter called the 'the company') of the other part:

Whereas the company is about to offer for public subscription an issue of shares of each in accordance with the terms of the draft prospectus a copy of which is annexed hereto, or with such modification therein as may be mutually agreed upon between the company and the underwriters:

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. If the said Shares shall on or before the day of be offered by the company for subscription by the public at par on the terms of such prospectus as aforesaid, the underwriters shall on or before the closing of the subscription list apply at par for the said Shares.
2. If on the closing of the lists under the said prospectus the said shares shall be allotted in respect of applications from the public the responsibility of the underwriters is to cease and no allotment is to be made under this agreement but if the said Shares shall not be allotted to the public but any smaller number of such shares is so allotted, the undertaking of the underwriters is to stand for the difference between the said shares and the number of the shares allotted to the public.
3. The company shall pay to the underwriters in cash within days from the allotment of the said shares a commission at the rate of
4. This agreement is to be irrevocable on the part of the underwriters.

Signed and delivered by within named Underwriter in presence of:

Witness – 1
Witness – 2

.....
Signature of Underwriter

Signed, sealed within named Company
(Name of the Company)

Through its Director

Signature.....



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write a short note on underwriting agreement?

ANSWER: Refer chapter 23

2. Draft a specimen of underwriting agreement?

ANSWER: Refer chapter 23



CHAPTER-24

Drafting of Agreements of Appointment of Managerial Person

COMPANY SECRETARY

INTRODUCTION

Despite the name, the role of a Company Secretary is not a clerical or secretarial one in the usual sense. In fact, a Company Secretary is typically a senior managerial person in the corporate structure ensuring efficient administration of the company and certifying the company's compliance with the provisions of the Act. A Company Secretary helps the company to comply with the Act, avoiding failures to comply which can be very debilitating.

With the introduction of the Companies Act, 2013, the importance of Company Secretary in corporate operations is significantly increased.

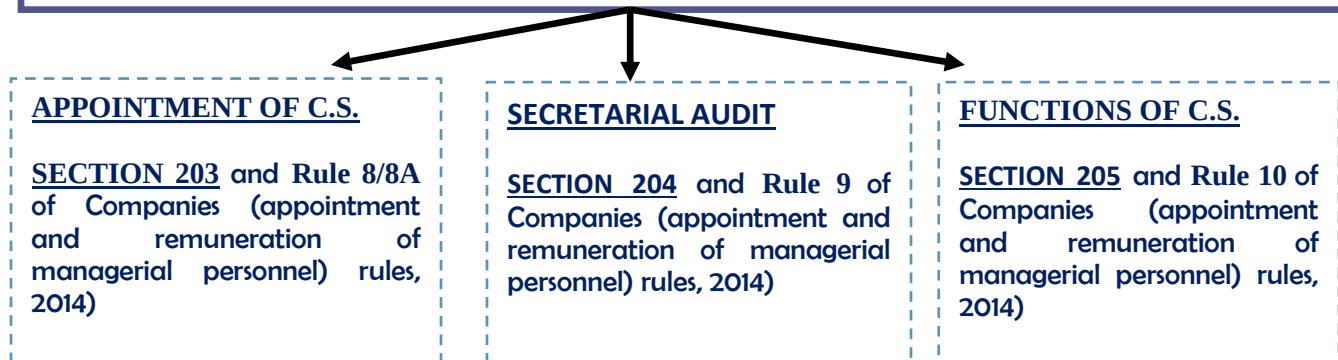
An analysis on company secretary and companies act 2013 is given below

Career As A Company Secretary



Under section 2 (51) of the Companies Act, 2013, Company Secretary has been defined as KEY MANAGERIAL PERSON.

COMPANIES ACT 2013 AND COMPANY SECRETARY



MEANING OF COMPANY SECRETARY**COMPANY SECRETARY – DEFINITION SECTION-2(24)**

Secretary means a company secretary within the meaning of Section 2(1) (c) of the Company Secretaries Act, 1980.

Section 2(1) (c) of the Company Secretaries Act, 1980 defines a company secretary as a person who is a member of the Institute of Company Secretaries of India.

**APPOINTMENT OF COMPANY SECRETARY****SECTION 203**

Every listed company and every public company having paid up share capital 10 crore or more shall have whole time KMP (**Rule 8**)

Every company which has a paid up share capital of ten crore rupees or more shall have a whole-time company secretary (**RULE 8A**)

If any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees. (Companies Amendment Ordinance 2018)

IN SHORT: Every Company (Private or Public) having paid up share capital 10 crore or more is required to appoint a whole time company secretary.

Appointment of KMP by the Board of directors

Section 203(2) provides that every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the **Board** containing the terms and conditions of the appointment including the remuneration.



Filing of Various Forms for appointment company secretary

- DIR-12 within **30 days** of their appointment
- MGT-14 within **30 days** of their appointment
- ~~MR 1 within 60 days of their appointment~~ (THIS REQUIREMENT EXEMPT FOR APPOINTMENT OF CS, CEO AND CFO)

KMP as an officer in default

Under **section 2(59)** of the Companies Act, 2013 the KMP has also been included in the category of the officer of the company and shall be considered to be in default in complying with any provisions of the Companies Act, 2013 as per provisions of **section 2(60)** of the Act.

In addition to the Companies Act, other laws like Income-tax Act, Negotiable Instruments Act, SEBI Act, MRTP Act, FEMA Regulations, Central Excise and Customs Act, etc. have recognised the secretary as a principal officer of the company and have placed various responsibilities for compliance by him.

SUMMONS ON COMPANY

Summons to company in civil matters can be served on a secretary As per rule 2 of order 9 of Code of Civil Procedure, in case of suit against a corporation, summons can be served on (a) Company Secretary, Director or other principal officer of the corporation or (b) By leaving it or by sending by post to registered office of the corporation.

SECRETARIAL AUDIT

(A NEW PROVISION)

SECRETARIAL AUDIT REPORT**SECTION 204**

1. Every listed company
2. Every public company having a paid-up share capital of **fifty crore rupees** or more
3. Every public company having a turnover of **two hundred fifty crore rupees or more**
4. **Every company** having outstanding loans or borrowings from banks or public financial institutions of **one hundred crore rupees** or more Has to obtain secretarial audit report in form no. **MR 3** from P.C.S.

Penalty for contravention Section 204

Every officer of the company or the company secretary in practice, who is in default, shall be **liable to a penalty of two lakh rupees.**
(COMPANIES AMENDMENT ACT 2020)



PROFESSIONAL RESPONSIBILITY AND PENALTY FOR INCORRECT AUDIT REPORT**1. PENALTIES UNDER COMPANY SECRETARIES ACT, 1980**

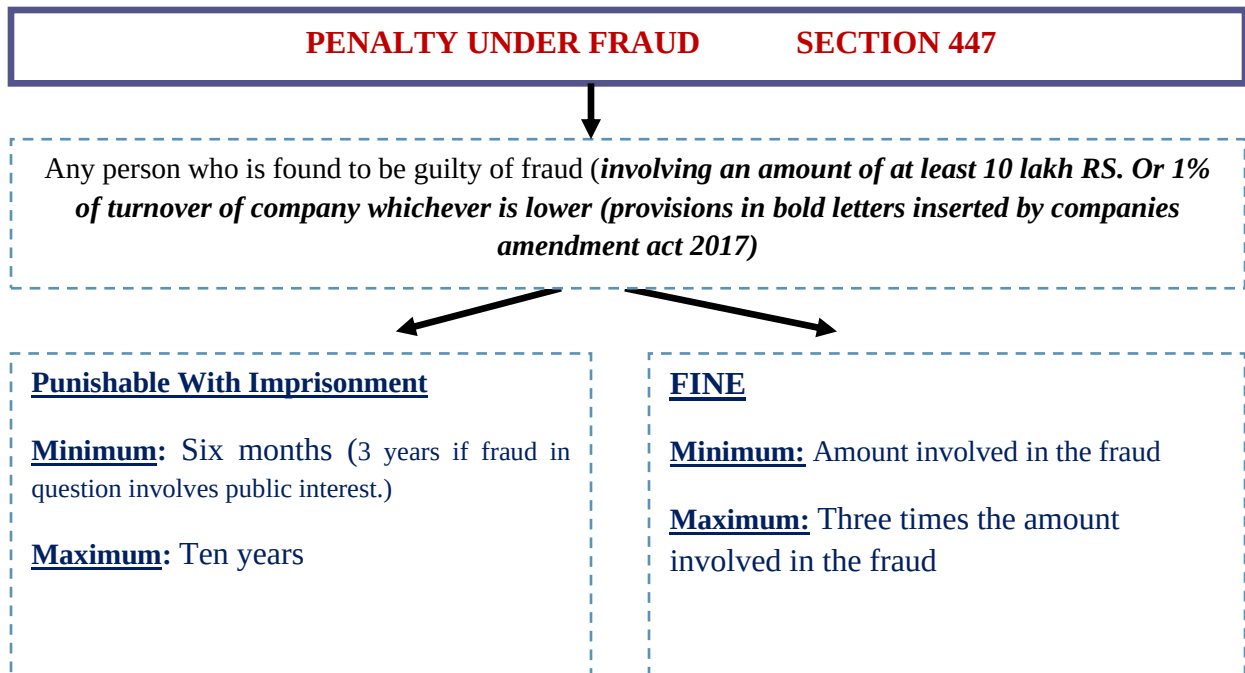
Any failure or lapse on the part of secretarial auditor may attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980.

2. PENALTIES UNDER COMPANIES ACT, 2013

Further section 448 of Companies Act, 2013 deals with penalty for false statements. The section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,

- | |
|--|
| a) which is false in any material particulars, knowing it to be false or |
| b) which omits any material fact, knowing it to be material |

He shall be liable under **section 447 (Fraud)**.



Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to 50 lakh rupees or with both. (This proviso inserted by companies' amendment act 2017)



In view of this, a company secretary in practice will be attracting the penal provisions of **section 448**, for any false statement in any material particulars or omission of any material fact in the Secretarial Audit Report. However, a person will be penalised under **section 448** in case he makes a statement, which is false in any material particulars, knowing it to be false, or which omits any material fact knowing it to be material.

SECRETARIAL STANDARD

SECTION 205 - FUNCTIONS OF COMPANY SECRETARY

The Functions of the company secretary shall include

- a) To report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company.
- b) To ensure that the company complies with the applicable secretarial standards
- c) To discharge such other duties as may be prescribed. (see Rule 10)



For the purpose of this section, the expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 (56 of 1980) and approved by the Central Government

RULE 10 OF COMPANIES (APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL) RULES, 2014

1. To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers
2. To facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings
3. To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act
4. To represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act
5. To assist the Board in the conduct of the affairs of the company
6. To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices
7. To discharge such other duties as have been specified under the Act or rules
8. Such other duties as may be assigned by the Board from time to time



DRAFTING OF LETTER OF OFFER TO PROSPECTIVE COMPANY SECRETARY**A SPECIMEN OF THE LETTER OF OFFER TO THE PROSPECTIVE COMPANY SECRETARY**

Ref. No.
Mr.
.....

Name and Address of the
Company
Date

Dear Mr. _____

I have been directed to inform you that the Board of Directors of the company have decided to appoint you as Secretary of the company and the said assignment is hereby offered to you. You are requested to join the service of the company on or before and contact the undersigned so that you may be introduced to the concerned persons before you start functioning.

You will be considered to have been appointed with effect from the day you actually join duty

1. The company shall pay to you a monthly basic salary of Rs. in the time scale of pay of Rs. with other allowances as are application to other employees of the company in the same time scale of pay.
2. You will enjoy other benefits like the medical expenses reimbursement, leave travel allowance, bonus etc. as may be permissible under the company's service rules.
3. You shall be allowed casual leave/sick leave/festival holidays, weekly off days and earned leave as per rules of the company.
4. You will be on probation for a period of six months and on your services during the said probation period being found satisfactory the Board of Directors may consider you for confirmation in the said post.
5. During the period of your probation, your services may be terminated by the company without any notice and you may also leave the service of the company at twenty-four hours' notice. On confirmation, however, the contract of employment may be terminated by either party by giving the other, thirty days' written notice or paying thirty days' salary in lieu thereof.
6. The company may terminate your services even after confirmation without giving you any notice if you are found by the Board of Directors of the company not performing your assigned duties and your statutory duties properly and to the satisfaction of the Board.
7. You shall devote your whole time and attention to the work of the company during your tenure as Company Secretary and shall work with due diligence and using your abilities to



your best. You shall obey the orders of the Board of Directors of the company. You shall do your best to promote the interest of the company and shall faithfully serve the company.

Please convey your acceptance of the offer and the terms and conditions attached thereto by signing the carbon copy of this letter and returning the same to the company within a period of seven days from the receipt hereof.

Thanking you,

Yours truly

For Ltd.

(.....)

MANAGING DIRECTOR

MANAGERIAL PERSON

The general principle is that the Board of directors should direct and control the company's affairs. But at the same time the Act allows a person to accept directorship in fifteen companies and does not prescribe the time and attention that he should devote to a particular company.

Accordingly, the day to day management has to be delegated to "professional management". The person appointed to do this may be either one of the directors of the Board and known as a managing director or may not be a director and may be designated as manager or chief executive officer.



SECTION 2 (51) OF COMPANIES ACT 2013

"KEY MANAGERIAL PERSONNEL" in relation to a company, means

- a. The Chief Executive Officer or the managing director or the manager
- b. The Company Secretary
- c. The whole-time director
- d. The Chief Financial Officer; and
- e. Such other officer as may be prescribed

SECTION 2 (53) OF COMPANIES ACT 2013

"MANAGER" means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not



SECTION 2 (54) OF COMPANIES ACT 2013

MANAGING DIRECTOR means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

SECTION 2 (49) OF COMPANIES ACT 2013

INTERESTED DIRECTOR means a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company

**SECTION 2 (59) OF COMPANIES ACT 2013**

OFFICER includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act;

APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER SECTION 196

- | |
|---|
| 1) No company shall appoint or employ at the same time a managing director and a manager. |
| 2) No company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time: |

Provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Disqualification employment of any person as managing director, whole-time director or manager Section 196 (3)

No person can be appointed as a as managing director, whole-time director or manager who

- | |
|---|
| a) is below the age of twenty-one years or has attained the age of seventy years: |
|---|

<i>Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;</i>

Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made



b) is an undischarged insolvent or has at any time been adjudged as an insolvent;
c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or
d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

Appointment must be made at a meeting of the Board subject to the provision of the Articles and further approval of members

Section 196(4) provides that subject to the provisions of section 197 and **part-1 of Schedule V** of the Companies Act, 2013, a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in that Schedule.

Appointment of key managerial personnel **SECTION 203**

(1) Every company (**listed company and public company having a paid-up share capital of ten crore rupees or more** (Rule 8 of Companies (appointment and remuneration of managerial personnel) rules, 2014) shall have the following whole-time key managerial personnel

- i. Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director
- ii. Company Secretary; and
- iii. Chief Financial Officer:

(2) Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

(3) A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

Provided that nothing contained in this sub-section shall disentitle a key managerial personnel from being a director of any company with the permission of the Board

Provided further that whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel:

(4) If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of **six months** from the date of such vacancy.

(5) If any company makes any default in complying with the provisions of this section, such



company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees.

SPECIMEN SERVICE AGREEMENT AS A MANAGERIAL PERSON OF A COMPANY

This Agreement made the day of 20 between _____, a company incorporated under the provisions of the Companies Act, 2013, having its registered office at (Hereinafter called the 'the company') of the one part and Resident of (Hereinafter called the Managing Director) of the other part.

WHEREAS the Board of Directors of the Company, in its meeting held on _____, had appointed _____ as Managing Director of the Company for a period of five (5) years, with remuneration, with effect from _____.

WHEREAS the said appointment of _____ as Managing Director was approved by the Shareholders of the Company in the Annual General Meeting held on _____.

WHEREAS it is necessary in the interest of the business of the Company to enter into an Agreement with the said Managing Director and the parties hereto agreed to enter into an Agreement on the following terms and conditions

NOW THIS DEED WITNESS AS FOLLOWS:

1. That _____ be appointed as Managing Director of the Company for a period of five (5) years, with remuneration, with effect from _____ on the terms and conditions hereinafter set forth.
2. That _____ Managing Director shall carry out such duties as may be entrusted to him subject to the supervision and control of the Board of Directors and shall also perform such other duties and services as shall from time to time be entrusted to him by the Chairman of the Company.
3. That _____ Managing Director shall be paid remuneration by the Company by way of salary and perquisites as listed below:-
Salary – Rs. _____ (Rupees _____ per month).
4. The Agreement is for a period of five (5) years with effect from _____ which may be terminated by either party giving the other party six months' notice.
5. The Managing Director shall not be liable to retire by rotation.
6. The Managing Director shall be in the whole-time employment of the Company and thus devote the whole of his attention to the business of the Company. During the terms of the service with the Company, the Managing Director hereby undertakes not to take up any other employment / assignment and further shall not draw any remuneration, commission, fees etc. from any other source, whether in India or abroad.



In witnessed whereof the parties hereto have duly executed these presents the day, month and year first above written.

Witness – 1

Signature

Witness – 2

Signature

PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Draft a specimen of letter of offer to prospective company secretary

ANSWER: Refer chapter 24

2. Draft a specimen of service agreement as a managerial person of a company

ANSWER: Refer chapter 24



CHAPTER-25 **Compromise, Arrangement, Merger and Amalgamation**

COMPROMISE AND ARRANGEMENT AS PER COMPANIES ACT 2013

The scheme of Chapter XV goes as follows

Section 230-231 deals with compromise or arrangements.

Section 232 deals with mergers and amalgamation including demergers.

Section 233 deals with amalgamation of small companies (also called fast track mergers)

Section 234 deals with amalgamation with foreign company (also called cross border mergers)

Section 235 deals acquisition of shares of dissenting shareholders.

Section 236 deals with purchase of minority shareholding.

Section 237 deals with power of central government to provide for amalgamation of companies in public interest.

Section 238 deals with registration of offer of schemes involving transfer of shares.

Section 239 deals with preservation of books and papers of amalgamated companies.

Section 240 deals with liability of officers in respect of offences committed prior to merger, amalgamation etc.

CONCEPT OF COMPROMISE AND ARRANGEMENT

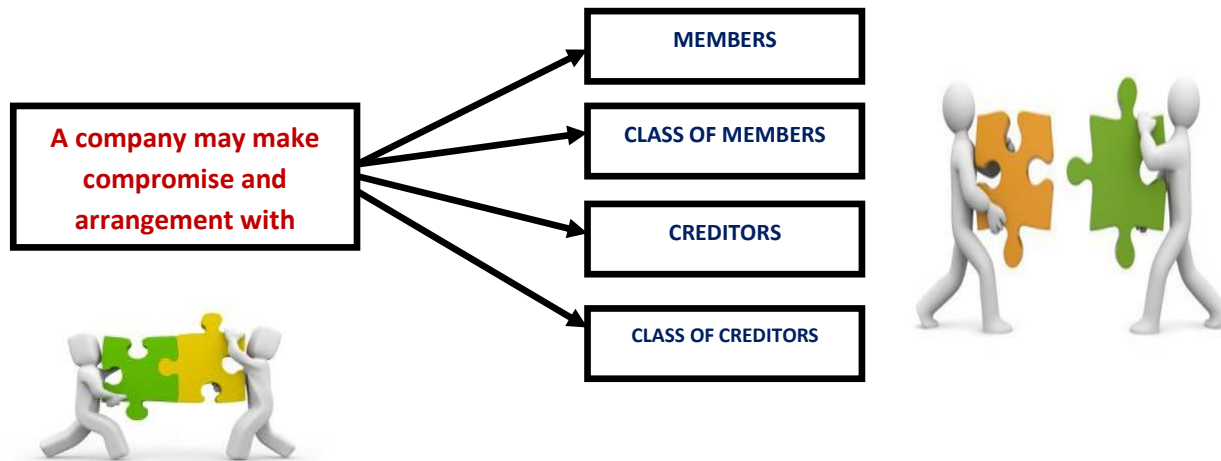
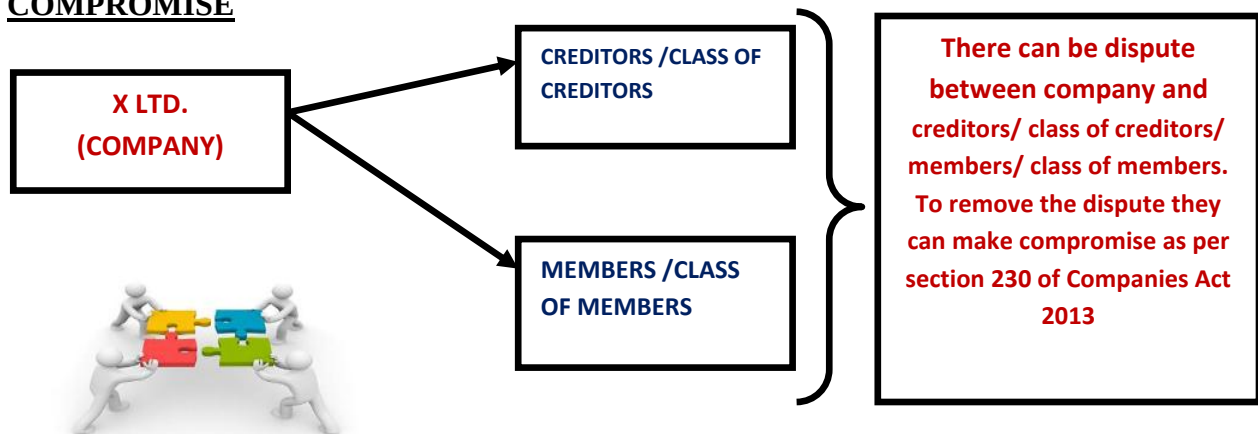
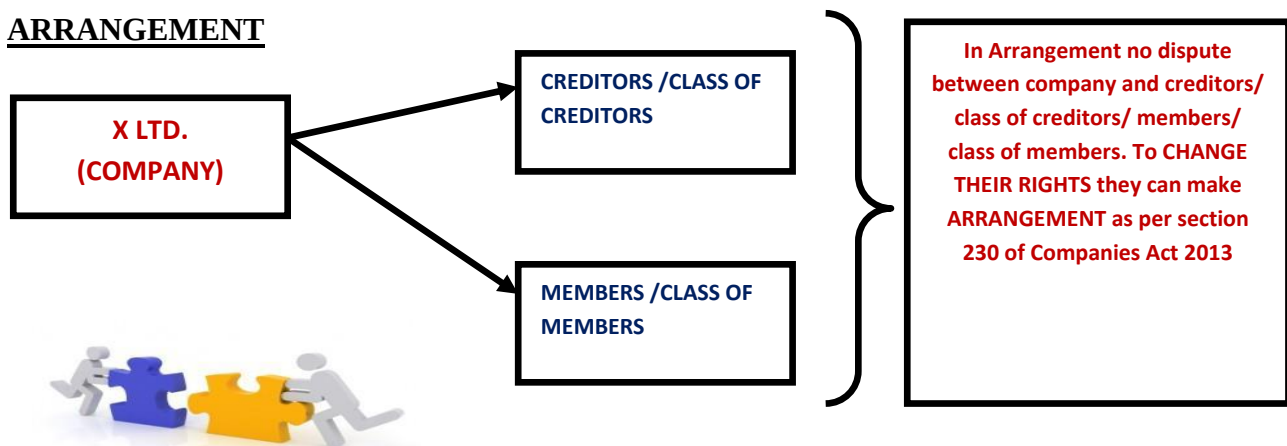
MEANING OF ARRANGEMENT

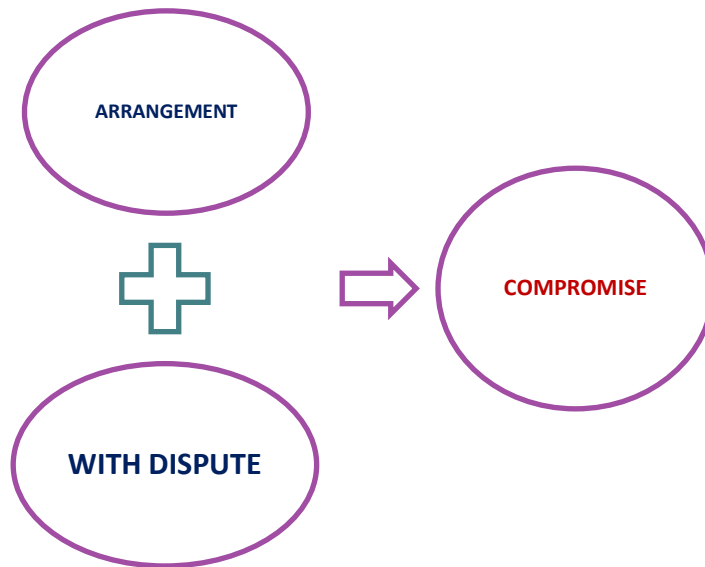
For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. (For example 100 equity shares and 100 preference shares consolidated in to 200 equity shares)

MEANING OF COMPROMISE

The word compromise is not defined by companies Act 2013. In general sense Compromise" denotes an agreement between two or more parties, for the ascertainment of their mutual rights and obligations, when there is an existing dispute or controversy between them, or some difficulty in the enforcement of their rights.



COMPROMISE AND ARRANGEMENT**COMPROMISE****ARRANGEMENT**

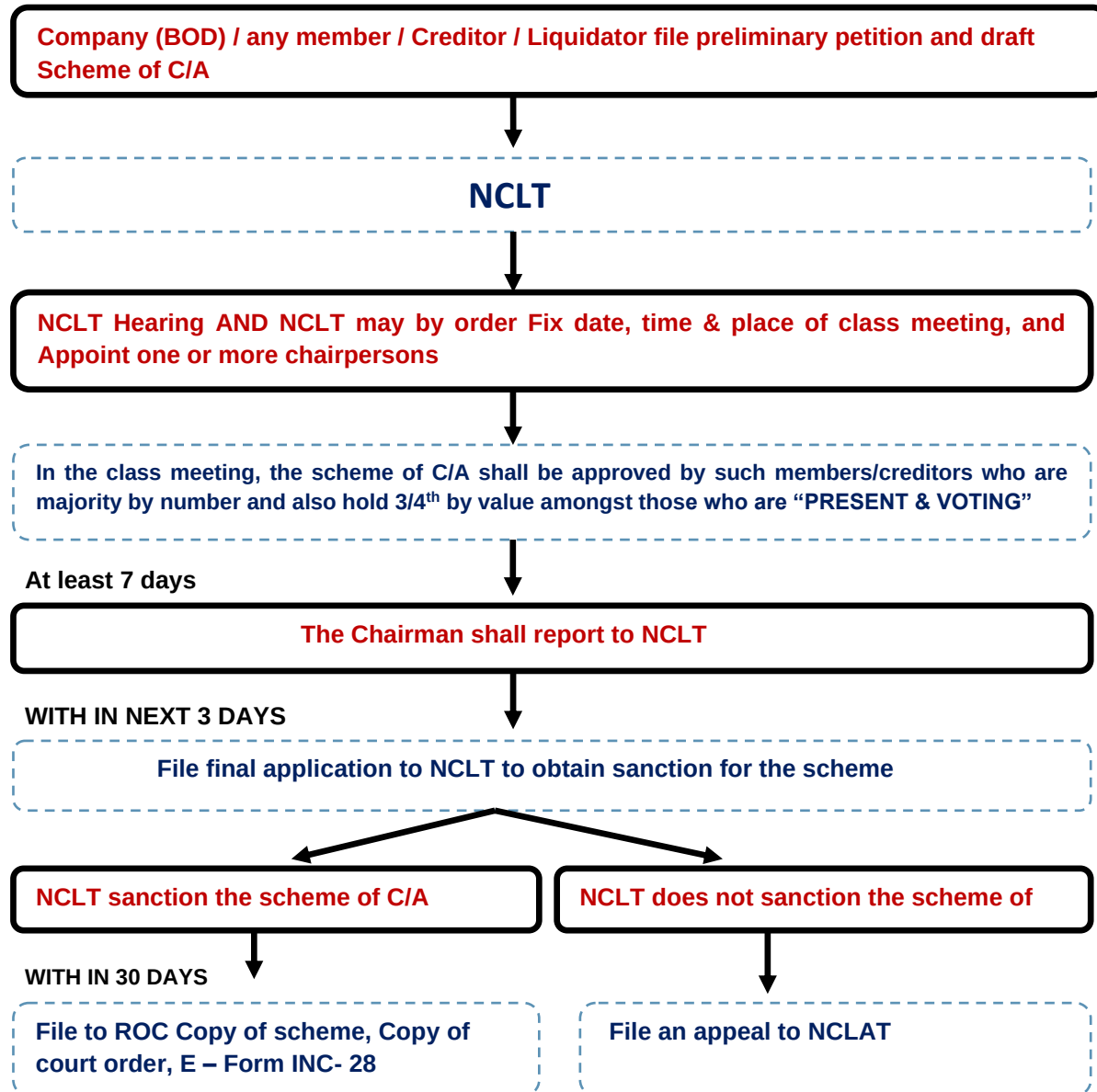
ARRANGEMENT IS WIDER TERM THAN COMPROMISE COMMENT

SPECIAL NOTE: With the help of this chart we can say

- Arrangement is wider term than Compromise
- All Compromise are Arrangement but all Arrangement are not Compromise

PARTICULARS	COMPROMISE	ARRANGEMENT
DEFINITION	The term “Compromise” has not been defined in the Act.	Arrangement” includes a re - organization of the Share Capital of the Company by – consolidation of Shares of different classes, and / or Division of Shares into Shares of different classes.
MEANING	Compromise” denotes an agreement between two or more parties, for the ascertainment of their mutual rights and obligations, when there is an existing dispute or controversy between them, or some difficulty in the enforcement of their rights.	Arrangement” – Involves re – adjustment of rights and liabilities of Members or Creditors or any class thereof.
EXISTENCE OF DISPUTE	Compromise implies the existence of a dispute. Without dispute, there cannot be any compromise as such. Amicable settlement of dispute constitutes compromise.	There need not be any existing dispute, to arrive at an “arrangement”
SCOPE	Comparatively limited in scope	Wider in scope



PROCEDURE FOR (C/A) Section 230 of companies Act 2013 – IN CHART FORM

MERGER AND AMALGAMATION – DEFINITION

A merger may mean absorption of one company by another company, wherein one of the two existing companies loses its legal identity after transferring all its assets, liabilities and other properties to the other company.



Amalgamation is an 'arrangement' or 'reconstruction'. Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

REASONS / OBJECTIVES FOR MERGER AND AMALGAMATION

(a) Synergistic operational advantages
(b) Economies of scale
(c) Reduction in production, administrative, selling, legal and professional expenses.
(d) Optimum use of capacities and factors of production.
(e) Tax advantages (Carry forward and set off of losses)
(f) Removing financial constraints for expansion
(g) Diversification.
(h) Competitive advantage
(i) Revival of a weak or sick company.
(j) Accelerating company's market share.

Power to Compromise or Make Arrangements with Creditors and Members section 230

S.NO.	PARTICULARS	PROVISIONS
1	SECTION 230 (1) 1 ST APPLICATION FOR MAKING COMPROMISE AND ARRANGEMENT	Where a compromise or arrangement is proposed-- (a) between a company and its creditors or any class of them; or (b) between a company and its members or any class of them, The Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs. Explanation. --For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or



		by both of those methods.
2	SECTION 230 (2) ADDITIONAL DOCUMENTS TO TRIBUNAL	The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit-- (a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company; (b) reduction of share capital of the company, if any, included in the compromise or arrangement; (c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including-- (i) a creditor's responsibility statement in the prescribed form; (ii) safeguards for the protection of other secured and unsecured creditors; (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board; (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.
3	SECTION 230 (3) NOTICE OF COMPROMISE AND ARRANGEMENT	Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed: Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed: Provided further that where the notice for the meeting is also issued by way of



		an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.
4	SECTION 230 (4) VOTING IN GENERAL MEETING	A notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice: Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.
5	SECTION 230 (5) VARIOUS AUTHORITIES TO WHOM NOTICE SHALL BE SENT	A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002 (12 of 2003), if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.
6	SECTION 230 (6) SPECIAL SPECIAL RESOLUTION	Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.
7	SECTION 230 (7) POWER OF TRIBUNAL	An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:-- (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable; (b) the protection of any class of creditors; (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;



		(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall abate; (e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement: Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.
8	SECTION 230 (8) EFFECTIVE DATE	The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.
9	SECTION 230 (9) DISPENSE WITH CALLING OF A MEETING OF CREDITOR	The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
10	SECTION 230 (10) SCHEME OF BUY BACK	No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.
11	SECTION 230 (11) COMPROMISE OR ARRANGEMENT AND TAKEOVER	Any compromise or arrangement may include takeover offer made in such manner as may be prescribed: Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.
12	SECTION 230 (12) SECTION 230 IS A COMPLETE CODE	An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit. Explanation.--For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.



COMPROMISE, ARRANGEMENT & AMALGAMATION RULES 2016

S.NO.	PARTICULARS	PROVISIONS
1	RULE 3 Application for order of a meeting	1. An application under sub-section (1) of section 230 of the Act may be submitted in Form no. NCLT – 1 • A notice of admission in Form No. NCLT – 2 • An affidavit in Form No. NCLT-6 • A copy of scheme of compromise or arrangement, which should include disclosures as per sub-section (2) of section 230 of the Act; and • Fee 5000 RS. 2. Where more than one company is involved in a scheme in relation to which an application under sub-rule (1) is being filed, such application may, at the discretion of such companies, be filed as a joint-application. 3. Where the company is not the applicant, a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator, not less than fourteen days before the date fixed for the hearing of the notice of admission. 4. The applicant shall also disclose to the Tribunal in the application under sub-rule (1), the basis on which each class of members or creditors has been identified for the purposes of approval of the scheme. 5. A member of the company shall make an application for



		arrangement, for the purpose of takeover offer in terms of sub-section (11) of <u>section 230</u>, when such member along with any other member holds not less than three-fourths of the shares in the company, and such application has been filed for acquiring any part of the remaining shares of the company. Explanation I. - "shares" means the equity shares of the company carrying voting rights, and includes any securities, such as depository receipts, which entitles the holder thereof to exercise voting rights. Explanation II.-Nothing in this sub-rule shall apply to any transfer or transmission of shares through a contract, arrangement or succession, as the case may be, or any transfer made in pursuance of any statutory or regulatory requirement. (6) An application of arrangement for takeover offer shall contain (a) the report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member after taking into account the following factors: - (i) the highest price paid by any person or group of persons for acquisition of shares during last twelve months; (ii) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple and such other parameters as are customary for valuation of shares of such companies. (b) details of a bank account, to be opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.
2	RULE 4 Disclosures in application made to the Tribunal for compromise or arrangement – Creditors Responsibility Statement.-	For the purpose of sub-clause (i) of clause (c) of sub-section (2) of section 230 of the Act, the creditor's responsibility statement in Form No. CAA.1 shall be included in the scheme of corporate debt restructuring. Explanation: - For the purpose of this rule, it is clarified that a scheme of corporate debt restructuring as referred to in clause (c) of sub-section (2) of section 230 of the Act shall mean a scheme that restructures or varies the debt obligations of a company towards its creditors.
3	RULE 5 Directions at hearing of the application.-	Upon hearing the application under sub-section (1) of section 230 of the Act, the Tribunal shall, unless it thinks fit for any reason to dismiss the application, give such directions as it may think necessary in respect of the following matters (a) Determining the class or classes of creditors or of members whose



		meeting or meetings have to be held for considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms of sub-section (9) of section 230; (b) Fixing the time and place of the meeting or meetings; (c) Appointing a Chairperson and scrutinizer for the meeting or meetings to be held, as the case may be and fixing the terms of his appointment including remuneration; (d) Fixing the quorum and the procedure to be followed at the meeting or meetings, including voting in person or by proxy or by postal ballot or by voting through electronic means. Explanation.- For the purposes of these rules, “voting through electronic means” shall take place, <i>mutatis mutandis</i>, in accordance with the procedure as specified in rule 20 of Companies (Management and Administration) Rules, 2014. (e) Determining the values of the creditors or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held; (f) Notice to be given of the meeting or meetings and the advertisement of such notice; (g) Notice to be given to sectoral regulators or authorities as required under sub-section (5) of section 230; (h) The time within which the chairperson of the meeting is required to report the result of the meeting to the Tribunal; and (i) Such other matters as the Tribunal may deem necessary.
4	RULE 6 Notice of meeting. -	1) Where a meeting of any class or classes of creditors or members has been directed to be convened, the notice of the meeting pursuant to the order of the Tribunal to be given in the manner provided in sub-section (3) of section 230 of the Act shall be in Form No. CAA.2 and shall be sent individually to each of the creditors or members. 2) The notice shall be sent by the Chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting. It is hereby clarified that the service of notice of meeting shall be deemed to have been effected in case of delivery by post, at the expiration of forty eight hours after the letter containing the same is posted.
5	RULE 7 Advertisement of the notice of the meeting.-	The notice of the meeting under sub-section (3) of Section 230 of the Act shall be advertised in Form No. CAA.2 in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, or such newspapers as may be directed by the Tribunal



		and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company (if any) and in case of listed companies also on the website of the SEBI and the recognized stock exchange where the securities of the company are listed. Provided that where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given.
6	RULE 8 Notice to statutory authorities	1) For the purposes of sub-section (5) of section 230 of the Act, the notice shall be in Form No. CAA.3, and shall be accompanied with a copy of the scheme of compromise or arrangement, the explanatory statement and the disclosures mentioned under rule 6, and shall be sent to:- - The Central Government, the Registrar of Companies, the Income-tax authorities, in all cases; - The Reserve Bank of India, the Securities and Exchange Board of India, the Competition Commission of India, and the stock exchanges, as may be applicable; - Other sectoral regulators or authorities, as required by Tribunal. 2) The notice to the authorities mentioned in sub-rule (1) shall be sent forthwith, after the notice is sent to the members or creditors of the company, by registered post or by speed post or by courier or by hand delivery at the office of the authority. 3) If the authorities referred to under sub-rule (1) desire to make any representation under sub-section (5) of section 230, the same shall be sent to the Tribunal within a period of thirty days from the date of receipt of such notice and copy of such representation shall simultaneously be sent to the concerned companies and in case no representation is received within the stated period of thirty days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed scheme of compromise or arrangement.
7	RULE 9 Voting	The person who receives the notice may within one month from the date of receipt of the notice vote in the meeting either in person or through proxy or through postal ballot or through electronic means to the adoption of the scheme of compromise and arrangement. Explanation. For the purposes of voting by persons who receive the notice as shareholder or creditor under this rule- “shareholding” shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and “Outstanding debt” shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six



		months.
8	RULE 10 Proxies:-	1) Voting by proxy shall be permitted, provided a proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting is filed with the company at its registered office not later than 48 hours before the meeting. 2) Where a body corporate which is a member or creditor (including holder of debentures) of a company authorises any person to act as its representative at the meeting, of the members or creditors of the company, or of any class of them, as the case may be, a copy of the resolution of the Board of Directors or other governing body of such body corporate authorising such person to act as its representative at the meeting, and certified to be a true copy by a director, the manager, the secretary, or other authorised officer of such body corporate shall be lodged with the company at its registered office not later than 48 hours before the meeting. 3) No person shall be appointed as a proxy who is a minor. 4) The proxy of a member or creditor blind or incapable of writing may be accepted if such member or creditor has attached his signature or mark thereto in the presence of a witness who shall add to his signature his description and address : provided that all insertions in the proxy are in the handwriting of the witness and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request and in the presence of the member or creditor before he attached his signature or mark. 5) The proxy of a member or creditor who does not know English may be accepted if it is executed in the manner prescribed in the preceding sub-rule and the witness certifies that it was explained to the member or creditor in the language known to him, and gives the member's or creditor's name in English below the signature.
9	RULE 11 Copy of compromise or arrangement to be furnished by the company	Every creditor or member entitled to attend the meeting shall be furnished by the company, free of charge, within one day on a requisition being made for the same, with a copy of the scheme of the proposed compromise or arrangement together with a copy of the statement required to be furnished under section 230 of Act.
10	RULE 12 Affidavit of service.	The Chairperson appointed for the meeting of the company or other person directed to issue the advertisement and the notices of the meeting shall file an affidavit before the Tribunal not less than seven days before the date fixed for the meeting or the date of the first of the meetings, as the case may be, stating that the directions regarding the issue of notices and the advertisement have been duly complied with.
11	RULE 13 Result of the	1) The voting at the meeting or meetings held in pursuance of the directions of the Tribunal under Rule 5 on all resolutions shall take place by poll or by voting through electronic means.



	meeting to be decided by voting.-	2) The report of the result of the meeting under sub-rule (1) shall be in Form No. CAA.4 and shall state accurately the number of creditors or class of creditors or the number of members or class of members, as the case may be, who were present and who voted at the meeting either in person or by proxy, and where applicable, who voted through electronic means, their individual values and the way they voted.
12	RULE 14 Report of the result of the meeting by Chairperson.-	The Chairperson of the meeting (or where there are separate meetings, the Chairperson of each meeting) shall, within the time fixed by the Tribunal, or where no time has been fixed, within three days after the conclusion of the meeting, submit a report to the Tribunal on the result of the meeting in Form No. CAA.4
13	RULE 15 Petition for confirming compromise or arrangement.	1) Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case may be, with or without modification, the company (or its liquidator), shall, within seven days of the filing of the report by the Chairperson, present a petition to the Tribunal in Form No. CAA.5 for sanction of the scheme of compromise or arrangement. 2) Where a compromise or arrangement is proposed for the purposes of or in connection with scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition shall pray for appropriate orders and directions under section 230 read with section 232 of the Act. 3) Where the company fails to present the petition for confirmation of the compromise or arrangement as aforesaid, it shall be open to any creditor or member as the case may be, with the leave of the Tribunal, to present the petition and the company shall be liable for the cost thereof.
14	RULE 16 Date and notice of hearing.-	1. The Tribunal shall fix a date for the hearing of the petition, and notice of the hearing shall be advertised in the same newspaper in which the notice of the meeting was advertised, or in such other newspaper as the Tribunal may direct, not less than ten days before the date fixed for the hearing. 2. The notice of the hearing of the petition shall also be served by the Tribunal to the objectors or to their representatives under sub-section (4) of section 230 of the Act and to the Central Government and other authorities who have made representation under rule 8 and have desired to be heard in their representation.
15	RULE 17 Order on petition.-	1) Where the Tribunal sanctions the compromise or arrangement, the order shall include such directions in regard to any matter or such modifications in the compromise or arrangement as the Tribunal may think fit to make for the proper working of the compromise or arrangement. 2) The order shall direct that a certified copy of the same shall be filed with the Registrar of Companies within thirty days from the date of the receipt of copy of the order, or such other time as may be fixed by the Tribunal. 3) The order shall be in Form No. CAA. 6, with such variations as may be necessary.



SLUMP SALE AGREEMENT

1. Slump sale is one of the widely used ways of business acquisitions. In simple words, 'slump sale' is nothing but transfer of a whole or part of business concern as a going concern
2. The concept of 'slump sale' was incorporated in the Income Tax Act, 1961 ("IT Act") by the Finance Act, 1999 with the inclusion of section 2(42C).
3. The term 'slump sale' is defined as transfer of one or more undertakings as a result of the sale for a lump-sum consideration without values being assigned to the individual assets and liabilities in such sales.
4. Given the high figures involved in such transactions, taxation is one of the key elements of consideration for both the buyer as well as the seller. With increase in slump sale deals, several rulings and judicial precedents have emerged over the years.

**SLUMP SALE IS CARRIED OUT THROUGH FOLLOWING STEPS**

S.NO.	PARTICULARS	PROVISIONS
1	Find Buyer	The seller has to find the potential buyers.
2	Sign MOU/Term sheet	Once the buyer company is selected, there is need to sign MOU [Memorandum of Undertaking] which helps the buyer company to get access to seller entities information for making due diligence, valuation etc.
3	Make Valuation	Valuation is a process of determining the value of assets and liabilities of business. It is one of the most important aspects of slump sale process, as seller wants maximum valuation for its business whereas buyer wants it at lowest end. Valuation of business is mandatory for listed company.
4	Deal Structuring	A deal should be structured considering agreement between buyer and seller. It should be time, cost and compliance effective.

SPECIMEN SCHEME OF AMALGMATION**DEED OF AMALGAMATION & TRANSFER OF UNDERTAKINGS OF COMPANIES****Specimen agreement for Amalgamation & Transfer of Undertakings between two companies**

THIS DEED is executed made on this _____ day of _____(Month),
 _____(Year) at _____(Place)

BETWEEN



ABS NGA COMPANY LIMITED, a public company with limited liability incorporated under the Companies Act, 2013, with corporate identity number: _____ and having its registered office at _____ (hereinafter referred to as the “Transferor Company”, which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and permitted assigns);

AND

MST SERVICES LIMITED, a company incorporated under the provisions of the Companies Act, 2013 with corporate identification number: _____ and having its registered office at _____ (hereinafter referred to as the “Transferee Company”, which expression shall, unless repugnant to the context or meaning thereof, deem to include its successors and substitutes from time to time).

The parties mentioned above are hereinafter collectively referred to as the “Parties” and individually as a “Party”.

Whereas:

- a. This Scheme of Arrangement (“the Scheme”) provides for amalgamation of _____ (Name of Transferor Company) with _____ (Name of the Transferee Company).
- b. Transferor Company was incorporated as a Private Company limited by shares under the provisions of the Companies Act, 2013 having CIN No _____. The Registered Office of Transferor Company is situated at _____. The Transferor Company is engaged in the business of _____.
- c. Transferee Company was incorporated as a Private Company limited by shares under the provisions of the Companies Act, 2013 having CIN No _____. The Registered Office of Transferee Company is situated at _____. The Transferee Company carries on business of _____.
- d. It is proposed to amalgamate Transferor Company with Transferee Company pursuant to a Scheme
under Section 230 to 232 read with applicable Rules of Companies (Compromises, Arrangements and Amalgamations), Rules 2016 and other relevant provisions of the Act.
- e. This Scheme envisages vertical integration of Companies engaged in similar business profile resulting into consolidation of businesses, simplification of structure (including shareholding



structure) thereby strengthening the financial position of Transferee Company and its operational optimisation.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. The Scheme, set out herein in its present form or with any modification(s) approved, shall be effective from the latest date on which certified copies of the NCLT order under section 230 to 232 of the Companies Act, 2013 is filed with the Registrar of Companies (RoC). Such date is called as the Effective Date.
2. Though this Scheme shall become effective from the Effective Date, the provisions of this Scheme shall be applicable and come into operation from the Appointed Date.
3. Subject to the provisions of this Scheme as specified hereinafter and with effect from the Appointed Date, whole of the Undertaking of the Transferor Companies including but not limited to all the movable and immovable properties and assets (whether tangible or intangible) of the Transferor Companies comprising, amongst others, all furniture and fixtures, investments, software's, computers/ data processing, office equipment, electrical installations, telephones, telex, facsimile and other communication facilities, deposits, reserves, provisions, advances, receivables, funds, cash, bank balances and business licenses, permits, authorizations, approvals, lease, tenancy rights, permissions, incentives, if any, and all other rights, patents, know-how, trademark, service mark, trade secret or other intellectual property rights, proprietary right, title, interest, contracts, consent, approvals and rights and powers of every kind, nature and description whatsoever, privileges, liberties, easements, advantages, benefits and approvals, if any, existing as on Appointed Date, shall, under the provisions of Sections 230 to 232 of the Act, and pursuant to the confirmation order of the Hon'ble National Company Law Tribunal (NCLT) sanctioning this Scheme and without further act, instrument or deed, but subject to the charges effecting the same as on the Effective Date, be transferred and/or deemed to be transferred to and vested in the Transferee Company so as to become the properties, assets, rights of the Transferee Company.
4. From the aforesaid date of the purchase. the Transferee company shall be liable for all the debts and liabilities of the Transferor Company and shall be liable to perform all its engagements. The Transferor Company shall be indemnified by the company against all claims and demands. The company shall defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.
5. Without prejudice to the above provisions, with effect from the Appointed Date, all inter-party transactions between the Transferor Companies and the Transferee Company, if any, shall be considered as intraparty transactions for all purposes



6. The Transferee Company shall pay to the Transferor Company Rs _____ as consideration for the aforesaid purchase and out of the aforesaid consideration Rs _____ shall be paid through bank transfer/cheque and the balance of Rs _____ shall be paid to the vendor by allotment of _____ Equity Shares of Rs ____ each in the capital of the company credited as fully paid-up shares.

7. The company shall create and issue _____ Equity Share of Rs ____ each to increase its shares capital as aforesaid and for the same purpose the company shall pass a resolution in accordance with the Articles of Association of the company and in accordance with the provisions of the Companies Act, 2013.

8. For the purpose of Stamp Duty, the value of the immoveable properties of the Transferor Company shall be fixed for Rs _____ and the goodwill benefits of contracts and securities, debts, stock, fittings and fixture and all other properties of the Transferor Company shall be valued at Rs _____.

9. With effect from the Appointed Date and up to the Effective Date, the Transferor Companies shall be deemed to have held and stood possessed of and shall hold and stand possessed of all its properties and assets for and on account of and in trust for the Transferee Company. The Transferor Companies hereby undertakes to hold their said assets with utmost prudence until the Effective Date.

10. Thereupon, the purchase shall be deemed to have been completed and the Transferor Company shall execute necessary documents and do all things and give assurance as may be necessary and reasonable for the vesting of all the properties, the subject matter of the aforesaid purchase by the company.

IN WITNESS WHEREOF the parties herein under have set their hands on the day and year hereinabove mentioned.

.....
.....

First Party
Party

Second

.....
.....

Witness 1

Witness 2



Specimen Agreement between two Companies to Amalgamate by Sale of one to the other

This AGREEMENT is made on this day of between Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at (hereinafter referred to as the Vendor) and Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at (hereinafter referred to as the company)

WHEREAS the vendor was incorporated in the year with an authorised share capital of Rs. ten lakhs divided into one lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company shall have the power to sell, transfer or otherwise dispose of the whole or any part of the business and undertaking of the vendor company and to accept in consideration, cash or shares or debentures or debenture stock or other securities of any other company and to distribute among the members in specie or otherwise any surplus assets remaining in the winding-up of the vendor company.

WHEREAS the company was incorporated under the Companies Act, 2013 in the year with an authorised share capital of Rs. fifty lakhs divided into five lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company may acquire by purchase or otherwise the business and undertaking, in part or whole of any other company or companies having any of the purposes or objects same or similar to those of the company.

WHEREAS the Articles of Association of the company also provide that the company is empowered to increase its share capital.

NOW THIS AGREEMENT WITNESS AS FOLLOWS

1. The vendor shall sell and the company shall purchase the whole of the business undertaking, assets and property of the vendor, benefits of subsisting contracts, and debts due to the vendor relating to the business of the vendor as a running concern from the day of
2. The company shall be liable for all the debts and liabilities of the vendor and shall be liable to perform all its engagements.
3. The vendor shall be indemnified by the company against all claims and demands. The company shall defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.
4. The company shall pay to the vendor Rs. seven lakhs as consideration for the aforesaid purchase.
5. The company shall create and issue 7 lakh Equity Share of Rs. ten each to increase its shares capital as aforesaid and for the same purpose the company shall pass a resolution in accordance with the Articles of Association of the company and in accordance with the provisions of the Companies Act, 2013.
6. The title deeds to all the immovable and other properties of the vendor and an abstract of all the properties of the vendor, the sale of which is hereby agreed shall be handed over to the company within thirty days from this day of

IN WITNESS WHEREOF the parties hereto have set their hands and seals. Signatures and seals of the parties.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. What is meant by ‘compromise ‘and’ arrangement? What is the procedure to be followed for carrying through a compromise or arrangement?

ANSWER: Refer chapter 25

2. Can the exchange ratio approved by shareholders of the merging company be questioned by a small group of dissenting shareholders?

ANSWER: Generally, no, but if share exchange ratio is fixed to defeat the interest of minority then it is possible.

3. Is the transferring company justified in excluding assets held on lease and license arrangement from those transferred to the transferee company?

Answer: in the case of Hindustan Lever Employees Union vs. Hindustan Lever Ltd. The court held that where the exchange ratio has been approved by a majority of person's affected and there is no basis to doubt their judgement and valuation has been confirmed to true or fair by firms of auditors the objections to the same cannot be entertained / sustained. In view of the above case, the exchange ratio approved by shareholders of merging companies cannot be questioned by small group of dissenting shareholders unless it is unfair and unreasonable.

ii. In the case of **Hindustan Lever Employees Union v. Hindustan Lever Ltd.** The court held that did not attach importance to the fact certain leasehold assets and properties held under license excluded from valuation

1 Such assets, the court said, were not a transferable and as well as not heritable.

2. They are in the nature of personal privilege.

Hence. The transferor company is justified in excluding assets held on lease and license agreement from those transfer to the transferee company

4. Slump sale agreement as defined under the income-tax Act, 1961.

ANSWER: Refer chapter 25



CHAPTER-26 SHAREHOLDERS' AGREEMENTS & share purchase agreements

SHAREHOLDERS' AGREEMENTS

Shareholders' agreements (SHA) are quite common in business. In India shareholder's agreement have gained popularity with bloom in newer forms of businesses.

There are numerous situations where such agreements are entered into – family companies, JV companies, venture capital investments, private equity investments, strategic alliances, and so on.



Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations. Shareholders' agreement.

SHAs are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act.

Enforceability of the Shareholder's Agreement

While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or, even when consistent with company legislation, enforced such clauses only if they have been incorporated in the articles of association of the company

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	V.B. Rangaraj v. V.B. Gopalakrishnan	The Supreme Court in V.B. Rangaraj v. V.B. Gopalakrishnan held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders.
2	M.S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd	However, the Supreme Court in 2003 in its decision in M.S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd. not disagreeing with the decision in V.B Rangaraj case mentioned above, but distinguishing itself from the facts in that judgment, held that a restriction in relation to identified members on identified shares of a private company did not amount to restriction of transferability of shares per se.
3	Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd	In Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd Company, it was held that such clauses are to hamper the free transferability of shares and in violation of the Companies Act, and hence, are not enforceable.



	Company	
4	Messer Holdings Limited v. Shyam Madanmohan Ruia	Subsequently in the case of Messer Holdings Limited v. Shyam Madanmohan Ruia the Division Bench of Bombay High Court overruled its judgement in Western Maharashtra Development Corporation Ltd and provided a more liberal interpretation and recognised the rights inter se among shareholders in case of restrictions on transfer of shares.
5	V.B. Rangaraj case	In Indian context, while the landmark decision of the Supreme Court in V.B. Rangaraj case mentioned above is often cited in the context of shareholders' agreements, most other decisions have been rendered by the High Courts in various states especially the Bombay High Court. The decisions on shareholders' agreements are not uniformly inclined in a direction. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value. It is difficult to come to clear and crisp answers as to enforceability of shareholders' agreements

SPECIMEN SHAREHOLDERS AGREEMENT

THIS AGREEMENT made the ____ day of _____, 2013 BETWEEN MR. A residing at _____ (hereinafter referred to as "A") of the First Part And MR. B residing at _____ (hereinafter referred to as "B") of the Second Part And _____ (P) LTD., a Company incorporated under the Companies Act, 2013 and having its registered office at _____ herein represented by its _____ (hereinafter referred to as "XYZ") of the Third Part

WHEREAS

- A and B hereto have agreed to jointly manage a company in India named "XYZ Pvt Ltd.
- A and B have agreed to become Equity Partners by investing in the shares of the Company subject to the condition that they shall enter into a Shareholders Agreement in terms of these presents
- The Company "XYZ PVT. LTD. " has been requested to, and has agreed to, join in the execution of these presents and to take this Agreement on record so that it is aware of the rights and obligations of A AND B, the parties hereto and ensure that they comply with the same

NOW THIS AGREEMENT WITNESS AS FOLLOWS

- A and B shall jointly invest in the Company which is an existing company limited by shares under the Companies Act, 2013 and known as "XYZ PVT LTD
- The registered office of the Company shall be situate at _____, or at such other places as may be mutually agreed upon between the parties in writing
- The Company shall carry on the business of running and managing restaurants and (Description of the business and complete address), either by itself or through other agencies or company industries and may carry on any other business as may be decided by B hereto and shall ensure that no other business activity is undertaken by the Company at any time



without the consent of A hereto.

4. The authorised share capital of the Company is Rs. _____/- (Rupees _____ only) consisting of _____ (_____) equity shares of Rs.10/- (Rupees ten) each.
5. The subscription by A hereto to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/- (Rupees ten only) and the subscription by B to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/-(Rupees ten only).
6. There shall be no further issue of capital without the consent of both the parties hereto, and unless otherwise agreed upon in writing further investment shall be as mutually decided by both parties.
7. The Board of Directors of the Company shall consist of A and B
8. A shall have the right to nominate two (2) Additional Directors onto the Board and B shall have the right to nominate three or more Additional Directors on the Board. Both parties shall be entitled at any time to remove any of the representatives on the Board by written notice to the other party and to appoint another or other/s in their place.
9. The Auditors of the Company shall be M/s._____.
10. The Auditors of the Company shall not be changed without the prior written consent of both A and B.
11. A and B agree and undertake not to disclose or divulge directly or indirectly to any third party any trade or business secret or other secret or confidential information pertaining to the business, affairs or transactions of each other or of the Company or of their clients or customers, that may have been disclosed, imparted to or acquired by either of them from the other or from the Company.
12. No modification or alteration of this Agreement or any of its terms or provisions shall be valid or binding on A and/or B unless made in writing duly signed by both.
13. This Agreement is personal to A and B and shall not be transferred or assigned in whole or in part by either party without the prior written consent of the other.

In witnessed whereof the parties hereto have duly executed these presents the day, month and year first above written.

Witness – 1
Witness – 2
Witness – 2

Signature by MR. A
Signature by MR. B
Signature on behalf of XYZ



SHARE PURCHASE AGREEMENT

A share purchase agreement is defined as a legal contract between a seller and a buyer of shares. They may be referred to as the vendor and purchaser in the contract. The specific number of shares are listed in the contract at the stated price. This agreement proves that the sale and the terms of it were agreed upon mutually.

Share Purchase Agreement is an agreement entered into between the buyer and seller(s) of shares of a target company. Usually Share Purchase Agreements entail that the buyer would be taking over whole or significantly whole of the undertaking of the company. In such a scenario, the buyer would not only be taking over the assets but also the liabilities of a company.

Prior to drafting a Share Purchase Agreement, the parties should negotiate and draw up a term sheet which would address the key terms of the Share Purchase Agreement. This would help ease the drafting and negotiations of the Share Purchase Agreement as all the material terms would already be agreed to between the parties.

A share purchase agreement sets out specific rights and liabilities related to the purchase and sale of shares in a particular entity. It is important to set out the requirements related to a share purchase agreement. Usually a share purchase agreement would be typically used in the mergers and acquisitions processes. A particular entity would purchase about 50% or more of the share capital of the target company.

Advantages of Share Purchase Agreement

• Shares Specified- By entering into this form of agreement, there is a specific proportion of shares allocated to the buyer or the entity.
• Rights and Liabilities- The rights and liabilities of the parties are specifically drawn from this form of agreement. This would ensure that all the parties' rights and liabilities arising out the agreement are covered. In case of any breaches, the parties' first point of reference would be the SPA.
• Warranties- By entering into such an agreement the parties would be covered by specific warranties. Any party cannot escape the amount of any warranty which is arising from the share purchase agreement. All the parties would equally be covered by specific amount of warranties of the share purchase agreement.
• No Third-Party Involvement- As the contract has only specific amount of parties, there is no involvement of any other party or third-party.

Key Contents of Share Purchase Agreement

- ✓ Details of the buyer, seller and the company.
- ✓ The liabilities and obligations of both parties.
- ✓ The permissions, authorisations, etc. need to be taken before the transfer or sale of shares by the shareholder.



- ✓ Details of the number of shares and kind of shares purchased.
- ✓ Information about the pricing at which the shares are sold by the company.
- ✓ The rights that are given to the shareholder.
- ✓ Dispute resolution and arbitration process in cases of legal disputes arising.
- ✓ Jurisdiction of the court and law applicable in case of a legal dispute.

Share Purchase Agreement is an agreement entered into between the buyer and seller(s) of shares of a target company. Usually Share Purchase Agreements entail that the buyer would be taking over whole or significantly whole of the undertaking of the company. In such a scenario, the buyer would not only be taking over the assets but also the liabilities of a company. Hence any potential buyer needs to take proper stock of the company before entering into such a transaction.

Specimen Share Purchase Agreement

This SHARE PURCHASE AGREEMENT (“Agreement”) is entered into on this _____ day of _____ (month), _____ (year),

BETWEEN

(1) _____, a company duly incorporated under the Companies Act, 2013 and having its registered at _____ (hereinafter referred to as the “Company”, which expression shall, unless repugnant to the context or meaning thereof, be deemed to mean and include its successors and

assigns) of the FIRST PART;

(2) _____ S/o _____ R/o _____ (hereinafter referred to as the “Acquirer”, which expression shall, unless repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns) of the SECOND PART:

(3) _____ D/o _____ R/o _____ referred to as “Seller” which expression shall, unless repugnant to the context or meaning thereof, mean and include their respective legal heirs, successors, legal representatives, administrators, executors and assigns) of the THIRD PART.

(The Acquirer, the Seller and the Company shall be individually referred to as a “Party” and collectively referred to as the “Parties”, as the context may require).



WHEREAS:

A. The Company is a private limited company engaged in the business of _____

B. The authorized share capital of the Company is INR _____ (Indian Rupees Only) and divided into _____ Equity Shares of INR _____ (Indian Rupees _____ Only) each. The issued and paid up share capital of the Company is INR _____ (Indian Rupees _____ Only) and divided into _____ Equity Shares of INR _____ (Indian Rupees _____ Only) each.

C. As on the Effective Date, the Seller holds and owns _____ Equity Shares, in the aggregate constituting [_____%] of the Share Capital of the Company.

D. Acquirer desires to acquire the Shares, constituting of the [_____%] of the shareholding of the Seller in the Company. Consequently, Acquirer has offered to acquire the Shares from the Seller and the Seller have agreed to sell and transfer the said Shares (free from all Encumbrances and together with all rights, title and interest therein on the terms and conditions set forth in this Agreement) to Acquirer for the Purchase Price (at par value of Rs. _____ each share).

E. The Sale Shares shall represent (_____%) of the Share Capital on a Fully Diluted Basis.

F. The Seller, the Company, and Acquirer have agreed to make certain representations, warranties, covenants and agreements in connection with the transactions contemplated by this Agreement.

NOW THIS AGREEMENT WITNESS AS FOLLOWS:**SECTION 1. DEFINITIONS****1.1 Defined Terms**

The terms below have the following meanings when used in this Agreement in capitalised form unless otherwise expressed:

a. “Agreement” or “the Agreement” or “this Agreement” shall mean this Share Purchase Agreement and shall include the recitals hereto, and the contracts, certificates, disclosures and other documents to be executed and delivered pursuant hereto, if any and any amendments made to this Agreement by the Parties in writing.

b. “Assets” means assets or properties of every kind, nature, character and description (whether immovable, movable, tangible, intangible, absolute, accrued, fixed or otherwise) as operated, hired, rented, owned or leased by a Person from time to time, including cash, cash equivalents,



receivables, securities, accounts and note receivables, real estate, plant and machinery, equipment, trademarks, brands, other intellectual property, raw materials, inventory, furniture, fixtures and insurance owned or used by the Company as of the relevant date.

c. “Board” or “Board of Directors” shall mean and include the Board of Directors of the Company or any committee thereof, as constituted from time to time.

d. “Business” has the meaning set out in Recital.

SECTION 2. PURCHASE AND SALE OF SHARES

2.1 Subject to the satisfaction or waiver of the Conditions Precedent immediately prior to Closing, Acquirer shall, on the Closing Date, purchase from the Seller and the Seller shall sell to Acquirer, as the legal and beneficial owner, the Sale Shares free and clear from all Encumbrances and together with all rights, title, interest and benefits appertaining thereto (the “Share Purchase”), for the Purchase Price paid by the Acquirer to the Seller.

2.2 The Seller hereby agree and warrant that pursuant to the receipt of the Purchase Price from Acquirer on the Closing Date, the title of the Sale Shares, shall pass on to the Acquirer, free of all Encumbrances whatsoever and together with all legal rights and advantages now and hereafter attaching or accruing thereto, so that the Acquirer will upon the Transfer of the Sale Shares in its name, receive full legal and beneficial ownership thereof.

SECTION 3. CONDITIONS PRECEDENT

3.1 Seller’ Conditions Precedent to Closing. The obligations of the Acquirer to purchase and pay for the Sale Shares on Closing Date are subject to the satisfaction, or waiver in writing by the Acquirer at or prior to the Closing, of the following conditions.

a. Compliance with obligations. The Company and the Seller shall have performed and complied in all respects with all agreements, obligations and conditions contained in the Agreement that are required to be performed or complied with on or before Closing and shall have obtained all approvals, consents and qualifications necessary to complete the sale and purchase of the Sale Shares;

b. Capital Structure and Shareholding. No change in the capital structure of the Company or shareholding of the Seller or rights attached to the Equity Shares shall have occurred other than pursuant to the Transaction Documents.

c. Absence of Material Adverse Effect. There shall not have been, on or prior to the Execution Date or as of the Closing Date, any event, condition or circumstance of any character that, individually or in the aggregate, constitute(s) or is reasonably expected to have a Material Adverse Effect.



d. Corporate Actions. The Board shall have approved the execution of the Transaction Documents by the Company³

e. Execution of Transaction Documents. All Transaction Documents, other than this Agreement, shall have been duly executed, stamped and delivered by the parties thereto.

3.2 Acquirer's Conditions Precedent to Closing. The obligations of the Seller and Company to sell the Sale Shares on Closing Date are subject to the satisfaction, or waiver at or prior to the Closing, of the following conditions.

a. Compliance with obligations. The Acquirer shall have performed and complied in all respects with all agreements, obligations and conditions contained in the Agreement that are required to be performed or complied with on or before Closing and shall have obtained all approvals, consents and qualifications necessary to complete the sale and purchase of the Sale Shares;

b. Consents and Waivers. The Acquirer will have obtained all necessary consents, waivers and noobjections in writing from any Person as may be required under any applicable Law or contract or otherwise for the execution, delivery and performance of the Transaction Documents, including without limitation, Consents, waivers and no-objections;

c. Execution of Transaction Documents. All Transaction Documents, other than this Agreement, shall have been duly executed, stamped and delivered by the parties thereto.

SECTION 4. PRE CLOSING ACTIONS

4.1 Between the Effective Date and the Closing (the "Interim Period"), except as expressly permitted or required by this Agreement or with the prior written consent of the Acquirer, the Company and the Seller shall:

a. not directly or indirectly initiate or engage in discussions or negotiations with any other Person for the purpose of any transactions in respect of any Equity Shares or Assets of the Company, including creation of any interest, direct, indirect, current, future or contingent, in the Equity Shares or Assets of the Company;

b. not carry out any action or omission which may affect the proposed transaction under this Agreement or which may reduce or dilute the effective shareholding of the Acquirer upon Closing or which may change the shareholding of the Seller;

c. not pass any resolution of the Shareholders or Board, which is inconsistent with any provision of, or transactions contemplated under, the Transaction Documents;

d. carry-on the Business only in the ordinary course of business;

e. comply with all applicable Laws relating to the Business;



f. not make any amendments to the Memorandum or Articles of the Company except as contemplated in this Agreement; and

g. not agree or otherwise commit to take any of the actions described in the foregoing sub sections (a) through (f).

SECTION 5. CLOSING, DELIVERY AND PAYMENT

5.1 Closing. The Seller shall Transfer and deliver to the Acquirer, and the Acquirer shall, upon reliance on, amongst other things, the representations, warranties and undertakings contained in this Agreement, receive and take delivery from the Seller, all of the right, title and interest of the Seller in the Sale Shares free and clear from all Encumbrances, together with the share certificates and duly stamped and executed share transfer forms in relation to the Sale Shares. The Transfer or procurement of the Transfer of the Sale Shares by the Seller to the Acquirer shall constitute the closing of the Share Purchase (“Closing”).

5.2 Closing Payment and Actions. At Closing, in exchange for the Sale Shares and the delivery or performance by Seller of all those documents, items and actions as may be required to enable the Acquirer to be the legal and registered owner of the Sale Shares, the Acquirer has paid to the Seller, the Purchase Price (Rs. _____) by way of banking channel (IMPS Ref No. _____). At Closing the following events shall take place:

a. The Seller shall deliver to the Acquirer the share certificate(s) representing the Shares sold by such Seller, accompanied by duly stamped and executed share transfer form (Form SH-4) as prescribed under the Companies Act.

b. the Company shall and the Seller shall cause the Company to convene a meeting of the Board for: i. taking on record the duly executed and stamped share transfer forms in respect of the Sale Shares; and ii. approving the Share Purchase of Shares from the Seller to the Acquirer;

c. the Company shall make the necessary filings under applicable Law and execute all other documents as may be necessary for the conclusive Transfer of the Sale Shares in the name of the Acquirer;

d. the Company shall make the necessary entries in its register of members and register of share transfer to record the Transfer of the Sale Shares from the Seller to the Acquirer.

5.3 Deliverables at Closing. At the Closing the Company shall deliver to the Acquirer the following documents:

a. Certified extract of the resolutions passed by the Board approving the transfer of the Sale Shares from the Seller to the Acquirer.

b. Certified extract of the register of members and the share transfer register of the Company evidencing the entries relating to the transfer of the Sale Shares from the Seller to the Acquirer.



c. Certificate, dated as of the Closing Date, executed by Company and the Seller, certifying that the representation and warranties made by the Seller and the Company as set out in this Agreement are true and correct as of the Closing.

d. A certificate, dated as of the Closing executed by Company and the Seller, certifying to the fulfilment of the Execution Date Deliverables set forth in this Agreement.

e. Share certificate(s) with respect to the Shares with endorsement of name of the Acquirer on the same. f. Any other document as may be reasonably required by the Acquirer pursuant to Closing

5.4 Upon Closing, the Acquirer shall hold _____ Equity Shares of the Company pursuant to Share Purchase, constituting[_____] % of the Fully Diluted Share Capital of the Company.

6.1 Representation and Warranties of the Seller. The Seller and Company represents and warrants to the Acquirer that each of the statements set out below (Warranties of the Seller) is now and will be true and accurate as of the Effective Date (which representations and warranties shall be deemed to be repeated as of the Closing Date by reference to the facts and circumstances then existing as if references in such representations and warranties to the Effective Date were references to the Closing Date).

6.2 Authorisation by Seller. This Agreement has been duly authorised, executed and delivered by the Seller and the Company and creates legal, valid and binding obligations of the Seller, enforceable in accordance with its terms. No consent, approval or authorisation of any Person or entity is required in connection with the Seller' execution or delivery of this Agreement or the consummation by the Seller of the transactions contemplated by this Agreement, except for the approval of the Board to the transfer of the Sale Shares from the Seller to the Acquirer.

SECTION 7. INDEMNIFICATION AND DAMAGES

7.1 In consideration of the purchase of the Sale Shares by the Acquirer from the Seller hereunder, each defaulting Party ("Indemnifying Party") agrees to indemnify, defend and hold harmless, the other nondefaulting Party, its Affiliates and each of their respective partners, officers, employees, shareholders, partners, agents, as the case maybe (each, an "Indemnified Party" and collectively the "Indemnified Parties") from and against, any and all, damages, Losses, Liabilities, obligations, fines, penalties, levies, action, investigations, inquisitions, notices, suits, judgments, claims of any kind including third party claims, interest, governmental and statutory action, costs, litigation and arbitral costs, taxes or expenses (including without limitation, reasonable attorney's fees and expenses) (collectively referred to as "Loss") suffered or incurred, directly or indirectly by any Indemnified Party.

IN WITNESS, the Parties have executed this Share Purchase Agreement as of the date first written above.



ACQUIRER
COMPANY

SELLER

Witness
Witness 2

1



CHAPTER-27

NCLT AND NCLAT

INTRODUCTION

The Ministry of Corporate Affairs has issued notification for constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from today i.e. 1st June, 2016. Company Law Board (CLB) stands dissolved w.e.f. 1st June, 2016. Initially NCLT will have eleven Benches

NCLT can be considered as biggest Tribunal till date. Because NCLT will CONSOLIDATE the corporate jurisdiction of the followings:

1. Company Law Board/ BIFR/AAIFR
2. Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High courts

Advantages of NCLT & NCLAT:

1. It shall avoid multiplicity of litigation before various Forums (High Courts, CLB, BIFR, AAIFR).
2. There shall be at least 11 benches of the NCLT, thereby providing justice almost at one's doorstep.
3. This tribunal shall comprise of technical experts who will provide more concrete and precise decision.
4. There will be mixture of judicial and equitable jurisdiction while deciding matters.
5. There shall be reduction in period of winding up from 20-25 years to 2 years.

Qualification: (President/Member of NCLT)

SECTION 409

S. No.	President	Judicial Member	Technical Member
1	Is/has been Judge of High Court ≥ 5 years	Is/has been Judge of High Court (any period)	Has Member of Indian Corporate Law Service /Indian Legal Service ≥ 15 years (and has been holding the rank of secretary or additional secretary to government of india)
2		Is/has been District Judge at least 5 years	Is/has been Practicing Chartered Accountant at least 15 years
3		Has been Advocate of court OR held a judicial office or as member of a tribunal at least 10 years	Is/has been Practicing Cost Accountant at least 15 years
4			Is/has been Practicing COMPANY SECRETARY at least 15 years
5			Person with proven ability, integrity and standing having special knowledge and experience ≥ 15 years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.
6			Presiding Officer of Labour Court/ Tribunal/ National Tribunal (under Industrial Disputes Act, 1947) at least 5 years



Qualification: (Chairman/Member of NCLAT)**SECTION 411**

S. No.	Chairman	Judicial Member	Technical Member
1	Is/has been Judge of Supreme Court	Is/has been Judge of High Court	Person with proven ability, integrity and standing having special knowledge and experience $\geq$ 25 years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.
2	Is/has been Chief Justice of High Court	Is a Judicial Member of Tribunal for at least 5 years	

TERM OF OFFICE OF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS
SECTION 413**TERM OF OFFICE OF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS**

	<i>Tribunal (NCLT)</i>		<i>Appellate Tribunal (NCLAT)</i>	
	<i>President</i>	<i>Every other Member</i>	<i>Chairman</i>	<i>Every other Member</i>
<i>Tenure</i>	5 years	5 years	5 years	5 years
<i>Eligible for Reappointment</i>	Yes (Reappointment for 5 years)	Yes (Reappointment for 5 years)	Yes (Reappointment for 5 years)	Yes (Reappointment for 5 years)
<i>Maximum age</i>	67 Years	65 Years	70 Years	67 Years
<i>Minimum age</i>	50 Years	50 Years	50 Years	50 Years

REMOVAL OF MEMBERS**SECTION 417**

(1) The Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who

a. has been adjudged an insolvent; or
b. has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
c. has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or
d. has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or



e. has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e) without giving him a reasonable opportunity of being heard.

ORDERS OF TRIBUNAL

SECTION 420

(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time **within two years** from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

APPEAL FROM ORDERS OF TRIBUNAL

SECTION 421

(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of **forty-five days** from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of **forty-five days** from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

EXPEDITIOUS DISPOSAL BY TRIBUNAL AND APPELLATE TRIBUNAL **SECTION 422**

(1) Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal **within three months** from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

(2) Where any application or petition or appeal is not disposed of within the period specified in sub-section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not



disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding **ninety days** as he may consider necessary.

APPEAL TO SUPREME COURT

SECTION 423

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within **sixty days** from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding **sixty days**.

PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL

SECTION 424

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, 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:

○ Summoning and enforcing the attendance of any person and examining him on oath
○ Requiring the discovery and production of documents; (c) receiving evidence on affidavits
○ 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
○ issuing commissions for the examination of witnesses or documents; (f) dismissing a representation for default or deciding it <i>ex parte</i>
○ Setting aside any order of dismissal of any representation for default or any order passed by it <i>ex parte</i>
○ Any other matter which may be prescribed

Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein

POWER TO SEEK ASSISTANCE OF CHIEF METROPOLITAN MAGISTRATE, ETC.

SECTION 429

The Tribunal may, in any proceeding relating to a sick company or winding up of any other company, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such sick or other company, are situate or found, to take possession thereof, and the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him

(a) Take possession of such property, books of account or other documents
(b) Cause the same to be entrusted to the Tribunal or other person authorised by it.



CIVIL COURT NOT TO HAVE JURISDICTION**SECTION 430**

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

NCLT RULES-2016

S.NO.	PARTICULARS	PROVISIONS
RULE 3	Computation of time period.	Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Tribunal is closed, that day and any succeeding days on which the Tribunal remains closed shall also be excluded.
RULE 9	Sitting hours	The sitting hours of the Tribunal shall ordinarily be from 10:30 AM to 1:00 PM and 2:00 P.M. to 4:30 PM, subject to any order made by the President.
RULE 10	Working hours	(1) Except on Saturdays, Sundays and other National Holiday, the office of the Tribunal shall remain open on all working days from 09.30 A.M. to 6.00 P.M. (2) The Filing Counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.
RULE 11	Listing of cases	An urgent matter filed before 12 noon shall be listed before the Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for listing on the following day, with the specific permission of the Bench.
RULE 16	Functions of the President	○ preside over the consideration of cases by the Tribunal; ○ direct the Registry in the performance of its functions; ○ prepare an annual report on the activities of the Tribunal; ○ transfer any case from one Bench to other Bench when the circumstances so warrant; ○ to withdraw the work or case from the court of a member. ○ perform the functions entrusted to the President under these rules and such other powers as may be relevant to carry out his duties as head of the Tribunal while exercising the general superintendence and control over the administrative functions of the Members, Registrar, Secretary and other staff of the Tribunal.
RULE 17	Functions of the Registrar	The Registrar shall have the following functions, namely:- ▪ registration of appeals, petitions and applications; ▪ receive applications for amendment of appeal or the petition or application or subsequent proceedings. ▪ receive applications for fresh summons or notices and regarding services thereof; ▪ receive applications for fresh summons or notices and for short



		date summons and notices; ▪ receive applications for substituted service of summons or notices; ▪ receive applications for seeking orders concerning the admission and inspection of documents; ▪ transmission of a direction or order to the civil court as directed by Tribunal with the prescribed certificates for execution etc., and ▪ Such other incidental or matters as the President may direct from time to time.
RULE 18	Functions of the Secretary	(a) be in charge of the long term projects and initiatives of the Tribunal; (b) supervise the divisions and sections of the Human Resources; (c) prepare, monitor and manage budgetary allocations and financial managements of the Tribunal and the Benches; (d) provide all necessary support in the day to day operations of the Tribunal; (e) manage and supervise the facilities and administrative services of the Tribunal; (f) manage and administer the public grievances mechanism of the Tribunal; (g) coordinate with authorised representatives and other professionals in the smooth functioning of the Tribunal; (h) oversee information and communication technology and other technological facilities in the Tribunal; (i) manage and facilitate communication and services of the Tribunal; (j) manage, monitor and administer the public affairs and public safety provisions within the premises of the Tribunal; and (k) supervise library and research wings of the Tribunal.
RULE 20	Procedure	1. Every appeal or petition or application or caveat petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form; 2. The cause title shall state “Before the National Company Law Tribunal” and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred. 3. Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point. 4. Where <i>Saka</i> or other dates are used, corresponding dates of Gregorian calendar shall also be given. 5. Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character,



		shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application. 6. The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party. 7. These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers. 8. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in. 9. Every proceeding shall state immediately after the cause title the provision of law under which it is preferred
RULE 21	Particulars to be set out in the address for service	The address for service of summons shall be filed with every appeal or petition or application or caveat on behalf of a party and shall as far as possible contain the following items namely: (a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house; (b) the name of the town or village; (c) the post office, postal district and PIN Code; and (d) any other particulars necessary to locate and identify the addressee such as fax number, mobile number, valid e-mail address, if any.
RULE 22	Initialling alteration	Every interlineations, eraser or correction or deletion in any appeal or petition or application or document shall be initialled by the party or his authorised representative presenting it.
RULE-23	Presentation of petition or appeal	1. Presentation in triplicate: Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same. 2. Verification: Every petition or application or appeal may be accompanied by documents duly certified by the authorised representative or advocate filing the petition or application or appeal duly verified from the originals. 3. Document with Index: All the documents filed in NCLT shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.



		4. Copies for other parties: Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed under these rules. 5. Serving copies: In the pending matters, all applications shall be presented after serving copies thereof in advance on the opposite side or his authorised representative. 6. Processing Fee: The processing fee prescribed by these rules, with required number of envelopes of sufficient size and notice forms shall be filled alongwith memorandum or appeal.
Rule 23A	Presentation of joint petition	THE bench may permit more than 1 person join together and present joint petition if it is satisfied both of them have common interest in matter
Rule-24	Number of copies to be filed	The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or petition or application or counter or objections, as the case may be, and shall deliver 1 Copy to each party Any person may lodge a caveat in triplicate in any appeal or petition or application that may be instituted before NCLT by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the “Form No. NCLT 3C” and contain such details and particulars or orders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up. Provided, that NCLT may pass interim orders in case of urgency. The caveat shall remain valid for a period of ninety days from the date of its filing.
Rule-26	Endorsement and Verification	1. At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorised representative. 2. Every petition or appeal shall be signed and verified by the party concerned in the manner provided by these rules.
Rule-27	Translation of Document	A document other than English language intended to be used in any proceeding before NCLT shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by authorised representative engaged on behalf of parties in the case or if the



		authorised representative engaged in the case authenticates such certificate or prepared by a translator approved for the purpose by the Registrar on payment of such charges as he may order. Appeal or petition or other proceeding shall not be set down for hearing until and unless all parties confirm that all the documents filed on which they intend to rely are in English or have been translated into English and required number of copies are filed into NCLT
Rule-28	Endorsement and scrutiny of petition or appeal or document	The person in charge of the filing-counter shall immediately on receipt of petition or appeal or application or document affix the date stamp of NCLT thereon and also on the additional copies of the index and return the acknowledgement to the party and he shall also affix his initials on the stamp affixed on the first page of the copies and enter the particulars of all such documents in the register after daily filing and assign a diary number which shall be entered below the date stamp and thereafter cause it to be sent for scrutiny. If, on scrutiny, the appeal or petition or application or document is found to be defective, such document shall, after notice to the party, to returned for compliance and if there is a failure to comply within seven days from the date of return, the same shall be placed before the Registrar who may pass appropriate orders. The Registrar may for sufficient cause return the said document for rectification or amendment to the party filing the same, and for this purpose may allow to the party concerned such reasonable time as he may consider necessary or extend the time for compliance. Where the party fails to take any step for the removal of the defect within the time fixed for the same, the Registrar may, for reasons to be recorded in writing, decline to register the pleading or document.
Rule 25	Lodging of caveat	Any person may lodge a caveat in triplicate in any appeal or petition or application that may be instituted before this Tribunal by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the form NCLT 3C and contain such details and particulars or orders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up: Provided, that the Tribunal may pass interim orders in case of urgency.



		The caveat shall remain valid for a period of ninety days from the date of its filing.
RULE 30	Calling for records	On the admission of appeal or petition or application the Registrar shall, if so directed by the Tribunal, call for the records relating to the proceedings from any adjudicating authority and retransmit the same.
RULE 34	General Procedure	1. In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice. 2. The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT. 4. 3. Every petition or application or reference shall be filed in form as provided in Form No. NCLT. 1 with attachments thereto accompanied by Form No. NCLT.2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT. 1 accompanied by such attachments thereto along with Form No. NCLT.3 4. Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT.6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT-5.
RULE 35	Advertisement detailing petition	1. Where any application, petition or reference is required to be advertised, it shall, unless the Tribunal otherwise orders, or these rules otherwise provide, be advertised in Form NCLT-3A, not less than fourteen days before the date fixed for hearing, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situate, and at least once in English language in an English newspaper circulating in that district. 2. such advertisement shall state;- (a) the date on which the application, petition or reference was presented; (b) the name and address of the applicant, petitioner and his authorised representative, if any; (c) the nature and substance of application, petition or reference; (d) the date fixed for hearing; (e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorised representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing. 3. Where the advertisement is being given by the company, then the same may also be placed on the website of the company, if any. 4. An affidavit shall be filed to the Tribunal, not less than three days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to



		be served: Provided that the affidavit shall be accompanied with such proof of advertisement or of the service, as may be available. 5. Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit. 6. The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.
RULE 37	Notice to Opposite Party	(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT.5 shall be accompanied by a copy of the application with supporting documents. (2) If the respondent does not appear on the date specified in the notice in Form No. NCLT.5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application. If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.



RULE 38	Service of Notices and processes	- Any notice or process to be issued by the Tribunal may be served by post or at the e-mail address as provided in the petition or application or in the reply. - The notice or process if to be served physically may be served in any one of the following modes as may be directed by the Tribunal - by hand delivery through a process server or respective authorised representative; - by registered post or speed post or by courier with acknowledgment due; or - service by the party himself. - Where a notice issued by the Tribunal is served by the party himself by hand delivery, he shall file with the Registrar or such other person duly authorised by the Registrar in this behalf, the acknowledgment together with an affidavit of service and in case of service by registered post or by speed post, file with the Registrar, or such other person duly authorised by the Registrar in this behalf, an affidavit of service of notice alongwith the proof of delivery. - Notwithstanding anything contained in sub-rules (1) and (2), the Tribunal may after taking into account the number of respondents and their place of residence or work or service could not be effected in any manner and other circumstances, direct that notice of the petition or application shall be served upon the respondents in any other manner, including any manner of substituted service, as it appears to the Tribunal just and convenient. - A notice or process may also be served on an authorised representative of the applicant or the respondent, as the case may be, in any proceeding or on any person authorised to accept a notice or a process, and such service on the authorised representative shall be deemed to be a proper service. - Where the Tribunal directs a service under sub-rule (4), such amount of charges, as may be determined by the Tribunal from time to time, but not exceeding the actual charges incurred in effecting the service, shall be deposited with the registry of the Tribunal by the petitioner or applicant.
RULE 38A	Multiple remedy	A petition shall be based upon a single cause of action and may seek one or more relief provided that relief are consequential to one another.
RULE 41	Filing of Reply and other Documents by the Respondents	- Each respondent may file his reply to the petition or the application and copies of the documents, either in person or through an authorised representative, with the registry as specified by the Tribunal. - A copy of the reply or the application and the copies of other documents shall be forthwith served on the applicant by the



		respondent. 3. To the reply or documents filed under sub-rule (1), the respondent shall specifically admit, deny or rebut the facts stated by the applicant in his petition or application and state such additional facts as may be found necessary in his reply.
RULE 42	Filing of Rejoinder	Where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply filed by the respondent, with an advance copy to be served upon the respondent.
RULE 44	Hearing of petition or applications	1. The Tribunal shall notify to the parties the date and place of hearing of the petition or application in such manner as the President or a Member may, by general or special order, direct. 2. Where at any stage prior to the hearing of the petition or application, the applicant desires to withdraw his petition or application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary, such other party arrayed as opposite parties in the petition or the application or otherwise, may permit such withdrawal upon imposing such costs as it may deem fit and proper for the Tribunal in the interests of the justice.
RULE 45	Rights of a party to appear before the Tribunal	1. Every party may appear before a Tribunal in person or through an authorised representative, duly authorised in writing in this behalf. 2. The authorised representative shall make an appearance through the filing of Vakalatnama or Memorandum of Appearance in Form No. NCLT. 12 representing the respective parties to the proceedings. 3. The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Tribunal. 4. The officer authorised by the Central Government or the Regional Director or the Registrar of Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor. 5. During any proceedings before the Tribunal, it may for the purpose of its knowledge, call upon the Registrar of Companies to submit information on the affairs of the company on the basis of information available in the MCA21 portal. Reasons for such directions shall be recorded in writing. 6. There shall be no audio or video recording of the Bench proceedings by the parties or their authorised representatives.
RULE 47	Consequence of non-appearance of applicant (Rule	1. Where on the date fixed for hearing of the petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, NCLT may, in its discretion, either dismiss the application for default or hear and decide it on merit. 2. Where the petition or application has been dismissed for default and the applicant files an application within thirty days



		from the date of dismissal and satisfies NCLT that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, NCLT shall make an order restoring the same. Provided that where the case was disposed of on merits the decision shall not be re-opened.
RULE 49	Ex-parte Hearing and disposal	1. Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, NCLT may adjourn the hearing or hear and decide the petition or the application ex-parte. 2. Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to NCLT for an order to set it aside and if such respondent or respondents satisfies NCLT that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing when the petition or the application was called for hearing, NCLT may make an order setting aside the ex-parte hearing as against him or them upon such terms as it thinks fit. Provided that where the ex-parte hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only it may be set aside as against all or any of the other respondents also.
RULE 50	Registry to send certified copy	The Registry shall send a certified copy of final order passed to the parties concerned free of cost and the certified copies may be made available with cost as per Schedule of fees, in all other cases.
RULE 51	Power to regulate the procedure	NCLT may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Companies Act, 2013.
RULE 52	Summoning of witnesses and recording Evidence	1. If a petition or an application is presented by any party to the proceedings for summoning of witnesses, NCLT shall issue summons for the appearance of such witnesses unless it considers that their appearance is not necessary for the just decision of the case. 2. Where summons are issued by NCLT under sub-rule (1) to any witness to give evidence or to produce any document, the person so summoned shall be entitled to such travelling and daily allowance sufficient to defray the travelling and other expenses as may be determined by the Registrar which shall be



		deposited by the party as decided by the Registrar.
RULE 53	Substitution of legal representatives	1. Where a party to a proceeding pending before a Bench dies or is adjudged insolvent or, in the case of a company, being wound up, the proceeding shall not abate and may be continued by or against the executor, administrator or other legal representative of the parties or by or against the assignee, receiver or liquidator, as the case may be. 2. In the case of death of a party during the pendency of the proceedings before NCLT, the legal representative of the deceased party may apply within ninety days of the date of such death for being brought on record. 3. Where no petition or application is received from the legal representatives within the period specified in sub-rule (2), the proceedings shall abate: Provided that for good and sufficient reasons shown, NCLT may allow substitution of the legal representatives of the deceased at any time before disposing the petition on merits.
RULE 56	Application for execution	For execution of order passed by NCLT, the holder of an order shall make an application to NCLT in Form NCLT.8.
RULE 58	Effect of non-compliance	Failure to comply with any requirement of these rules shall not invalidate any proceeding, merely by reason of such failure, unless the Tribunal is of the view that such failure has resulted in miscarriage of justice
RULE 60	Matters relating to the Judgments or Orders of the Tribunal	1. Once the final text of the judgment has been approved and adopted, the judgment shall be signed and dated by the President or the concerned Members or Member and the Registrar, and shall contain the names of the Members who have taken part in the decision. 2. Any Member differing as to the grounds upon which the judgment was based or some of its conclusions, or dissenting from the judgment, may append a separate or dissenting opinion. 3. In case the members who have heard the case are equally divided in passing the order or judgment, then the President shall constitute a Bench as referred in sub-section (5) of section 419 of the Act.



RULE 61	Amicus Curiae	1. The Tribunal may, as its discretion, permit any person or persons, including the professionals and professional bodies to render or to communicate views to the Tribunal as <i>amicus curiae</i> on any point or points or legal issues as the case may be as assigned to such <i>amicus curiae</i>. 2. The Tribunal may permit <i>amicus curiae</i> to have access to the pleadings of the parties and the Tribunal shall enable the parties to submit timely observations on brief provided by the <i>amicus curiae</i>. 3. The Tribunal shall be at liberty to direct either of the parties or both the parties to the proceedings involving a point on which the opinion of the <i>amicus curiae</i> has been sought, to bear such expenses or fee as may be ordered by the Tribunal. 4. The judgment and any appended opinions shall be transmitted to the parties and to <i>amicus curiae</i>.
RULE 63	Appearance of authorised representative	(1) Subject to provisions of section 432 of the Act, a party to any proceedings or appeal before the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Appellate Tribunal. (2) The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Appellate Tribunal. (3) The officer authorised by the Central Government or the Regional Director or the Registrar of Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor.”
RULE 64	Matter earlier dealt by Company Law Board	Notwithstanding anything contained in any other law for the time being in force, an original civil action or case arising out of the Act, or any other corresponding provision of the Companies Act, 1956 or Reserve Bank of India Act, 1934 is filed or pending before the Company Law Board shall stand transferred to the respective Benches of the Tribunal.
RULE 65	Petition or Application under sub-section (2) of section 45QA of the Reserve Bank of India Act, 1934 (2 of 1934)	Provisions of these rules shall apply, <i>mutatis mutandis</i> , to the application or petition made under sub-section (2) of section 45QA of the Reserve Bank of India Act, 1934 (2 of 1934) or under such other analogous provision of the other Act(s).



RULE 74	Application for calling or obtaining a direction to call annual general meeting	1. An application under section 97 for calling or obtaining a direction to call the annual general meeting of the company shall be made by any member of the company in Form No. NCLT. 1 and shall be accompanied by the documents specified in Annexure B. 2. A copy of the application shall be served on the Registrar of Companies on or before the date of hearing. Inspection of minute-books of general meeting (Rule 76) Where any member has requested the company for inspection of minute-book of general meeting on payment of requisite fee and the company refused to give such inspection, he may apply to NCLT in Form No NCLT-9 for direction to the company for inspection of minute-book of general meeting.
RULE 119	Appearance of authorised representative	Subject to as hereinafter provided, no legal practitioner or authorised representative shall be entitled to appear and act, in any proceeding before the Tribunal unless he files into Tribunal vakalatnama or Memorandum of Appearance as the case may, duly executed by or on behalf of the party for whom he appears.
RULE 120	Consent for engaging another legal practitioner	A legal practitioner proposing to file a Vakalatnama or Memorandum of Appearance as the case may be, in any pending case or proceeding before the Tribunal in which there is already a legal practitioner or authorised representative on record, shall do so only with the written consent of the legal practitioner or the authorised representative on record or when such consent is refused, with the permission of the Tribunal after revocation of Vakalatnama or Memorandum of Appearance as the case may be, on an application filed in this behalf, which shall receive consideration only after service of such application on the counsel already on record.
RULE 121	Restrictions on appearance	A legal practitioner or the authorised representative as the case may be, who has tendered advice in connection with the institution of any case or other proceeding before the Tribunal or has drawn pleadings in connection with any such matter or has during the progress of any such matter acted for a party, shall not, appear in such case or proceeding or other matter arising therefrom or in any matter connected therewith for any person whose interest is opposed to that of his former client, except with the prior permission of the Tribunal.
RULE 122	Restriction on party's right to be heard	The party who has engaged a legal practitioner or authorised representative to appear for him before the Tribunal may be restricted by the Tribunal in making presentation before it.
RULE 123	Empanelment of special authorised representatives by the Tribunal	1. The Tribunal may draw up a panel of authorised representatives or valuers or such other experts as may be required by the Tribunal to assist in proceedings before the Tribunal. 2. The President may call upon any of the persons from panel under sub-rule (1) for assistance in the proceedings before the Bench, if so required. 3. The remuneration payable and other allowances and compensation admissible to such persons shall be specified in consultation with



		the Tribunal.
RULE 124	Professional dress for the authorised representatives	While appearing before the Tribunal, the authorised representatives shall wear the same professional dress as prescribed in their Code of Conduct.
RULE 146	Disposal of Cases	On receipt of an application, petition, appeal etc, the Tribunal, after giving the parties a reasonable opportunity of being heard, pass such orders thereon as it thinks fit: Provided that the Tribunal, after considering an appeal, may summarily dismiss the same, for reasons to be recorded, if the Tribunal is of opinion that there are no sufficient grounds for proceedings therewith.
RULE 150	Pronouncement of Order	1. The Tribunal, after hearing the applicant and respondent, shall make and pronounce an order either at once or, as soon as thereafter as may be practicable but not later than thirty days from the final hearing. 2. Every order of the Tribunal shall be in writing and shall be signed and dated by the President or Member or Members constituting the Bench which heard the case and pronounced the order. 3. A certified copy of every order passed by the Tribunal shall be given to the parties. 4. The Tribunal, may transmit order made by it to any court for enforcement, on application made by either of the parties to the order or <i>suo motu</i>. 5. Every order or judgment or notice shall bear the seal of the Tribunal.
RULE 151	Pronouncement of order by any one member of the Bench	Any Member of the Bench may pronounce the order for and on behalf of the Bench. (2) When an order is pronounced under this rule, the Court Master shall make a note in the order sheet, that the order of the Bench consisting of President and Members was pronounced in open court on behalf of the Bench.
RULE 152	Authorising any member to pronounce order	If the Members of the Bench who heard the case are not readily available or have ceased to be Members of the Tribunal, the President may authorise any other Member to pronounce the order on his behalf after being satisfied that the order has been duly prepared and signed by all the Members who heard the case. (2) The order pronounced by the Member so authorised shall be deemed to be duly pronounced. (3) The Member so authorised for pronouncement of the order shall affix his signature in the order sheet of the case stating that he has pronounced the order as provided in this rule. (4) If the order cannot be signed by reason of death, retirement or resignation or for any other reason by any one of the Members of the Bench who heard the case, it shall be deemed to have been released from part-heard and listed afresh for hearing.
RULE 153	Enlargement of time	Where any period is fixed by or under these rules, or granted by Tribunal for the doing of any act, or filing of any document or representation, the Tribunal may, in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such



		period, even though the period fixed by or under these rules or granted by the Tribunal may have expired.
RULE 154	Rectification of Order	Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on application of any party by way of rectification. (2) An application under sub-Rule (1) may be made in Form No. NCLT. 9 within two years from the date of the final order for rectification of the final order not being an interlocutory order

NCLAT RULES 2016

S.NO.	PARTICULARS	PROVISIONS
1	RULE 3 Computation of time period.	Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Appellate Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Appellate Tribunal is closed, that day and any succeeding day on which the Appellate Tribunal remains closed shall also be excluded
2	RULE 9 Sitting hours of the Appellate Tribunal.	The sitting hours of the Appellate Tribunal shall ordinarily be from 09.30 AM. to 01.00 P.M. and from 2.15 P.M. to 5.00 P.M. subject to any order made by the Chairperson and this shall not prevent the Appellate Tribunal to extend its sitting as it deems fit.
3	RULE 10 Working hours of office.	1. The office of the Appellate Tribunal shall remain open on all working days from 09:30 A.M. to 6.00 P.M. 2. The filing counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.
4	RULE 13 Listing of cases	All urgent matters filed before 12 noon shall be listed before the Appellate Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for listing on the following day, with the specific permission of the Appellate Tribunal or Chairperson.
5	RULE 14 Power to exempt.	The Appellate Tribunal may on sufficient cause being shown, exempt the parties from compliance with any requirement of these rules and may give such directions in matters of practice and procedure, as it may consider just and expedient on the application moved in this behalf to render substantial justice.
6	RULE 15 Power to extend time.	The Appellate Tribunal may extend the time appointed by these rules or fixed by any order, for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require, and any enlargement may be ordered, although the application therefore is not made until after the expiration of the time appointed or allowed.
7	RULE 17 Power of adjournment.	All adjournments shall normally be sought before the concerned Bench in court and in extraordinary circumstances, the Registrar may, if so directed by the Tribunal in chambers, at any time adjourn any matter and lay the same before the Tribunal in chambers.
8	RULE 18 Delegation powers of the	The Chairperson may assign or delegate to a Deputy Registrar or to any other suitable officer all or some of the functions required by these rules to be exercised by the Registrar



	Chairperson.	
9	RULE 19 Procedure for proceedings.	1. Every appeal to the Appellate Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type-written or printed in double spacing on one side of standard paper with an inner margin of about four centimeters width on top and with a right margin of 2.5 cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form. 2. The cause title shall state “In the National Company Law Appellate Tribunal” and also set out the proceedings or order of the authority against which it is preferred. 3. Appeal shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point. 4. Where <i>Saka</i> or other dates are used, corresponding dates of Gregorian calendar shall also be given. 5. Full name, parentage, description of each party and address and in case a party sue or being sued in a representative character, shall also be set out at the beginning of the appeal and need not be repeated in the subsequent proceedings in the same appeal. 6. The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party and these numbers shall not be changed and in the event of the death of a party during the pendency of the appeal, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers. 7. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in. 8. Every proceeding shall state immediately after the cause title and the provision of law under which it is preferred.
10	RULE 22 Presentation of appeal.	1. Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same. 2. Every appeal shall be accompanied by a certified copy of the impugned order. 3. All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon. 4. Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed. 5. In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative. 6. The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal.



11	RULE 23 Number of copies to be filed	The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.
12	RULE 33 Preparation and publication of daily cause list.	- The Registry shall prepare and publish on the notice board of the Registry before the closing of working hours on each working day the cause list for the next working day and subject to the directions of the Chairperson, listing of cases in the daily cause list shall be in the following order of priority, unless otherwise ordered by the concerned Bench; namely;- - cases for pronouncement of orders; - cases for clarification; - cases for admission; - cases for orders or directions; - part-heard cases, latest part-heard having precedence; and - cases posted as per numerical order or as directed by the Bench; - The title of the daily cause list shall consist of the number of the appeal, the day, date and time of the sitting Bench hall number and the coram indicating the names of the Chairperson, Judicial member and Technical members constituting the Bench. - Against the number of each case listed in the daily cause list, the following shall be shown, namely;- - names of the legal practitioners or authorised representative appearing for both sides and setting out in brackets the designation of the parties whom they represent; - names of the parties, if unrepresented, with their ranks in brackets. - the objections and special directions, if any, of the Registry shall be briefly indicated in the daily cause list in remarks' column, whenever compliance is required
131	RULE 67 Title of affidavits	Every affidavit shall be titled as "Before the National Company Law Appellate Tribunal." followed by the cause title of the application or other proceeding in which the affidavit is sought to be used.
14	RULE 74 Suo motu summoning of documents	Notwithstanding anything contained in these rules, the NCLAT may, suo motu, issue summons for production of public document or other documents in the custody of a public officer in Form NCLAT-6.
15	RULE 75 Marking of documents	- The documents when produced shall be marked as follows: - if relied upon by the appellant's or petitioner's side, they shall be numbered as 'A' series. - if relied upon by the respondent's side, they shall be marked as 'B' series. - The Appellate Tribunal exhibits shall be marked as 'C' series, - NCLAT may direct the applicant to deposit with NCLAT by way of Demand Draft or Indian Postal Order drawn in favour of the pay



		and Accounts Officer, Ministry of Corporate Affairs, New Delhi, a sum sufficient to defray the expenses for transmission of the records before the summons is issued.
16	RULE 101 Placing of Supreme Court orders before NCLAT	Whenever an interim or final order passed by the Supreme Court of India in an appeal or other proceeding preferred against a decision of NCLAT is received, the same shall forthwith be placed before the Chairperson or Members for information and kept in the relevant case file and immediate attention of the Registrar shall be drawn to the directions requiring compliance.
17	RULE 103 Filing through electronic media	NCLAT may allow filing of appeal or proceedings through electronic mode such as online filing and provide for rectification of defects by e-mail or internet and in such filing, these rules shall be adopted as nearly as possible on and from a date to be notified separately and the Central Government may issue instructions in this behalf from time to time.



CHAPTER-28 APPLICATION TO NCLT FOR CALLING AGM

APPLICATION TO NCLT FOR DIRECTION FOR CALLING THE AGM AND OTHER MEETINGS

Section 97: Power of Tribunal to Call Annual General Meeting

(1) If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, notwithstanding anything contained in this Act or the articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act

Section 98: Power of Tribunal to Call Meeting of Members, etc.

(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may, either suo motu or on the application of any director or member of the company who would be entitled to vote at the meeting,—

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with any order made under sub-section (1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

It's pertinent to note here that while Section 97 talks about Direction by NCLT for holding the AGM on the application of a member on the other hand Section 98 talks about Direction by NCLT for holding any of the members meeting other than AGM.



Can a Company may apply for Calling AGM?

CLB in its decision in Cannanore Whole Body CT Scan and Research Centre P. Ltd. Vs Saibunnisa S.V. (1998) 93 Com cases 99: (1998) 3 Comp LJ 518: (1998) 29 CLA 446 (CLB-SB) stated as “It is clear that a member and not the company is empowered to invoke the provisions of Sec 167. Any application, if filed by the Company will be bad in law and will be treated ab initio defective as Company can’t seek direction against itself.” Also an applicant, whose membership has been disputed by the company by showing that he has transferred his entire shareholding, has no Locus standi to make an application under the Section. M. Sampath vs. AKMN Cylinders (P.) Ltd. (1998) 29 CLA 455 (CLB – SB)

Procedural of Application

As per NCLT Rules, 2016 (Applicable to all kind of Application to be filed before NCLT):

1. Preparation of Application/Petition to be filed:

- a. Every petition or application shall be filed before the Bench having territorial jurisdiction.
- b. Every application/petition before the tribunal shall be filed in NCLT form No.1 [Rule 34(3)] with attachment thereto accompanied by FORM NO. NCLT 2.
- c. Every application/petition to be filed with the tribunal shall be prepared in triplicate.
- d. The applicant may, by way of a separate application, apply to the President and the President may thereupon for the reasons to be recorded, direct a Bench other than the Bench which has territorial jurisdiction to adjudicate upon it. [Rule 16(d)].

2. Sequence in which details to be mentioned in every application/ petition:- Every application/petition the following sequence while mentioning the facts in the application/petition namely;

- a. General heading of all proceedings before the Tribunal shall be as per NCLT Form No.4 [Rule 34(2)].
- b. Then details of Applicants/Petitioners to be mentioned.
- c. To mention the jurisdiction of the Bench—The jurisdiction of the bench is to be mentioned.
- d. Limitation period to be mentioned i.e. whether the present application/petition is within the limitation period or not.
- e. Facts of the case to be mentioned: It is required to mention the reasons for not holding the AGM in Detail.



f. Relief sought from the tribunal to be mentioned: In the Prayer for relief the direction of the tribunal can be sought to call or direct the calling of AGM of the Company and such other direction as the Hon'ble Tribunal may deems fit.

g. Details of Bank Draft evidencing the payment of prescribed fees: Appropriate amount is required to be paid as fees for filing the application in the form of Bank draft. The details of the same are also to be mentioned by giving following details i.e. (a) Bank Draft No, (b) Branch on which it is drawn, (c) Name of the Issuing branch, (d) Date and (e) Amount.

3. Affidavit accompanying the petition: Every Application/Petition filed before the Tribunal shall be accompanied by a duly notarized affidavit of the authorized representative/s of the applicant/ petitioner in the Form No.NCLT 6 [Rule 34(4)].

4. Filing of Vakalatnama: Every application/Petition should also be accompanied by the Vakalatnama of the Advocate/Legal practitioner representing the client in the Form NCLT 12.

5. Memo of Appearance: A memo of appearance is required to be filed in the form NCLT 12 by the practicing Company Secretary or Chartered Accountant or Cost Accountant appearing before the tribunal for representing their client.

6. An Interlocutory Application shall be filed in FORM No. NCLT 1 accompanied by such attachment thereto along with FORM No. NCLT 3.

7. Where on date fixed for hearing of the petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on meri

8. Where the petition or application has been dismissed for default and the applicant files an application within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the petition or application was called for hearing, the Tribunal shall make an order restoring the same.

Provided that where the case was disposed of on merits the decision shall not be re-opened.

9. Application, petition or reference, if required, shall be advertised in Form No. NCLT 3A at least 14 days before the date fixed for hearing the application/petition in at least 2 newspaper one in English and another in the vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated.



Rule 74 of NCLT Rules : Application for calling or obtaining a Direction to Call Annual General Meeting under Section 97 of CA 2013

1. Every Application under Section 97 for calling or obtaining a direction to call the Annual General Meeting of the company shall be made by any member of the Company in Form No. NCLT 1 and shall be accompanied by the following documents.

2. DOCUMENTS TO BE FILED ALONG WITH APPLICATION/PETITION U/S97

Following documents to be annexed with the application to be filed u/s 97

- a. Affidavit verifying the application/petition – Form No. NCLT 6 [Rule 34(4)].
- b. Bank Draft evidencing the payment of application fee. – The Present fee is Rs. 1000/-
- c. Any other Relevant Documents – Which may include the following
 - Copy of Board Resolution to Appoint Authorized representative.
 - Copy of the last Audited Financial statements.
 - Copy of Memorandum and Articles of association of the company

A Copy of the application shall be served on the Registrar of Companies on or before the date of hearing.



CHAPTER-29 APPLICATION TO NCLT FOR OPRESSION & MISMANAGEMENT

APPLICATION IN CASE OPPRESSION AND MISMANAGEMENT & CLASS ACTIONS

The concept of shareholders' democracy in the present-day corporate world denotes the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or through their elected representatives.

POWERS OF MAJORITY AND MINORITY RIGHTS



It is a cardinal rule of company law that prima facie a majority of members of a company are entitled to exercise the powers of the company and generally to control its affairs. The resolution of a majority of shareholders, passed at a duly convened and held general meeting, upon any question with which the company is legally competent to deal, is binding upon the minority and consequently upon the company.

CASE LAWS



S.NO.	CASE NAME	PROVISIONS
1	North-West Transportation Co. v. Beatty	The resolution of a majority of shareholders, passed at a duly convened and held general meeting, upon any question with which the company is legally competent to deal, is binding upon the minority

Thus, the majority of the members enjoy the supreme authority to exercise the powers of the company and generally to control its affairs. But this is subject to two very important limitations.

Firstly, the powers of the majority of members is subject to the provisions of the Company's memorandum and articles of association. A company cannot legally authorise or ratify any act which being outside the ambit of the memorandum, is ultra vires of the company **Ashbury Rly. Carriage and Iron Co. v. Riche**. Also, where the articles authorise the directors to deal with any matters except those which are outside the scope of the authority of the directors; or with which the directors, having power, are unable or unwilling to deal.

Secondly, the resolution of a majority must not be inconsistent with the provisions of the Act or any other statute, or constitute a fraud on minority depriving it of its legitimate rights.

THE PRINCIPLE OF NON-INTERFERENCE' (Rule in Foss v. Harbottle)

The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company. The basic principle of non-interference with the internal management of company by the court is laid down in the case of **Foss v. Harbottle**.



Facts of the case

- Two shareholders instituted a suit against the directors.
- The shareholders alleged that-
 - **the directors had effected various fraudulent and illegal transactions acting on behalf of the company;**
 - **The directors had misapplied, alienated and wasted the property of the company.**
- The shareholders claimed damages from the directors for loss caused to the company.

Decision

The suit was dismissed.

Reasons for decision

- (a) Proper plaintiff is the company.
- (b) Recognition of 'majority rule'.
- (c) Avoiding unproductive litigation.
- (d) Avoiding multiplicity of suits.

**Rule in Foss v Harbottle**

- The 'majority rule' was laid down in Foss v Harbottle.
- The 'majority rule' is also called as 'rule in Foss v Harbottle'.
- The 'majority rule' states that the will of the majority must prevail.

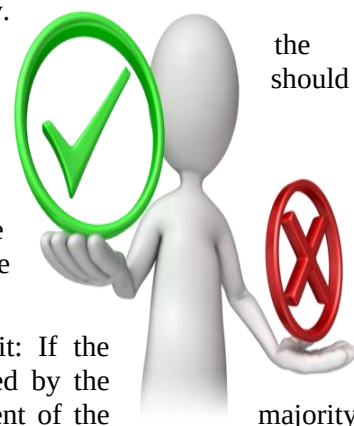
Principle emerged from Foss v Harbottle

- A company has a separate legal identity. It can sue in its own name.
- A company is regulated like a democracy. The affairs of a company are conducted by the majority of members.
- The resolution passed by the majority of members is binding on the company and consequently on the minority.
- The courts do not usually intervene in the matters of internal management of the company.



JUSTIFICATION AND ADVANTAGES OF THE RULE IN FOSS V. HARBOTTLE

1. Recognition of the separate legal personality of company: If a company has suffered some injury, and not the individual members, it is the company itself that should seek to redress.
2. Need to preserve right of majority to decide: The principle in Foss v. Harbottle preserves the right of majority to decide how the affairs of company shall be conducted. It is fair that the wishes of the majority prevail.
3. Multiplicity of futile suits avoided: Clearly, if every individual member were permitted to sue anyone who had injured the company through a breach of duty, there could be as many suits as there are shareholders. Legal proceedings would never cease, and there would be enormous wastage of time and money.
4. Litigation at suit of a minority futile if majority does not wish it: If the irregularity complained of is one which can be subsequently ratified by the majority it is futile to have litigation about it except with the consent of the majority in a general meeting. **In Mac Dougall v. Gardiner** the articles empowered the chairman, with the consent of the meeting, to adjourn a meeting and also provided for taking a poll if demanded by the shareholders. The adjournment was moved, and declared by the chairman to be carried; a poll was then demanded and refused by the chairman. A shareholder brought an action for a declaration that the chairman's conduct was illegal. Held, the action could not be brought by the shareholder; if the chairman was wrong, the company alone could sue.

**CASE LAWS**

S.NO.	CASE NAME	PROVISIONS
1	Application of Foss v. Harbottle Rule in Indian context The Delhi High Court in ICICI v. Parasrampuriah Synthetic Ltd.	It was held that an automatic application of Foss v. Harbottle Rule to the Indian corporate realities would be improper. Here the Indian corporate sector does not involve a large number of small individual investors but predominantly financial institutions funding at least 80% of the finance. It is these financial institutions which provide entire funds for the continuous existence and corporate activities. Though they hold only a small percentage of shares, it is these financial institutions which have really provided the finance for the company's existence and, therefore, to exclude them or to render them voiceless on an application of the principles of Foss v. Harbottle Rule would be unjust and unfair.
	In Rajahmundry Electric Supply Co. v. Nageshwara Rao the Supreme Court observed that:	The courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of the company by its directors so long as they are acting within the powers conferred on them under articles of the company. Moreover, if the directors are supported by the majority shareholders in what they do, the minority shareholders can, in general do nothing about it.
	Pavlides v. Jensen	A minority shareholder brought an action for damages against three directors and against the company itself on the ground that they have been negligent in selling a mine owned by the company for £ 82,000, whereas its real value was about £ 10,00,000. It was held that the



		action was not maintainable. The judge observed, “It was open to the company, on the resolution of a majority of the shareholders to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of majority to decide that if the directors by their negligence or error of judgement has sold the company’s mine at an undervalue, proceedings should not be taken against the directors

EXCEPTION OF GENERAL RULE

EXCEPTIONS AS PER DECIDED CASES

- **Ultra vires and illegal acts**

If funds of the company are misapplied by entering into ultra vires transactions, even a single member can sue the directors for recovery of damages.

Even a single member can apply to the Court to grant an injunction restraining the company from entering into an ultra vires contract.

In **Bharat Insurance Ltd. v. Kanhya Lalthe** plaintiff was a shareholder of the Bharat Insurance Company. One of the objects of the company was: “To advance money at interest on the security of land, houses, machinery and other property situated in India...” The plaintiff complained that “several investments had been made by the company without adequate security and contrary to the provisions of the memorandum and therefore, prayed for perpetual injunction to restrain it from making such investments”. The Court observed:

“In all matters of internal management, the company itself is the best judge of its affairs and the Court should not interfere. But application of assets of a company is not a matter of internal management. As directors are acting ultra vires in the application of the funds of the company, a single member can maintain a suit”.

It means that the rule in *Foss v. Harbottle* will operate in full force only when the majority of shareholders through their chosen directors act within the extent of the powers of the company

- **Fraud on minority**

Where the majority misuses its power to defraud or oppress the minority, an action can be brought by an individual member.

Though there is no clear definition of the expression “**fraud on the minority**”, but the court decides a particular case according to the surrounding facts. The general test which is applied to decide whether a case falls in the category of fraud on the minority or not is whether a resolution passed by the majority is “bona fide for benefit of the company as a whole” [**Allen v. Gold Reefs of West Africa**]

As regards the meaning of the expression “bona fide for the benefit of the company as a whole” **Evershed M.R. in Greenhalgh Ardeme Cinemas Ltd.** has observed thus : “It mean that the shareholder must proceed on what, in his honest opinion, is for the benefit, of the company as a whole. Secondly, the phrase ‘the company as a whole’ does not... mean the company as a commercial entity as distinct from the corporates. It means the corporators as a general body.



In other words, it can be said that the court ought not to interfere with decision of the majority in a general meeting if that decision is arrived at fairly and honestly In Re. **Transval Gold Exploration and Land Co. Ltd** and is not an act of fraud on the minority.

- **Wrongdoers in control**

Where the directors control majority of share capital, they will not permit the company to bring a suit against themselves. Therefore, even a single member can sue.

In **Glass v. Atkin**, a company was controlled equally by the two defendants and the two plaintiff. The plaintiff brought an action against defendants alleging that they had fraudulently converted the assets of the company for their own private use. **The Court allowed the action and observed:** “While the general principle was for the company itself to bring an action, where it had an interest, since the **two defendants** controlled the company in the sense that they would prevent the company from taking action.

- **Breach of fiduciary duties**

If directors make a secret profit, then any member can compel the directors to pay back the profits made by them

- **Infringement of rights of a member**

If any individual right of a member is infringed, the member has a right to sue the company for the enforcement of his right.

- **Resolution requiring Special Majority but is passed by a simple majority**

A shareholder can sue if an act requires a special majority but is passed by a simple majority. Simple or rigid, formalities are to be observed if the majority wants to give validity to an act which purports to impede the interest of minority. An individual shareholder has the right of action to restrain the company from acting on a special resolution to which the insufficient notice is served **Baillie v. Oriental Telephone and Electric Co. Ltd.** refer also **Nagappa Chettiar v. Madras Race Club**

- **Personal Actions**

Individual membership rights cannot be invaded by the majority of shareholders. He is entitled to all the rights and privileges appertaining to his status as a member. An individual shareholder can insist on the strict compliance with the legal rules, statutory provisions. Provisions in the memorandum and the articles are mandatory in nature and cannot be waived by a bare majority of shareholders [**Salmon v. Quin and Axtens**]. In **Nagappa Chettiar v. Madras Race Club**, it was observed by the Court that “An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election.

Where the candidature of a shareholder for directorship is rejected by the Chairman, it is an individual wrong in respect of which a suit is maintainable [**Joseph v. Jos**].

- **Prevention of Oppression and Mismanagement**

The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement.

In **Bennet Coleman & Co. v. Union of India**, the Division Bench of the Bombay High Court held that Sections 397 and 398 of the Companies Act, 1956 (now section 241-244) of companies act 2013) are intended to avoid winding up of the company if possible and keep it going while at the same time



relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs from being conducted in a manner prejudicial to public interest.

Thus, the Court has wide powers to supplant the entire corporate management by resorting to non-corporate management which may take the form of appointing an administrator or a special Officer or a committee of advisers etc., who will be in charge of the affairs of the company.

The exceptions to the rule in **Foss v. Harbottle** are not limited to those covered above. Further exceptions may be admitted where the rules of justice require that an exception to the rule should be made.

It should be noted that the ordinary civil courts are not deprived of the jurisdiction to decide the matters except where the Companies Act expressly excludes it such as matters relating to winding up. **Panipat Woollen & General Mills Co. Ltd. v. R.L. Kaushik**

CASE LAWS

Menier v Hooper's Telegraph Works Ltd.

(Majority diverting the profits of the company to another company in which they are majority shareholders)

- A compromise was made between 'Company A' and 'Company B'.
- The compromise was detrimental to the interests of 'Company A' but was favourable to 'Company B'.
- Majority of members of 'Company A' were also the members of 'Company B'.
- It was held that the majority had tried to put something in their pockets at the cost of the minority and thus minority was empowered to take an action.

Brown v BRITISH Abrasive Wheel Co.(Compulsory acquisition of shares of a minority shareholder)

- A large majority of 98% wished to buy the shares held by the minority shareholders.
- The minority shareholders refused to sell their shares.
- In order to grab the shares of minority shareholders, the majority shareholders passed a resolution altering the articles so as to enable 9/10th of the shareholders to buy the shares of any other shareholder.
- It was held that the minority could not be compelled to sell its shares to the majority.

Daniels v Daniels (sale at gross undervalue)

- A husband and wife were the only two directors in a company. They held majority shares of the company.
 - The land of the company was sold to one of the directors at gross undervalue.
- It was held that minority shareholders had a valid cause to bring an action against the directors.



EXCEPTIONS UNDER COMPANIES ACT

▪ Dissenting shareholders (if not less than 10%) may apply to the Court for the cancellation of the variation made in class rights (Sec. 48).
▪ Dissenting shareholders may apply to the Court for the purpose of restraining the transferee company from acquiring their shares (Sec.235)
▪ Requisite number of members (may make an application to NCLT for seeking relief from oppression and mismanagement (Sec. 241,242,243 and 244).
▪ Requisite number of members can demand a poll (Sec.109 Companies act 2013).
▪ Any member can apply to CLB to call AGM if default is made in holding AGM (Sec.97 Companies Act 2013).
▪ Any member can apply to CLB to call EGM if default is made in holding EGM (Sec.98 Companies Act 2013).

PREVENTION OF OPRESSION AND MISMANAGEMENT

The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement. These are the statutory rights of the minority shareholder.

OPPRESSION AND MISMANAGEMENT- MEANING

The words “oppression” and “mismanagement” are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense.

In general, **oppression** refers to *an act of majority which is harsh and burdensome on minority*.

Mismanagement refers to *gross negligence. Mere un-wise conduct of business cannot be considered as mismanagement*.

**VARIOUS CASE LAWS ON OPRESSION AND MISMANAGEMENT**

S.NO.	PARTICULARS	PROVISIONS
1	lalita rajya lakshmi v. indian motor co.	Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible shareholders should try to resolve their differences by mutual readjustment.
2	shanti prasad jain v. kalinga tubes ltd.	There must be an unfair abuse of powers and impairment of confidence in the probity with which the company's affairs are being conducted
3	re. bellador silk ltd	A member can complain of oppression only in his capacity as a member and not in his capacity as director or creditor
4	worldwide agencies pvt. ltd. v. mrs. margaret t. deposor	The legal representatives of a deceased member whose name is still on the register of members are entitled to file a petition under Sections 397 and 398 of the Companies Act, 1956, for relief against oppression or mismanagement



5	shanti prasad jain v. kalinga tubes ltd	Oppression must be a continuous process. This is suggested by the words, 'are being conducted in a manner...' used in Section 397. Hence isolated acts of oppression or mismanagement will not give rise to an action under Section 397 of the Act
6	Maharashtra Power Development Corporation Ltd. v. Dabhol Power Company	it was held that “an irregular or illegal action is not per se oppressive but the illegality of an action may have a bearing upon its oppressiveness. A single act of oppression would not ordinarily give rise to a cause of action for filing of a petition under Section 397 of the Companies Act. If the effects of a single act are burdensome, wrongful, oppressive and of continuing nature, and the member concerned is deprived of a right and privilege for all time to come in future, then the petition under Section 397 of the Act can be filed even in respect of a single act”.
7	Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. (Supra)	Supreme Court held that the true position is that “an isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed”.
8	Mr. Vasudev P Hanji & Others v. Ashok Ironworks Pvt. Ltd.	Non-Declaration of Dividend it was held that “declaration of dividend is left to the collective decision of the Board and its non-declaration cannot be termed to be an oppressive conduct”.
9	Dale and Carrington Investment (P) Ltd. v. P. K. Prathapan and Others	Increase of share capital of a company for the sole purpose of gaining control of the company would amount to oppression held that increase of share capital of a company for the sole purpose of gaining control of the company, where the majority shareholder is reduced to minority, would amount to oppression. The director holds a fiduciary position and could not on his own issue shares to himself. In such cases the oppressor would not be given an opportunity to buy out the oppressed.
10	In Chandra Krishan Gupta v. Pannalal Girdhari Lal Pvt. Ltd.	Non-Availability of Records it was held that “The non-maintaining of the assets register or records cannot amount to acts of oppression being committed on minority shareholders. Similarly, no



		maintaining of statutory books at the registered office may attract evil consequences to the directors and may also, in certain circumstances, amount to an act of mismanagement but under no circumstances, can it be regarded as an act of oppression
11	In Chandra Krishan Gupta v. Pannalal Girdhari Lal Pvt. Ltd., supra,	Non-Holding of Meetings of the Board it was held that “The non-holding of the meetings of the Board would not amount to oppression of minority shareholders. The rights of the petitioner as a director might have been affected but his rights as a minority shareholder have not been affected thereby”.
12	Chandra Krishan Gupta v. Pannalal Girdhari Lal Pvt. Ltd., supra,	Filing of Unaudited Balance Sheets it was held that “Filing of the unaudited balance sheets show misconduct in the managing of the affairs of the company. If this act causes prejudice to the company’s interests, it may justify action under Section 398 of the (Old) Act but this by itself cannot be regarded as an ingredient of oppression within the meaning of Sec. 397 of the Act.
13	[Rajkumar Devraj & Anr. v. Jai Mahal Hotels Pvt. Ltd. & Others	A shareholder dies and his heirs apply for transmission of shares while their application for succession certificate was pending before the Civil Court. The legal heirs alleged illegal allotment of shares by respondent to themselves, reducing the legal heirs to minority. It has held that the legal heirs are entitled to file a petition alleging oppression and mismanagement.
14	Five Minute Car Wash Service Ltd.	a petition founded on the ground that the managing director has been unwise, inefficient and careless in the performance of his duties could not succeed.
16	Tea Brokers P. Ltd. v. Hemendra Prosad Barooah	This is undoubtedly, a right and privilege which a member enjoys in his capacity as a member of the company such an act may be even a single act done on one particular occasion if the effect of such an act will be of a continuing nature and the member concerned is deprived of his rights and privilege for all time to come in future.
17	Thakur Prem Singh v. Thakur Hotel	Past acts of oppression will not entitle a plaintiff to seek the remedy under Section 397. The purpose of this section is not so much to take up the past as to redeem the future. A catalogue of charges of the past alleged misdeeds will not attract the section
18	Bhagirath Agarwala v.	The removal of a director and allotment of shares were set



	Tara Properties P. Ltd.	aside as they were done at a meeting which was covered without complying with the requirements of Section 286 and also reflected an oppressive policy. The allotment was made only to one member without simultaneous offer to others on pro rata basis. A single act of issue of additional shares can have a continuous effect. It can constitute oppression.
19	In Ramshankar Prasad v. Sindu Iron Foundry (P.) Ltd.	it was held that a petition under Section 397, would be maintainable even if the oppression was of a short duration and of a singular conduct if its effects persisted indefinitely

Application to Tribunal for relief in cases of oppression, etc.**Section 241**

S.NO.	PARTICULARS	PROVISIONS
1	Section 241(1)	<i>Any member of a company who complains that</i> (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply (IN FORM NCLT-1) to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.
2	Section 241(2)	The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.
	RULE 82 OF NCLT RULES 2016. Withdrawal of Application filed under	1. An application under clause (a) or clause (b) of sub-section (1) of section 241 of the Act, shall not be withdrawn without the leave of the Tribunal. 2. An Application for withdrawal under sub-rule (1) shall be filed in the Form NCLT-9.



	section 241	
3.	Section 241(3)	(3) Where in the opinion of the Central Government there exist circumstances suggesting that— (a) any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust; (b) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices; (c) a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or (d) the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest, the Central Government may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company. (4) The person against whom a case is referred to the Tribunal under sub-section (3), shall be joined as a respondent to the application. (5) Every application under sub-section (3) (a) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and (b) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908, for the signature and verification of a plaint in a suit by the Central Government.

Power of Tribunal Section 242

S.NO.	PARTICULARS	PROVISIONS
1	Section 242(1)	(1) If, on any application made under section 241, the Tribunal is of the opinion (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members



		or prejudicial to public interest or in a manner prejudicial to the interests of the company; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
2	Section 242(2)	(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for (a) the regulation of conduct of affairs of the company in future; (b) the purchase of shares or interests of any members of the company by other members thereof or by the company; (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital; (d) restrictions on the transfer or allotment of the shares of the company; (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case; (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned; (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference; (h) removal of the managing director, manager or any of the directors of the company; (i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims; (j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h); (k) appointment of such number of persons as directors, who



		may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; (l) imposition of costs as may be deemed fit by the Tribunal; (m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.
3	Section 242(3)	A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.
4	Section 242(4)	The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.
5	Section 242(5)	Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.
6	Section 242(6)	Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.
7	Section 242(7)	A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.
8	Section 242(8)	If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be ~~punishable with imprisonment for a term which may extend to six months~~ or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, ~~or with both.~~ (COMPANIES AMENDMENT ACT 2020)



Consequence of termination or modification of certain agreements section 243

S.NO.	PARTICULARS	PROVISIONS
1	Section 243(1)	(1) Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section, (a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise; (b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company: Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.
	RULE 83 OF NCLT RULES 2016 Application under section 243	(1) An application under clause (b) of sub-section (1) of section 243 of the Act for leave to any of the persons mentioned therein to be appointed or to act as the managing director or other director or manager of the company, shall be filed in Form NCLT-1 (2) An application under sub - rule (1) shall state whether a notice of intention to apply for such leave, as required under the proviso to sub-section (1) of section 243 of the Act, has been given to the Central Government and such application shall also be accompanied by a copy of such notice. (3) The notice of the date of hearing of the application together with a copy of the application shall be served on the Central Government not less than fifteen days before the date fixed for the hearing.
2	Section 243(2)	(2) Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1), and every other director of the company who is knowingly a party to such contravention, shall be ~~punishable with imprisonment for a term which may extend to six months~~ or with fine which may extend to five lakh rupees, ~~or with both.~~ (COMPANIES AMENDMENT ACT 2020)



Right to apply under section 241**section 244**

S.NO.	PARTICULARS	PROVISIONS
1	Section 244(1)	(1) The following members of a company shall have the right to apply under section 241, namely: (a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares; (b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members: Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241. Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member. RULE 83A OF NCLT RULES 2016 Application under sub-section (1) of section 244.- An application in Form No. NCLT. 9 may be filed before the Tribunal for waiver of requirement of clause (a) or (b) of Section 244 of the Act Example If a company is having 5000 members then: 100 members or one tenth of total members i.e, 500 members, which is less. In this case 100 members is the eligibility criteria.
2	Section 244(2)	Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.



SOME ANALYSIS ON SECTION 244

Whether a Shareholder is eligible to make an application under this Section?

The word used under this Section is member but not the shareholder. It implies that a person whose name is duly entered as member in the register of members only is eligible to make an application to the Tribunal under this Section.

A person who is holding shares and not entered as member in the register of members of the company is not eligible to make an application under this Section.

A member can complain of oppression only in his capacity as a member and not in his capacity as director or creditor as held in *Re. Bellador Silk Ltd.*

Person who is mentioned as Beneficiary in the records of NSDL and CDSL

The person mentioned as beneficiary is also covered in the definition of member and accordingly any person who is in the list of ben-poses being submitted by NSDL and CDSL in relation to that company is eligible to make an application to the Tribunal under this Section.

Are members holding partly paid shares eligible?

The words used in the clause (a) of sub-Section (1) of Section 244 is 'the issued share capital'. This implies the issued share capital always consists of paid-up capital either fully paid or partly paid based on the calls made by the company.

If the company has made few calls and not yet made the remaining calls to make those shares fully paid, in those circumstances also the members holding those partly paid shares are eligible as per the criteria mentioned in this Section.

But in case if the company has made calls for making the shares fully paid up and few members have not paid such calls, then they shall not be eligible under this Section to make an application with the Tribunal.

Body corporate mentioned as member in the Register of Members

If a body corporate is holding shares in the company and its name is entered in the Register of Members is also eligible to make an application. The member need not necessarily be an Individual. It can be any body corporate which is eligible to hold shares as per the provisions of any statute.

Position of Preference shareholder

Whether preference shareholder can make an application to tribunal for relief in cases of oppression and mismanagement? The answer is affirmative. Since preference shareholder is also a member as per definition of member in sub-clause (iii) of clause (55) of Section 2. Hence, he can also make an application to tribunal under this Section for relief in cases of oppression and mismanagement.

Position of Debenture holder

Whether the interest of other stakeholders such as debenture holders etc., other than members of the company is protected? Will the expression under clause (a) of sub-Section (1) which reads "...being conducted in a manner prejudicial to public interest" include interest of debentures? The definition of member does not include debenture holders either holding convertible or not, hence he can't apply to Tribunal under this Section to protect his interest. Debenture holder



being creditors, as per terms of contract, and to protect their interest they have to invoke other remedies available to them.

Position of other stakeholders

The sub-clause (a) of sub-section (1) Section 241 categorically includes the expressions “prejudicial to public interest” and “prejudicial to the interests of the company” gives ample scope to protect the interests of others stakeholders also. Though the affected person cannot approach Tribunal, member of the company can go to Tribunal by establishing the same.

CASE LAWS



S.NO.	CASE NAME	PROVISIONS
1	Re. Hindustan Co-operative Insurance Society Ltd	An attempt to force new and more risky objects upon an unwilling minority may in circumstances amount to oppression. wherein the life insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among shareholders, rather they passed a special resolution changing the objects of the company to utilise the compensation money for the new objects. This was held to be an “Oppression”. The court observed: “The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful. They attempted to force the minority shareholders to invest their money in different kind of business against their will. The minority had invested their money in a life insurance business with all its safeguards and statutory protections. But they were being forced to invest where there would be no such protections or safeguards.
2	Scottish Co-operative Wholesale Society v. Mayer	In this case, the society created a subsidiary company to enable it to enter in the rayon industry. Subsequently when the need for the subsidiary ceased to exist, the society adopted a policy of running down its business which depressed the value of its shares. The two petitioners who were managing directors and minority shareholders in the company successfully pleaded “oppression”. The court ordered the society to purchase the minority shares at the value at which they stood before the oppressive policy started.
3	Lalita Rajya Lakshmi v. Indian Motor Co.	The petitioner alleged that the Board of directors were guilty of certain acts detrimental to the minority of the shareholders. The allegations were that the income of the company was deliberately shown less by excessive expenditure; that passengers travelling without ticket on the company’s buses were not checked; that petrol consumption was not properly checked; that second hand buses of the company had been



		disposed of at low price, that dividends were being declared at too low a figure. It was held that even if each of these allegations were proved to the satisfaction of the court, there would have been no oppression.
4	K.S. Mothilal v. K.S. Kasimaris Ceranique	The legal heirs to be registered on probate or will are also entitled to apply.
5	Rajkumar Devraj v. Jai Mahal Hotels Pvt. Ltd.	A shareholder dies and his heirs apply for transmission of shares while their application for succession certificate was pending before the Civil Court. The legal heirs alleged illegal allotment of shares by respondent to themselves, reducing the legal heirs to minority. It has held that the legal heirs are entitled to file a petition alleging oppression and mismanagement.
6	Re Five Minute Car Wash Service Ltd	A petition founded on the ground that the managing director has been unwise, inefficient and careless in the performance of his duties could not succeed.
7	Re. Sindhri Iron Foundry Ltd	It should not, however, be supposed that these special remedies against oppression or mismanagement are available only to minorities. "In an appropriate case, if the court is satisfied about the act of oppression or mismanagement, relief can be granted even if the application is made by a majority, who have been rendered completely ineffective by the wrongful acts of a minority group . "Accordingly, a relief under the section was allowed to a majority group by Mitra, J., of the Calcutta High Court in In Re. Sindhri Iron Foundry Ltd . His Lordship observed that "if the court finds that the company's interest is being seriously prejudiced by the activities of one or the other group of shareholders, that two different registered offices at two different addresses have been set up, that two rival Boards are holding meetings, that the company's business, property and assets have passed to the hands of unauthorised persons who have taken wrongful possession and who claim to be the shareholders and directors there is no reason why the court should not make appropriate order to put an end to such matters.
8	Ajit Singh Ahuja v. Sapphire (India) (P) Ltd.	It was held, a member has to specifically plead on following facts - (a) what is the alleged act of oppression; (b) who committed the act of oppression; (c) how it is oppressive; (d) whether it is in the affairs of the company
9	Ramshankar Prasad v. Sindu Iron Foundry (P) Ltd	It was held that a petition under Section 397, would be maintainable even if the oppression was of a short duration and of a singular conduct if its effects persisted indefinitely.
10	Bhagirath Agarwala v. Tara Properties P Ltd	It was held that removal of a director and allotment of shares were set aside as they were done at a meeting which was



		covered without complying with the requirements of Section 286 (now section 169) and also reflected an oppressive policy.
11	Ashok Kumar Oswal v. Panchsher Textile Mfg. & Trading Co. Ltd.	The allotment was made only to one member without simultaneous offer to others on pro rata basis. A single act of issue of additional shares can have a continuous effect. It can constitute oppression. A relief can be had against it. There is no bar of limitation in such a case.
12	TATA SONS AND CYRUS MISTRY CASE	Tata Consultancy Services (TCS) is a division of Tata Sons founded on April 1, 1968. It is an Indian multinational information technology (IT) services and consulting company having its headquarterd in Mumbai, Maharashtra, India. TCS operates in 46 countries throughout the world. Cyrus Investments Private Limited is a Non-govt company, incorporated on 7 March, 1923. It operates as an investment advisor. It's a private unlisted company and is classified as 'company limited by shares'. Ratan Tata is an Indian industrialist as well as one of India's most prominent business leaders. He was the former Chairman of Tata Sons and also the former Chairman of Tata Group. Cyrus Mistry is an Indian businessman. He served as the Chairman (2012–16) of the gigantic Tata Group conglomerate. He is also one of the directors of Cyrus Investments Private Limited. In December, 2012: Cyrus Mistry was appointed as the Chairman of Tata Sons Limited chosen by a selection panel of Tata Group when Ratan Tata stepped down from the post. In October, 2016: Cyrus Mistry was removed from the post of Chairman of Tata Sons Limited by a majority of the Board of Directors for loss of confidence. On January 12, 2017: Tata Sons names N Chandrashekar as the Chairman of Tata Sons Limited, the then TCS Chief Executive Officer and Managing Director. In February, 2017: Cyrus Mistry was removed as a Director of the board of Tata Sons, by the shareholders' vote during a general meeting. Thereafter, Cyrus Mistry files a suit under Sections 241, 242 and 244 of the Companies Act, 2013 before National Company Law Tribunal (NCLT), Mumbai alleging oppression of minority shareholder rights and operational mismanagement of the Tata Sons.



	Mistry's charges alleging oppression and mismanagement Charges that Cyrus Mistry's made on part of Tata Sons to Show Oppression and mismanagement by the group: • Tata Sons abused their powers under few articles and Tata Trust exercised control over the Tata Sons board. • Removal of Cyrus Mistry as an executive chairman from Tata Sons Limited. • Transactions made with Siva and Sterling Group of Companies by Tata Groups. • Fraudulent transaction worth Rs. 22 crore in Air Asia by Tata Trusts. • The losses suffered in Nano car project clearly depicts the oppression of minority shareholder rights and mismanagement by the Tata Group. • The acquisition of Corus at overpayment by Tata Trusts. <u>NCLT, Mumbai Verdict</u> In July 2018, NCLT Mumbai Bench dismissed all the charges made against Tata Sons. The bench also rules that the Board of Directors of Tata Sons are competent enough to remove Cyrus Mistry From the post of Chairman of Tata Sons Limited. For the allegation regarding Air Asia, the bench held that it have been made with impunity by Cyrus Mistry flouting all legal principles. As regards allegations on the Nano project, NCLT held that allegations were made without making Tata Motors a party to the case. The NCLT also rejected allegations on the acquisition of Corus and the transactions made with Shiva and Sterling Group by Tata Group. The bench also states that it found no merit in the arguments on the oppression of minority shareholder rights and operational mismanagement of the Tata Sons. <u>National Company Law Appellate Tribunal (NCLAT) Verdict</u> In December, 2019, the National Company Law Appellate Tribunal (NCLAT) overturns the NCLT, Mumbai Bench judgment, and had ruled in favour of Cyrus Mistry firms.



	The NCLAT states that Mistry's removal as Chairman of Tata Sons was illegal. The NCLAT also ordered to reinstate Cyrus Mistry as chairman of Tata Sons and also termed N Chandrasekaran's appointment to the chairman's post of the over USD 100 billion salt-to-software conglomerates as 'illegal'. <u>Tata's contentions</u> In January, 2020, Tata Sons and Ratan Tata moved to Supreme Court and challenged the NCLAT decision before the Supreme Court. In its appeal Tata has contended that there was no wrongdoing involved on the part of Tata Group in the removal of Cyrus Mistry as chairman of Tata Sons Limited in October, 2016, the Tata Group also added that the board was "well within its rights to do so". Subsequently, in January, 2020 the Supreme Court granted relief to Tata Group and stays the NCLAT order of December 2019 to reinstate Cyrus Mistry as the executive chairman of Tata Sons. <u>Supreme Court Verdict:</u> The Supreme Court on March 26, 2021, pronounced its long-awaited judgement in the Tata- Cyrus Mistry case. The judgement was pronounced by a bench of Supreme Court headed by Chief Justice S A Bobde and comprising Justice V Ramasubramanian and Justice A S Bopanna. The judgement was pronounced in favour of the Tata Group. The bench dismissed all the charges of oppression and mismanagement against the Tata Sons Limited made by entities owned by Cyrus Mistry. The Supreme Court observed that "unless the removal of a person as a chairman of a company is oppressive or mismanaged or done in a prejudicial manner damaging the interests of the company, its members or the public at large, the Company Law Tribunal cannot interfere with the removal of a person as a Chairman of a Company in a petition under Section 241 of the Companies Act, 2013. The court held that mere removal of a person as Chairman of the Company is not a subject matter under Section 241 unless it is shown to be "oppressive or prejudicial". The court held that Sections 241 and 242 of the Companies Act, 2013 do not specifically confer the power of reinstatement. Therefore, The Supreme Court set aside the December 18, 2019 order of the National Company Law Appellate Tribunal



		(NCLAT) to reinstate Cyrus Mistry as executive chairman of Tata Sons. The bench also held that there was never a case, to begin with, the only dispute that arise was the removal of Cyrus Mistry as chairman of Tata Sons Limited and the companies were padding up their actual grievance with various historical facts.



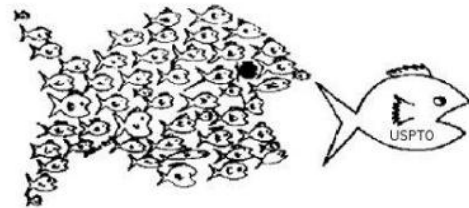
CHAPTER-30 APPLICATION TO NCLT FOR CLASS ACTION SUITS

WHAT IS A CLASS ACTION SUIT

A class action suit is a lawsuit where a group of people representing a common interest may approach the Tribunal to sue or be sued. It is a procedural instrument that enables one or more plaintiffs to file and prosecute litigation on behalf of a larger group or class having common rights and grievances.

This form of lawsuit is also called a representative action. One set of persons representing a larger group approach the court for redressed of their grievances. The rationale behind such suits are- firstly to protect the interest of members of a class who are geographically dispersed and secondly to reduce the duplication of the litigation as it combines the various proceedings initiated in different parts/jurisdiction bearing same cause of action(s). Further it also makes adjudication possible; otherwise as per the rule of necessary party all the members of a class are required to be made plaintiff, which otherwise would have made the adjudication impossible.

CLASS ACTION



This form of collective lawsuit is very popular in the **United States of America (USA)**, **United Kingdom (UK)**, **Singapore** and other **European Countries**.

In **USA**, Class Action Suits are governed by Federal Rules of Civil Procedure.

In **Singapore**, Order 15, Rule 12 of Rules of Courts governs such suits.

Likewise, in **UK**, Rule 19.6 of the Civil Procedure Rule govern the Class Action Suits.

In **India**, Class Action Suits will be governed under Section 245-246 of the Companies Act, 2013 (Act) and Rules made thereunder In India before the emergence of the of their grievances.

EVOLUTION IN INDIA

The Company Law Committee headed by Dr. J J Irani anticipated the requirement of such measure in 2005 and specifically advocated the need of such measure under Companies Act, in parallel to counterparts (i.e. USA, Singapore and UK). Subsequently in 2009, it gained its momentum with "India's Enron"- Satyam Fiasco case

wherein financial accounts were manipulated to the extent of INR 7,855 Crores. Thereafter in Companies Bill, 2009, Class Action Suits were included as a measure to be available to the members and depositors of the company to approach National Company Law Tribunal (NCLT or Tribunal), if the affairs of the company were conducted in a manner prejudicial to the interest of the company, or its members and depositors.



Types of Class Action Suits

Broadly in the global context, there are four kinds of class action suits that can be brought against a company:

- a. Product liability/Personal Injury Class Actions: Such law- suits are brought when a defective product or deficient service harms many people, for example, a drug with harmful side effects, or causing “mass accident”.
- b. Consumer Class Actions: Most common type of class action suits, these class actions suits are generally brought when a company’s systematic and illegal practices harm a group of consumer, such as violation of consumer protection laws, illegal charges and penalties etc.
- c. Employment Class Actions: Brought on behalf of employees of a company for contravention of the Labor laws, such as unpaid overtime, safety violations, workplace discrimination among others.
- d. Securities Class Actions: Securities class actions are lawsuits brought on behalf of a group of investors who have been injured as a result of a improper conduct, corporate or otherwise by the management of a company. It includes all illegal practices ranging from misstating earnings to concealing or misrepresenting risks and all unethical practices.

CLASS ACTION SUITS UNDER COMPANIES ACT 2013

Against whom a Class Action Suit can be filed? Section 245 (1)

Class action suit can be filed against the

- Company,
- Any of its directors
- Auditor, including audit firm
- Expert or advisor or consultant or any other person



Where Class Action Suit can be filed?

Before NCLT

WHAT KIND OF ORDER NCLT CAN GIVE ON CLASS ACTION SUIT

- | |
|--|
| (a) To restrain the company from committing an act which is ultra vires the articles or memorandum of the company; |
| (b) To restrain the company from committing breach of any provision of the company’s memorandum or articles; |



(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) To restrain the company and its directors from acting on such resolution;

(e) To restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) To restrain the company from taking action contrary to any resolution passed by the members;

(g) To claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) To seek any other remedy as the Tribunal may deem fit.

(2) Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

WHO CAN FILE APPLICATION UNDER SECTION 245

SECTION 245 (3)



S.no.	Type of company	Members	Depositors
<u>1</u>	in the case of a company having a share capital	not less than one hundred members of the company or not less than 5% of the total number of its members whichever is less, or any member or members holding not less than 5% of the issued share capital of the company in case of unlisted company or any member or members holding not less than 2% of the issued share capital of the company in case of listed company	shall not be less than one hundred depositors or not less than 5% of the total number of depositors whichever is less, or any depositor or depositors to whom the company owes 5% of total deposits of the company
<u>2</u>	in the case of a company	Not less than one-fifth of the total number of its members.	shall not be less than one hundred depositors or not less than 5% of the



	not having a share capital,		total number of depositors whichever is less, or any depositor or depositors to whom the company owes 5% of total deposits of the company

(4) In considering an application under sub-section (1), the Tribunal shall take into account, in particular

○ Whether the member or depositor is acting in good faith in making the application for seeking an order
○ Any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

- If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:

(a) Public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) Two class action applications for the same cause of action shall not be allowed;

(d) The cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

(6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

(7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.



NCLT RULES 2016**RULE 84****Right to apply under section 245**

(1) An application under sub-section (1) of section 245, read with sub-section (3) of section 245 of the Act, shall be filled in **Form NCLT-9**.

(2) A copy of every application under sub-rule (1) shall be served on the company, other respondents and all such persons as the Tribunal may direct.

RULE 85.**Conducting a class action suit**

(1) Without prejudice to the generality of the provisions of sub-section (4) of section 245 of the Act, the Tribunal may, while considering the admissibility of an application under the said section, in addition to the grounds specified therein, take into account the following:

(a) whether the class has so many members that joining them individually would be impractical, making a class action desirable;
(b) whether there are questions of law or fact common to the class;
(c) whether the claims or defences of the representative parties are typical of the claims or defences of the class ;
(d) whether the representative parties will fairly and adequately protect the interests of the class.

RULE 86.**Rule of opt-out**

(1) A member of a class action under section 245 of the Act is entitled to opt-out of the proceedings at any time after the institution of the class action, with the permission of the Tribunal, as per **Form No. NCLT-1**.

(2) A class member opting out shall not be precluded from pursuing a claim against the company on an individual basis under any other law, where a remedy may be available, subject to any conditions imposed by the Tribunal.

RULE 87.**Publication of notice**

For the purposes of clause (a) of sub section (5) of section 245 of the Act, on the admission of an application filed under sub-section (1) of section 245 of the Act, a public notice shall be issued by the Tribunal as per **Form No. NCLT-13** to **all the members** of the **class** by-

- publishing the same within **seven days** of admission of the Application by the Tribunal at least once in a vernacular newspaper in the principal vernacular language of the State in which the registered office of the company is situated and at least once in English in an English newspaper that is in circulation in that State;
- requiring the company to place the public notice on the website of such company, if any, in addition to publication of such public notice in newspaper under sub-clause (a):

Provided that such notice shall also be placed on the websites of the Tribunal and the Ministry of Corporate Affairs, the concerned Registrar of Companies and in respect of a listed company on the



website of the concerned stock exchange where the company has any of its securities listed, until the application is disposed of by the Tribunal.

2. The cost or expenses connected with the publication of the public notice under this rule shall be borne by the applicant and shall be defrayed by the company or any other person responsible for any oppressive act in case order is passed in favour of the applicant.

DIFFERENCE BETWEEN SECTION 241 AND 245

S.NO.	PARTICULARS	SECTION 241	SECTION 245
1	Who can apply?	Member(s)	Member(s) or Depositors(s) or any class of them
2	When can apply?	In case of oppression/mismanagement	When the affairs of the company have been or are being conducted in a manner prejudicial
3	Power of Central Government	If the affairs of the company are being conducted in a manner prejudicial to public interest, CG may itself apply under Section 241(2)	No such provisions
4	Public Notice	NO	YES
5	Consolidation of various applications under different jurisdictions	NO	YES

Actions under the CPC

Actions provided for under Order 1, Rule 8 of the CPC can be filed by the concerned persons before a court by seeking the permission of the court or by the direction of the court. The action must be filed before the appropriate court with requisite territorial and pecuniary jurisdiction. While territorial jurisdiction is determined based on (among others) cause of action and/or locations of defendants, pecuniary jurisdiction is based on the valuation of the lawsuit, and differs across different states in India.

The provisions regarding the filing of representative actions are set out under Order 1, Rule 8 of the CPC. Under this rule, an individual or group of individuals can file an action for the benefit



of all persons interested in the subject matter of the litigation. However, to bring an action the following conditions must be met:

(a) Numerous parties must be present in the representative action.
(b) All parties must share the same interest (commonality of interest).
(c) The action is maintainable only upon seeking prior permission of the court.
(d) On permission being given by court, the court must issue notice to all the interested parties.
(e) No part of the action can be withdrawn or a compromise recorded unless notice is given to all interested persons. (f) If the person suing or defending in representative capacity is not acting with due diligence, the court can substitute in his place any other person with the same interest in the representative action.

Consequently, a decree passed by the court in a representative action will be binding on all persons on whose behalf, or for whose benefit, the suit was instituted, or defended (as the case may be) (Order 1 Rule 8(6), CPC).

In addition to Order 1 Rule 8, the CPC has another provision relating to collective action. Section 91 empowers two or more persons to file a suit with the permission of the court to seek a declaration and injunction or any such other relief against public nuisance or other wrongful act affecting, or likely to affect the public. Such an action can be brought even if no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

In a representative suit there are numerous plaintiffs with different complaints and claims represented by one. In this one case is not taken as a base whereas each and every case or claim is discussed while deciding this particular representative suit. However the Scope of Order 1 Rule 8 of CPC is much wider than the one specified u/s. 245 of the 2013 Act.

Actions under the CPA

The CPA seeks to provide simple and speedy redressal to consumer disputes by establishing quasi-judicial machinery at district, state and national levels. Depending on the value of the claim, a complaint under the CPA can be filed before the:

(a) District Forum (for claims of up to INR 20 lakhs). This is a consumer dispute redressal forum established by the State Government in each district of the State by notification.

(b) State Commission (for claims of between INR 20 lakhs and INR 1 crore). This is a Consumer Disputes Redressal Commission established by the State Government in the State by notification.



(c) National Commission (for claims of more than INR 1 crore). This is the Consumer Disputes Redressal Commission established by the Central Government by notification.

Under section 12(1)(c) of the CPA, one or more consumers with the same interest (as well as consumers acting on behalf of, or for the benefit of all consumers) can file a complaint with the District Forum in relation to:

- (a) Any goods sold or delivered, or agreed to be sold or delivered.
- (b) Any service provided, or agreed to be provided.
- (c) Such a complaint can only be filed with the permission of a District Forum.

Actions under the Competition Act

Applications made under section 53(N)(1) of the Competition Act must be filed before the Competition Appellate Tribunal (COMPAT). The Competition Act recognises the need to compensate parties for loss or damage caused as a result of anti-competitive conduct. The Competition Act also recognises that the conduct of parties may affect numerous parties for whom an individual claim may not be viable, accordingly, it provides for class actions as a form of redressal for numerous parties affected by anti-competitive conduct. Where numerous persons with the same interest have suffered loss or damage caused by the anti-competitive conduct of an enterprise (upheld by a decision of the Competition Commission of India (CCI) or the COMPAT) one or more such persons as well as persons acting for and on behalf of all persons can make an application to the COMPAT for the recovery of compensation for any loss or damage suffered (section 53N(4), Competition Act).

However, an application for compensation can only be made to the COMPAT either:

- (a) When the CCI or the COMPAT has determined in the prior proceedings that there has been a violation of the provisions of the Competition Act.
- (b) Where section 42A or section 53Q(2) of the Competition Act apply. These provisions provide a right to make an application for compensation when parties have suffered damage as a result of an enterprise contravening directions from the CCI or COMPAT.

In such cases, the provisions of Order 1, Rule 8 of the CPC apply subject to the following modifications:

- (a) Every reference therein to a lawsuit must be construed as a reference to the aforementioned application to the COMPAT.
- (b) Every reference to a decree must be construed as a reference to the order of the COMPAT.



Public Interest Litigation

Public Interest Litigation (“PILs”) in common parlance means a legal action filed for the interest of general public. It is a tool for safeguarding the socio economic rights and Judiciary has used it as a weapon against the wrongdoers. Class Action has been brought up on the same lines but there are some key differences between the two of them. Class Action can be filed against any entity including private entities whereas PILs can only be filed against State or Public Authorities in High Court or Supreme Court. Representative in the Class Action Suit must suffer an injury or have interest in the claim whereas there is no such requirement in PIL for the plaintiff.

Industrial disputes/collective bargaining under the IDA

Representative actions through collective bargaining can be said to be permitted under the IDA, as industrial jurisprudence is based on class- action or representative litigation. The IDA permits collective bargaining by employees/workers as represented by their unions (which to some extent is an embodiment of the common law principles of representative litigation). The concept was evolved to enable poor workmen to unite together and press their demand collectively in order to confront a powerful employer.

Procedure for Compounding Of Offence

- Prepare the compounding application alongwith the following documents:
- Affidavit verifying the application
- Memorandum of appearance or Power of Attorney
- Copy of notice from RoC if any
- Other necessary documents
- File e-form GNL-1
- Joint application by the Company and Officer in default can be made
- Based on the quantum of penalty, ROC will forward the application to RD or NCLT
- Passing of order by RD or NCLT l File e-form INC 28 for intimation of Order.



CHAPTER-31 APPLICATION TO NCLT FOR WINDING UP

PETITION FOR WINDING UP

According to section 272(1), subject to the provisions of this section, a petition to NCLT for the winding up of a company shall be presented by—

(a) the company;
(b) any contributory or contributories;
(c) all or any of the persons specified in clauses (a) and (b);
(d) the Registrar;
(e) any person authorised by the Central Government in that behalf; or
(f) in a case falling under clause (c) of sub-section (1) of section 271, by the Central Government or a State Government.

Section 272(2) provides that a contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

Section 272(3) provides that the Registrar shall be entitled to present a petition for winding up under section 271, except on the grounds specified in clause (a) of that section:

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

Section 272(4) provides that a petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.



Section 272(5) provides that a copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.”.

THE COMPANIES (WINDING UP) RULES, 2020

Petition for winding up (Rule 3)

(1) For the purposes of sub-section (1) of section 272, a petition for winding up of a company shall be presented in Form WIN 1 or Form WIN 2, as the case may be, with such variations as the circumstances may require, and shall be presented in triplicate.

(2) Every petition shall be verified by an affidavit made by the petitioner or by the petitioners, where there are more than one petitioners, and in case the petition is presented by a body corporate, by the Director, Secretary or any other authorised person thereof, and such affidavit shall be in Form WIN 3.



CHAPTER-32 ADJUDICATION AND E-ADJUDICATION

ADJUDICATION AND E-ADJUDICATION

Section 454 of the Companies Act, 2013 provides the substantive law relating to Adjudication of penalties for companies.

It inter alia provides that:

The Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of Companies Act in the manner as may be prescribed.

The Central Government shall while appointing adjudicating officers, specify their jurisdiction.

The adjudicating officer may, by an order-

- (a) impose the penalty on the company, the officer who is in default, or any other person, stating therein any non-compliance or default under the relevant provisions of this Act; and
- (b) direct such company, or officer who is in default, or any other person, to rectify the default, wherever he considers fit.

However, in case the default relates to non-compliance of sub-section (4) of section 92 or sub-section (1) or subsection (2) of section 137 and such default has been rectified either prior to, or within thirty days of, the issue of the notice by the adjudicating officer, no penalty shall be imposed in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.

The adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company, the officer who is in default or any other person.

Any person aggrieved by an order made by the adjudicating officer under sub-section (3) may prefer an appeal to the Regional Director having jurisdiction in the matter.

Every appeal as mentioned above shall be filed within sixty days from the date on which the copy of the order made by the adjudicating officer is received by the aggrieved person.

The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against.



THE COMPANIES (ADJUDICATION OF PENALTIES) RULES, 2014**Adjudication of Penalties (Rule 3)**

The central government can appoint any officers, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of the Companies Act(the Act).

Before adjudging penalty, the adjudging officer shall issue a written notice in the specified manner, to the company, the officer who is in default or any other person, as the case may be, to show cause, within such period as may be specified in the notice (not being less than fifteen days and more than thirty days from the date of service thereon), why the penalty should not be imposed on it or him.

Every notice issued as mentioned above, shall clearly indicate the nature of non-compliance or default under the Act alleged to have been committed or made by such company, officer in default, or any other person, and also draw attention to the relevant penal provisions of the Act and the maximum penalty which can be imposed.

The reply to such notice shall be filed in electronic mode only within the period as specified in the notice:

Provided that the adjudicating officer may, for reasons to be recorded in writing, extend the period referred to above by a further period not exceeding fifteen days, if the company or officer in default or any person, satisfies the adjudicating officer that it or he has sufficient cause for not responding to the notice within the stipulated period or the adjudicating officer has reason to believe that the company or the officer or the person has received a shorter notice and did not have reasonable time to give reply.

If, after considering the reply submitted, the adjudicating officer is of the opinion that physical appearance is required, he shall issue a notice, within a period of ten working days from the date of receipt of reply fixing a date for the appearance of such company, through its authorised representative, or officer of such company, or any other person, whether personally or through his authorised representative:

However, if any person, to whom a notice is issued, desires to make an oral representation, whether personally or through his authorised representative and has indicated the same while submitting his reply in electronic mode, the adjudicating officer shall allow such person to make such representation after fixing a date of appearance.

On the date fixed for hearing and after giving a reasonable opportunity of being heard to the person concerned, the adjudicating officer may, subject to reasons to be recorded in writing, pass any order in writing as he thinks fit including as order for adjournment:



However, after hearing, adjudicating officer may require the concerned person to submit his reply in writing on certain other issues related to the notice, relevant for determination of the default.

The adjudicating officer shall pass an order,-

- (a) within thirty days of the expiry of the period in sub-rule (2), or of such extended period as referred therein, where physical appearance was not required;
- (b) within ninety days of the date of issue of notice under rule (2), where any person appeared before the adjudicating officer.

However, in case an order is passed after the aforementioned duration, the reasons of the delay shall be recorded by the adjudicating officer and no such order shall be invalid merely because of its passing after the expiry of such thirty days or ninety days.

Every order of the adjudicating officer shall be duly dated and signed by him and shall clearly state the reasons for requiring the physical appearance under sub-rule (5)

The adjudicating officer shall send a copy of the order passed by him to the concerned company, officer who is in default or any other person or all of them and to the Central Government and a copy of the order shall also be uploaded on the website.

For the purposes of this rule, the adjudicating officer shall exercise the following powers, namely:

- (a) to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case after recording reasons in writing;
- (b) to order for evidence or to produce any document, which in the opinion of the adjudicating officer, may be relevant to the subject matter.

If any person fails to reply or neglects or refuses to appear as required under sub-rule (5) or sub-rule (10) before the adjudicating officer, the adjudicating officer may pass an order imposing the penalty, in the absence of such person after recording the reasons for doing so.

While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:-

- (a) size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest;
- (d) nature of the default;



(e) repetition of the default;

(f) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and

(g) the amount of loss caused to an investor or group of investors or creditors as a result of the default.

However, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Companies Act.

In case a fixed sum of penalty is provided for default of a provision, the adjudicating officer shall impose that fixed sum, in case of any default therein.

Appeal Against the Order of Adjudicating Officer (Rule 4)

Every appeal against the order of the adjudicating officer shall be filed in writing with the Regional Director having jurisdiction in the matter within a period of sixty days from the date of receipt of the order of adjudicating officer by the aggrieved party, in Form ADJ setting forth the grounds of appeal and shall be accompanied by a certified copy of the order against which the appeal is sought:

However, where the party is represented by an authorised representative, a copy of such authorisation in favour of the representative and the written consent thereto by such authorised representative shall also be appended to the appeal.

Further, an appeal in Form ADJ shall not seek relief(s) therein against more than one order unless the reliefs prayed for are consequential.

Registration of Appeal (Rule 5)

On the receipt of an appeal, office of the Regional Director shall endorse the date on such appeal and shall sign such endorsement.

If, on scrutiny, the appeal is found to be in order, it shall be duly registered and given a serial number. Further, where the appeal is found to be defective, the Regional Director may allow the appellant such time, not being less than fourteen days following the date of receipt of intimation by the appellant from the Regional Director about the nature of the defects, to rectify the defects and if the appellant fails to rectify such defects within the time period allowed as above, the Regional Director may by order and for reasons to be recorded in writing, decline to register such appeal and communicate such refusal to the appellant within a period of seven days thereof.

The Regional Director may, for reasons to be recorded in writing, may further extend the period referred to in above above by a further period of fourteen days if an appellant satisfies



the Regional Director that the appellant had sufficient cause for not rectifying the defects within the period of fourteen days referred to in the first proviso.

Disposal of Appeal by Regional Director (Rule 6)

On the admission of the appeal, the Regional Director shall serve a copy of appeal upon the adjudicating officer against whose order the appeal is sought along-with a notice requiring such adjudicating officer to file his reply thereto within such period, not exceeding twenty-one days, as may be stipulated by the Regional Director in the said notice.

However, the Regional Director may, for reasons to be recorded in writing, extend the period referred above for a further period of twenty-one days, if the adjudicating officer satisfies that he had sufficient cause for not being able to file his reply to the appeal within the above-said period.

A copy of every reply, application or written representation filed by the adjudicating officer before the Regional Director shall be forthwith served on the appellant by the adjudicating officer.

The Regional Director shall notify the parties, the date of hearing of the appeal which shall not be a date earlier than thirty days following the date of such notification for hearing of the appeal.

On the date fixed for hearing the Regional Director may, subject to the reasons to be recorded in writing, pass any order as he thinks fit including an order for adjournment of the hearing to a future date.

In case the appellant or the adjudicating officer does not appear on the date fixed for hearing, the Regional Director may dispose of the appeal ex-parte:.

However, where the appellant appears afterwards and satisfies the Regional Director that there was sufficient cause for his nonappearance, the Regional Director may make an order setting aside the ex-parte order and restore the appeal.

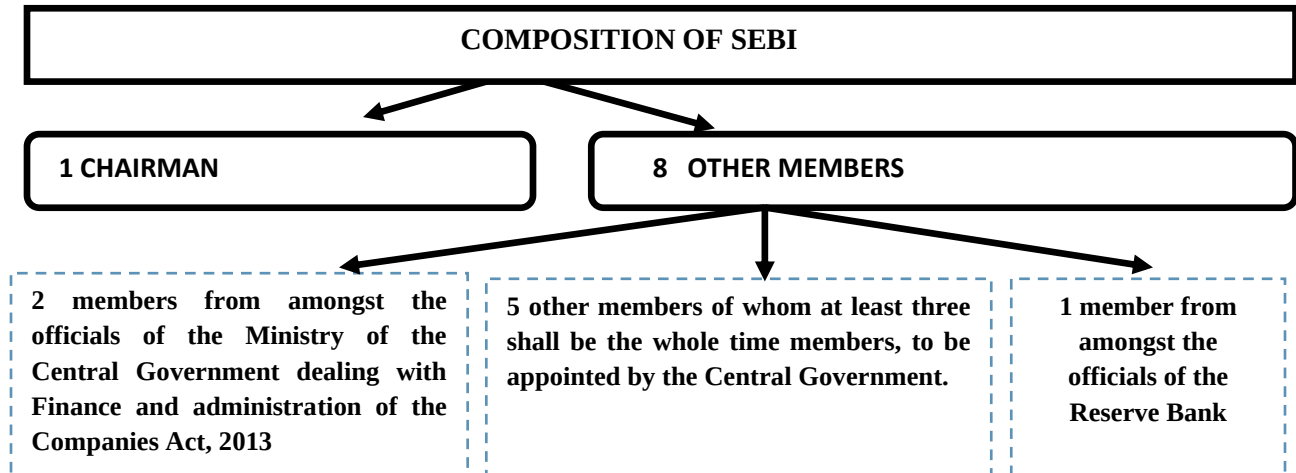
Every order passed under this rule shall be dated and signed by the Regional Director.

A certified copy of every order passed by the Regional Director shall be communicated to the adjudicating officer and to the appellant forthwith and to the Central Government.



CHAPTER-33 ADJUDICATION UNDER SEBI LAWS

1. The SEBI Act, 1992 establishes SEBI.
2. SEBI has its Head Office at Mumbai and has powers to establish its offices at other places in India.
3. SEBI presently has offices also in Kolkata, New Delhi and Chennai.
4. SEBI having status of body corporate.
5. The main functions of SEBI are to protect the interest of investors and to promote development of security market.



The Chairman and the other members are from amongst the persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to **SEBI**. The terms and conditions of service of Chairman and members are determined in the rules framed by Government in this regard.

The general superintendence, direction and management of the affairs of SEBI vests in a Board of members, which exercises all powers and do all acts and things which may be exercised or done by SEBI. Unless determined otherwise through regulations, the Chairman shall also have all these powers

POWERS AND FUNCTIONS OF SEBI

Section 11 of the Act lays down functions of Board

• Protecting the interests of investors in securities,
• Promoting the development of the securities market, and
• Regulating the securities market
• regulating the business in stock exchanges and any other securities markets;
• Registering and regulating the working of various market intermediaries.
• prohibiting fraudulent and unfair trade practices relating to securities markets;
• promoting investors' education and training of intermediaries of securities markets;
• prohibiting insider trading in securities;



• regulating substantial acquisition of shares and takeover of companies;
• calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries in the securities market;
• performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956, as may be delegated to it by the Central Government;

For carrying out the duties assigned to it under the Act, SEBI has been vested with the same **powers** as are available to a Civil Court under the Code of Civil Procedure, 1908 for trying a suit in respect of the following matters:

(a) The discovery and production of books of account and other documents at the place and time indicated by SEBI.
(b) Summoning and enforcing the attendance of persons and examining them on oath.
(c) inspection of any books, registers and other documents of any person listed in section 12 of the Act, namely stock brokers, sub brokers, share transfer agents, bankers to an issue, trustee of trust deed, registrar to an issue, merchant bankers, underwriters, portfolio managers, investment advisors and other such intermediaries associated with securities markets.
(d) Issuing commissions for the examination of witnesses or documents.

Powers to issue directions and levy penalty under Section 11B of SEBI Act, 1992

If after making or causing to be made an enquiry, the Board is satisfied that it is necessary, –

- (i) in the interest of investors, or orderly development of securities market; or
- (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 of SEBI Act, 1992 being conducted in a manner detrimental to the interest of investors or securities market; or
- (iii) to secure the proper management of any such intermediary or person.

It may issue such directions, –

- (a) to any person or class of persons referred to in section 12, or associated with the securities market; or
- (b) to any company in respect of matters specified in section 11A of SEBI Act, 1992, as may be appropriate in the interests of investors in securities and the securities market.

Explanation. – For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.



The SEBI Act laid down the heavy penal consequences for non-compliance under section 15A to 15HB of the Act. However, the quantum of penalty and power of adjudication was provided under section 15I & J of the Act which has to be read along with sections pertaining to penal provisions.

Penalties for Failures

Section 15A lays down that if any person who is required under SEBI Act or any rules or regulations made thereunder:

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| <ul style="list-style-type: none"> to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less. |
| <ul style="list-style-type: none"> to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less. |
| <ul style="list-style-type: none"> To maintain books of accounts or records, fails to maintain the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less. |

Section 15B lays down that if any person who is registered as an Intermediary and is required under this Act or any rules or regulations made thereunder, to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to pay a penalty of **one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.**

Section 15C lays down that if any listed company or any person who is registered as an Intermediary, after having been called upon by SEBI in writing to redress the grievances of Investor, fails to redress such grievances within the time specified by the Board, such company or intermediary shall be liable to pay a penalty of **one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.**

PENALTIES FOR DEFAULT

Section 15D lays down that in case of mutual funds, if any person who is:

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| <ul style="list-style-type: none"> registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration, he shall be liable to a penalty of minimum one lakh rupees and maximum one crore rupees. |
| <ul style="list-style-type: none"> registered with the Board as a collective investment scheme, including mutual funds, fails to make an application for listing of its schemes as provided for in the regulations governing such listing, he shall be liable to penalty of minimum one lakh rupees and maximum one crore rupees. |



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| <ul style="list-style-type: none"> registered as a collective investment scheme, including mutual funds, fails to dispatch unit certificates of any scheme in the manner provided in the regulation governing such dispatch, he shall be liable to a penalty minimum one lakh rupees and maximum one crore rupees. |
| <ul style="list-style-type: none"> registered as a collective investment scheme, including mutual funds, fails to refund the application monies paid by the investors within the period specified in the regulations, he shall be liable to a penalty of minimum one lakh rupees and maximum one crore rupees. |
| <ul style="list-style-type: none"> registered as a collective investment scheme, including mutual funds, fails to invest money collected by such collective investment schemes in the manner or within the period specified in the regulations, he shall be liable to a penalty of one minimum one lakh rupees and maximum one crore rupees. |

Section 15E lays down that where any asset management company of a mutual fund registered under SEBI Act fails to comply with any of the regulation providing for restrictions on the activities of such company, **it shall be liable to a penalty which shall not be less than one lakh rupees but which may extend one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.**

Section 15F provides penalties for default in case of stock brokers. As per the Section, if any person registered as a stock broker under SEBI Act -

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| <ul style="list-style-type: none"> fails to issue contract notes in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be a penalty which shall not be less than one lakh rupees but which may extend to for which the contract note was required to be issued by that broker |
| <ul style="list-style-type: none"> fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less |
| <ul style="list-style-type: none"> charges an amount of brokerage which is in excess of the brokerage specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less; |

PENALTY FOR INSIDER TRADING

Section 15G lays down that if any insider:

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| <ul style="list-style-type: none"> either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information; or |
| <ul style="list-style-type: none"> communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or |
| <ul style="list-style-type: none"> counsels, or procures for any other person to deal in any securities of anybody corporate on the basis of unpublished price sensitive information, |

he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.



PENALTY FOR NON-DISCLOSURE OF ACQUISITION OF SHARES AND TAKEOVERS

Section 15H lays down that if any person fails to:

• disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or
• make such a public announcement to acquire shares at a minimum price, he shall be liable to a penalty not exceeding five lakh rupees;
• make a public offer by sending letter of offer to the shareholders who sold their shares pursuant to letter of offer,

he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher

Section 15HA provides that if a person indulges in fraudulent and unfair trade practices relating to securities, **he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.**

PENALTY FOR CONTRAVENTION SEC. 15 HB

Whoever fails to comply with any provision of this Act, the rules or regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, **shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees**

Penalties under Securities Contracts (Regulation) Act, 1956

SECTION	CAUSE	PENALTY
23(1)	Any person who- (a) without reasonable excuse (the burden of proving which shall be on him) fails to comply with any requisition made under sub-section (4) of section 6; or (b) enters into any contract in contravention of any of the provisions contained in section 13 or section 16; or (c) contravenes the provisions contained in section 17 or section 17A, or section 19; or (d) enters into any contract in derivative in contravention of section 18A or the rules made under section 30; (e) owns or keeps a place other than that of a	be punishable with imprisonment for a term which may extend to ten years or with fine, which may extend to twenty-five crore rupees, or with both.



	recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act and knowingly permits such place to be used for such purposes; or (f) manages, controls, or assists in keeping any place other than that of a recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act or at which contracts are recorded or adjusted or rights or liabilities arising out of contracts are adjusted, regulated or enforced in any manner whatsoever; or (g) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17 wilfully represents to or induces any person to believe that contracts can be entered into or performed under this Act through him; or (h) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17, canvasses, advertises or touts in any manner either for himself or on behalf of any other persons for any business connected with contracts in contravention of any of the provisions of this Act; or (i) joins, gathers or assists in gathering at any place other than the place of business specified in the bye-laws of a recognised stock exchange any person or persons for making bids or offers or for entering into or performing any contracts in contravention of any of the provisions of this Act; shall, without prejudice to any award of penalty by the Adjudicating Officer or the Securities and Exchange Board of India under this Act, on conviction	
23(2)	Any person who enters into any contract in contravention of the provisions contained in section 15 or who fails to comply with the provisions of section 21 or section 21A or with the orders of or section 22 or with the orders of the Securities Appellate Tribunal shall, without prejudice to any award of penalty by the Adjudicating Officer under	punishable with imprisonment for a term which may extend to ten years or with fine, which may extend to twenty-five crore rupees, or with both.



	this Act, on conviction	
23A	<u>Penalty for failure to furnish information, return, etc.</u> Any person who fails to furnish any information, document, books, returns or report to a recognised stock exchange, fails to furnish the same within the time specified therefor in the listing agreement or conditions or bye-laws of the recognised stock exchange or who furnishes false, incorrect or incomplete information, document, books, return or report,	shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees for each such failure;
23B	<u>Penalty for failure by any person to enter into an agreement with clients.</u> If any person, who is required under this Act or any bye-laws of a recognised stock-exchange made thereunder, to enter into an agreement with his client, fails to enter into such an agreement,	he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees for every such failure.
23C	<u>Penalty for failure to redress investors' grievances</u> If any stock broker or sub-broker or a company whose securities are listed or proposed to be listed in a recognised stock exchange, after having been called upon by the Securities and Exchange Board of India or a recognised stock exchange in writing, to redress the grievances of the investors, fails to redress such grievances within the time stipulated by the Securities and Exchange Board of India or a recognised stock exchange	he or it shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees
23D	<u>Penalty for failure to segregate securities or moneys of client or clients</u> If any person, who is registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) as a stock broker or sub-broker, fails to segregate securities or moneys of the client or clients or uses the securities or moneys of a client or clients for self or for any other client	he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.
23E	<u>Penalty for failure to comply with provision of</u>	it or he shall be liable



	<u>listing conditions or delisting conditions or grounds.</u> If a company or any person managing collective investment scheme or mutual fund or real estate investment trust or infrastructure investment trust or alternative investment fund, fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof.	to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.
23F	<u>Penalty for excess dematerialisation or delivery of unlisted securities.</u> If any issuer dematerialises securities more than the issued securities of a company or delivers in the stock exchanges the securities which are not listed in the recognised stock exchange or delivers securities where no trading permission has been given by the recognized stock exchange	he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.
23G	<u>Penalty for failure to furnish periodical returns, etc.</u> If a recognised stock exchange fails or neglects to furnish periodical returns or furnishes false, incorrect or incomplete periodical returns to the Securities and Exchange Board of India or fails or neglects to make or amend its rules or bye-laws as directed by the Securities and Exchange Board of India or fails to comply with directions issued by the Securities and Exchange Board of India	such recognised stock exchange shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.
23GA	<u>Penalty for failure to conduct business in accordance with rules, etc.</u> Where a stock exchange or a clearing corporation fails to conduct its business with its members or any issuer or its agent or any person associated with the securities markets in accordance with the rules or regulations made by the Securities and Exchange Board of India and the directions issued by it under this Act	the stock exchange or the clearing corporations, as the case may be, shall be liable to penalty which shall not be less than five crore rupees but which may extend to twenty-five crore rupees or three times the amount of gains made out of such failure, whichever is higher.
23H	<u>Penalty for contravention where no separate penalty has been provided.</u> Whoever fails to comply with any provision of this	shall be liable to a penalty which shall not be less than one lakh rupees but which may



	Act, the rules or articles or bye- laws or the regulations of the recognised stock exchange or directions issued by the Securities and Exchange Board of India for which no separate penalty has been provided	extend to one crore rupees.

PENALTIES UNDER DEPOSITORIES ACT, 1996

Section 19A	Penalty for failure to furnish information, return, etc. Any person, who is required under this Act or any rules or regulations or bye-laws made thereunder, – (a) to furnish any information, document, books, returns or report to the Board, fails to furnish the same within the time specified therefor, or who furnishes or files false, incorrect or incomplete information, return, report, books or other documents he shall be liable to: (b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations or bye-laws, fails to file return or furnish the same within the time specified therefor, he or who furnishes or files false, incorrect or incomplete information, return, report, books or other documents shall be liable to: (c) to maintain books of account or records, fails to maintain the same, he shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees for each such failure. a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees. a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.



Section 19B	Penalty for failure to enter into an agreement. If a depository or participant or any issuer or its agent or any person, who is registered as an intermediary under the provisions of section 12 of the Securities and Exchange Board of India Act, 1992, and is required under this Act or any rules or regulations made thereunder, to enter into an agreement, fails to enter into such agreement, such depository or participant or issuer or its agent or intermediary shall be liable to	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees for every such failure.
Section 19C	Penalty for failure to redress investors' grievances. If any depository or participant or any issuer or its agent or any person, who is registered as an intermediary under the provisions of section 12 of the Securities and Exchange Board of India Act, 1992, after having been called upon by the Board in writing, to redress the grievances of the investors, fails to redress such grievances within the time specified by the Board, such depository or participant or issuer or its agents or intermediary shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
Section 19D	Penalty for delay in dematerialisation or issue of certificate of securities. If any issuer or its agent or any person, who is registered as an intermediary under the provisions of section 12 of the Securities and Exchange Board of India Act, 1992, fails to dematerialise or issue the certificate of securities on opting out of a depository by the investors, within the time specified under this Act or regulations or bye-laws made thereunder or abets in delaying the process of dematerialisation or issue the certificate of securities on opting out of a depository of securities, such issuer or its agent or intermediary shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.



Section 19E	Penalty for failure to reconcile records. If a depository or participant or any issuer or its agent or any person, who is registered as an intermediary under the provisions of section 12 of the Securities and Exchange Board of India Act, 1992, fails to reconcile the records of dematerialised securities with all the securities issued by the issuer as specified in the regulations, such depository or participant or issuer or its agent or intermediary shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
Section 19F	Penalty for failure to comply with directions issued by Board under section 19 of the Act. If any person fails to comply with the directions issued by the Board under section 19, within the time specified by it, he shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
Section 19 FA	Penalty for failure to conduct business in a fair manner Where a depository fails to conduct its business with its participants or any issuer or its agent or any person associated with the securities markets in a fair manner in accordance with the rules, regulations made by the Board or directions issued by the Board under this Act, it shall be liable to:	a penalty which shall not be less than five crore rupees but which may extend to twenty-five crore rupees or three times the amount of gains made out of such failure, whichever is higher.
Section 19G	Penalty for contravention where no separate penalty has been provided. Whoever fails to comply with any provision of this Act, the rules or the regulations or bye-laws made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to:	a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.



NON-COMPLIANCE WITH CERTAIN PROVISIONS OF THE SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

SEBI vide its various circulars dated November 30, 2015, October 26, 2016 and May 13, 2018 laid down the framework for imposing penalty and taking action against such listed entities which violate the provisions of the SEBI Listing Regulations. Considering the various amendments under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 pursuant to the Kotak Committee recommendations, SEBI thought fit to bring yet another circular making amendments to the existing framework. The circular dated January 22, 2020, is in supersession to the earlier circular dated May 13, 2018. Further as per SEBI circular dated March 26, 2020 ref no.

SEBI/HO/CFD/CMD1/CIR/P/2020/48 the circular dated January 22, 2020 shall come into force with effect from compliance periods ending on or after June 30, 2020. Therefore, June 30, 2020 is the 1st quarter for monitoring of non-compliant companies as per provisions of circular dated January 22, 2020.

SEBI vide circular dated January 22, 2020 (ref no. SEBI/HO/CFD/CMD/CIR/P/2020/12) have specified uniform approach in the matter of levy of fines for non-compliance with certain provisions of the Listing Regulations, the manner of suspension of trading of securities of a listed entity and the manner of freezing the holdings of the promoter of a non-compliant listed entity.

The recognized stock exchanges shall take action for non-compliance with the provisions of the Listing Regulations & circulars/guidelines issued thereunder, by a listed entity as under:

Sl. No.	Regulations under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015	Fine payable and/or other action to be taken for noncompliance in respect of listed entity
1	Regulation 6(1) Non-compliance with requirement to appoint a qualified company secretary as the compliance officer	Rs. 1000 per day
2	Regulation 7(1) Non-compliance with requirement to appoint share transfer agent	Rs. 1000 per day
3	Regulation 13(1) Failure to ensure that adequate steps are taken for expeditious redressal of investor complaints	Rs. 1000 per day
4	Regulation 13(3) Non-submission of the statement on shareholder complaints within the period prescribed under this regulation or under any circular issued in respect of redressal of investor grievances	Rs. 1000 per day



5	Regulation 17(1) Non-compliance with the requirements pertaining to the composition of the Board including failure to appoint woman director	Rs. 5000 per day
6	Regulation 17(1A) Non-compliance with the requirements pertaining to appointment or continuation of Non-executive director who has attained the age of seventy five years	Rs. 2000 per day
7	Regulation 17(2) Non-compliance with the requirements pertaining to the number of Board meetings	Rs. 10,000 per instance
8	Regulation 17(2A) Non-compliance with the requirements pertaining to quorum of Board meetings.	Rs. 10,000 per instance
9	Regulation 18(1) Non-compliance with the constitution of audit committee	Rs. 2000 per day
10	Regulation 19(1)/ 19(2) Non-compliance with the constitution of nomination and remuneration committee	Rs. 2000 per day
11	Regulation 20(2) / (2A) Non-compliance with the constitution of stakeholder relationship committee	Rs. 2000 per day
12	Regulation 21(2) Non-compliance with the constitution of risk management committee	Rs. 2000 per day
13	Regulation 23(9) Non-compliance with disclosure of related party transactions on consolidated basis.	Rs. 5000 per day
14	Regulation 24A Non-compliance with submission of secretarial compliance report	Rs. 2000 per day
15	Regulation 27(2) Non-submission of the Corporate governance compliance report within the period provided under this regulation	Rs. 2000 per day
16	Regulation 28 (1) Non-compliance with obtaining in-principle approval of stock exchange(s) before issuance of securities	Rs. 50,000 per instance
17	Regulation 29(2)/29(3) Delay in furnishing prior intimation about the meeting of the board of directors	Rs. 10,000 per instance of non-compliance per item
18	Regulation 31 Non-submission of shareholding pattern within the period prescribed	Rs. 2000 per day
19	Regulation 31A(3)(a) Non-compliance pertaining to delay in submission of reclassification application to stock exchanges	Rs. 5,000 per day



20	Regulation 32(1) Non-submission of deviations/ variations in utilization of issue proceeds	Rs.1000 per day
21	Regulation 33 Non-submission of the financial results within the period prescribed under this regulation	Rs. 5,000 per day
22	Regulation 34 Non-submission of the Annual Report within the period prescribed under this regulation	Rs. 2,000 per day
23	Regulation 42(2)/42(3)/ 42(4)/42(5) Delay in/ non-disclosure of record date/ dividend declaration or non-compliance with ensuring the prescribed time gap between two record dates/ book closure dates	Rs. 10,000 per instance of non-compliance per item
24	Regulation 43A Non-disclosure of Dividend Distribution Policy in the Annual Report and on the websites of the entity	Rs. 25,000 per instance
25	Regulation 44(3) Non-submission of the voting results within the period provided under this regulation	Rs. 10,000 per instance of non-compliance
26	Regulation 44(5) Non-convening of annual general meeting within a period of five months from the close of financial year	Rs. 25,000 per instance
27	Regulation 45(3) Non-obtaining approval of stock exchange(s) before filing request for change of name with Registrar of Companies	Rs. 25,000 per instance
28	Regulation 46 Non-compliance with norms pertaining to functional website	Advisory/warning letter per instance of non-compliance per item Advisory/warning letter per instance of non-compliance per item

Fine to be levied in case of non-compliance(s) by issuers of listed Non-convertible Securities w.e.f. August 01, 2022

Sl. No.	Regulation	Fine payable and/or other action to be taken for noncompliance in respect of an entity having listed its Non Convertible Securities



4	Regulation 13(3) Non-submission of the statement on debenture holder complaints within the period prescribed under this regulation or under any circular issued in respect of redress of investor grievances	Rs.1000 per day
5	Regulation 50(1) Delay in furnishing intimation about board meeting.	Rs. 5,000 per instance of non-compliance per item
6	Regulation 50(2) Delay in furnishing intimation about meeting of shareholders or holders of non-convertible securities	Rs. 5,000 per instance of non-compliance per item
7	Regulation 52(1) / 52(2)(a) / 52(2)(d) / 52(2)(f) Non-submission of quarterly and year to date standalone financial results on a quarterly basis within the period prescribed under this Regulation under Regulation 52(1)/ Unaudited financial results submitted without limited review report under Regulation 52(2)(a)/ Non-submission of annual audited standalone and consolidated financial results within the period prescribed under Regulation 52(2) (d)/ Non-submission of statement of assets & liabilities and cash flow statement as required under Regulation 52(2)(f)	Rs. 5,000 per day
8	Regulation 52(4) / 52(6) Non-disclosure of line items prescribed under Regulation 52(4) along with the quarterly / annual financial results / non-disclosure of items pertaining to non-convertible securities as prescribed under Regulation 52(6) as notes to financials	Rs. 1,000 per day
9	Regulation 52(7)/ (7A) Non-submission of statement indicating the utilization of issue proceeds/ material deviation in the use of proceeds	Rs. 1,000 per day
10	Regulation 53(2) Non-submission of annual report within the period prescribed under this regulation.	Rs. 2,000 per day
11	Regulation 54 (2)/ (3) Non-disclosure of extent and nature of security created and maintained with respect to secured listed non-convertible debt securities in the financial statements	Rs. 1,000 per day
12	Regulation 57(1) Non-disclosure of information related to payment obligations.	Rs. 2,000 per day per ISIN
13	Regulation 57(4) Non-submission of details of payable interest/dividend/principal obligations during the quarter	Rs. 1,000 per ISIN



14	Regulation 57(5) Non-submission of certificate confirming the payment of interest/dividend/principal obligations due in the quarter or non-submission of details of all unpaid interest/dividend/principal obligations at the end of the quarter	Rs. 1,000 per ISIN
15	Regulation 59 (1) Failure to obtain prior approval of stock exchange for any structural change in non-convertible securities	Rs. 50,000 per instance
16	Regulation 60 (2) Delay in submission of the notice of record date	Rs. 10,000 per ISIN
17	Regulation 62 Non-compliance with norms pertaining to functional website	Rs. 10,000 per instance for every additional advisory/ warning letter exceeding the four advisory/ warning letters in a financial year.

Fine to be levied in case of non-compliances by issuers of listed Commercial Papers

Sl. No.	Clause	Fine payable and/ or other action to be taken for non-compliance in respect of an entity having listed Commercial Paper
1	Non-submission of financial results within the prescribed period	Rs. 5,000 per day
2	Non-disclosure of line items prescribed under Regulation 52(4) of SEBI LODR Regulations along with the financial results	Rs. 1,000 per day
3	Non-submission of certificate regarding fulfillment of payment obligations	Rs. 1,000 per day per ISIN

CASE STUDY

Century Enka Limited vs. Securities and Exchange Board of India & Ors. before SAT (Dated 25.03.2022)

The facts leading to the filing of the present appeal is, that Mr. B. K. Birla was a non-independent nonexecutive director in the appellant company and died on July 3, 2019 thereby causing a vacancy in the board of directors. This vacancy was required to be filled up and eventually an independent director was appointed on February 5, 2020.

Admittedly, after July 3, 2019 on account of demise of Mr. B.K. Birla, the composition of the board of directors reduced from 6 to 5 directors. The vacancy so caused was eventually filled up on February 5, 2020.

For the aforesaid period from July 4, 2019 to February 5, 2020 on account of non-compliance of the Regulation 17(1) of the LODR Regulations, BSE and NSE has imposed a fine for the quarter ended



December 31, 2019 and again for the quarter ended March 31, 2020 under circular dated May 3, 2018 issued by SEBI as under

Regulation	Fine payable and / or other action to be taken for non-compliance in respect of listed entity
Regulation 17(1) Non-compliance with the requirements pertaining to the composition of the Board including failure to appoint woman director	Rs. 5000/- per day

The appellant being aggrieved filed an application before SEBI for waiver of the fine which was rejected by SEBI by an order dated June 30, 2021.

The stock exchanges in their orders have levied a fine holding that the exchange has decided to provide a period of three months or time till the next board meeting whichever is later to enable the companies to fill the vacancy in consonance with the provisions of Regulation 25(6) of the LODR Regulations and since the appellant failed to fill the vacancy within three months, the penalty has been imposed from October 3, 2019 under Regulation 17 of the LODR Regulations. The same view was taken by SEBI in its order of June 30, 2021.

Order

It is observed that the approach adopted by the respondent is totally illegal and against the provisions of law. The provisions under the LODR Regulations are required to be complied by the companies including the appellant. Non-compliance of various provisions may entail imposition of fine as per the circular dated May 3, 2018. This circular has been issued in exercise of the powers under Section 11A(2) of the Securities and Exchange Board of India Act, 1992(hereinafter referred to as 'SEBI Act') read with Sections 9 and 21 of Securities Contract (Regulations) Act, 1956 (hereinafter referred to as 'SCR Act') and read with Regulation 98 of the LODR Regulations. This circular has the force of law. Under Annexure I to the circular a fine of Rs. 5,000/- per day can be imposed for non-compliance of Regulation 17(1) of the LODR Regulations.

Regulation 17(1) states that the board of directors shall comprise of not less than 6 directors. If there are less than 6 directors, the said regulation is violated and fine can be imposed but the question is that there is no time line provided under Regulation 17(1) to fill the vacancy caused by the reason of death, resignation, etc. If no time line is provided, the question of imposition of fine at the rate of Rs.5,000/- per day does not arise.

In this regard, Regulation 25(6) of the LODR Regulations provides certain obligations with respect to independent directors, namely, that where an independent director who resigns or is removed from the board of directors, the said independent director would be replaced by a new



independent director at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy whichever is later. Such provision is missing under Regulation 17(1). Consequently, so long as the period of filing the vacancy in the board of directors under Regulation 17(1) is not framed, no fine could be imposed.

Further, the exchange cannot on its own take a decision for imposition of fine. Fine can only be imposed by statutes or by circular which has the force of law. In the instant case, nothing has been brought on record to show that the stock exchange has the power to frame such laws nor anything has been brought on record to indicate that SEBI has framed such laws under Section 11A of the SEBI Act read with Sections 9 and 21 of the SCR Act and read with Regulation 98 of the LODR Regulations.

Thus, the impugned orders cannot be sustained and are quashed.

CASE STUDY

Ignorance of law is not an excuse for escaping from liability of violation of law

The Appellant, Mega Resources Limited, is aggrieved by the order dated 13.08.2014 passed by the Adjudicating Officer, SEBI imposing a penalty of Rs. 2,00,000/- under Section 15A(b) of the SEBI Act and Rs. 50,00,000/- under Section 15 H(ii) of the SEBI Act for failure on the part of the appellant to comply with the provisions of Regulation 7(1) read with Regulation 7(2) and Regulation 11(1) read with Regulation 14(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

The appellant has admitted that pursuant to the acquisition of 25000 equity shares through off-market transactions the shareholding of the Promoters/Promoter Group of the Company had increased from 50.46% to 60.46% of the Target Company. This triggered Regulation 11(1) of the erstwhile SAST Regulations along with the requirement of submission of certain disclosures under Regulation 7(1) and 7(2) of the erstwhile Regulations. It is admitted by the appellant that the non-compliance with the disclosure requirements in respect of acquisition of shares and failure to make an open offer to the shareholders of the Company was due to lack of awareness of the erstwhile regulations on the part of the Appellant and purely unintentional and without any malafide intentions.

However, it is trite law that ignorance of law will not excuse the appellant to escape the liability of violating the law nor ever absolve the wrongdoer of his crime or misconduct. Further, the appellant contended that in the matter of imposition of penalty, the Section 15(H)(ii) of the SEBI Act, 1992 was amended dated October 29, 2002 and the penalty for non-disclosure of acquisition of shares and takeovers was enhanced from a maximum of Rs.5 lakh to Rs.25 crore. It is argued that since the violation in Appeal was committed in February, 2001, the appellant would be governed by the erstwhile provisions of Section 15H(ii) of the SEBI Act, which existed on the date of violation in question.



Decision:

It is true that the maximum monetary penalty imposable for non-disclosure of acquisition of shares and takeovers under the erstwhile SEBI Act on the date of violation by the Appellant was Rs. 5 Lakh and by the amendment dated October 29, 2002 it is up to Rs. 25 Crore or three times of the amount of profits made out of such failure, whichever is higher. However, the moot point in this connection to be noted is that as on October 29, 2002 the obligation to make disclosure and public announcement under Regulations 7(1) read with 7(2) and 11(1) read with 14(1) continued. Therefore, because the violation was continued even after October 29, 2002, the appellant has been rightly imposed penalty under the amended provisions of Section 15H(ii) of the SEBI Act.

Decision: It is true that the maximum monetary penalty imposable for non-disclosure of acquisition of shares and takeovers under the erstwhile SEBI Act on the date of violation by the Appellant was Rs. 5 Lakh and by the amendment dated October 29, 2002 it is up to Rs. 25 Crore or three times of the amount of profits made out of such failure, whichever is higher. However, the moot point in this connection to be noted is that as on October 29, 2002 the obligation to make disclosure and public announcement under Regulations 7(1) read with 7(2) and 11(1) read with 14(1) continued. Therefore, because the violation was continued even after October 29, 2002, the appellant has been rightly imposed penalty under the amended provisions of Section 15H(ii) of the SEBI Act.



CHAPTER-34

SEBI (SETTLEMENT PROCEEDINGS) REGULATIONS, 2018

SECURITIES AND EXCHANGE BOARD OF INDIA (SETTLEMENT PROCEEDINGS) REGULATIONS, 2018

INTRODUCTION

To **enable pass consent orders** after arriving at a settlement, SEBI issued Circular No. EFD/ED/Cir-1/2007 containing guidelines for passing consent orders and for considering requests for composition of offences.

This circular was further amended by the Board's circular ref No. CIR/EFD/1/2012 dated **May 25, 2012**.

On 9th January, 2014, SEBI notified Securities and Exchange Board of India (Settlement of Administrative and Civil Proceedings) Regulations, 2014 to provide for the terms of settlement and the procedure of settlement and matters connected therewith or incidental thereto, **rescinding the above two circulars**. These regulations were deemed to have come into force from 20th April 2007.

NEW REGULATIONS FOR SETTLEMENT AND SETTLEMENT PROCEEDINGS

With passage of time and as over two decades have lapsed from the issue of the first guidelines on 20th April 2007 for settlement /consent and passing of consent orders, SEBI has now issued a new set of regulations which have come into force from **1st day of January 2019** which are new /revised regulations to provide for the terms of settlement and the procedure of settlement and matters connected therewith or incidental thereto. These regulations were notified on November 31, 2018 and is in force from **1st January 2019**.

SECURITIES AND EXCHANGE BOARD OF INDIA (SETTLEMENT PROCEEDINGS) REGULATIONS, 2018

In exercise of the powers conferred by Section 15JB of the Securities and Exchange Board of India Act, 1992

Section 23JA of the Securities Contracts (Regulation) Act, 1956 and Section 19-IA of the Depositories Act, 1996 read with Section 30 of the Securities and Exchange Board of India Act, 1992, Section 31 of the Securities Contracts (Regulation) Act, 1956 and Section 25 of the Depositories Act, 1996, the Securities and Exchange Board of India hereby makes the following regulations to provide for the **terms of settlement and the procedure of settlement** and matters connected therewith or incidental thereto, namely- Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018. They shall come into force on the 1st day of January 2019.

APPLICATION FOR SETTLEMENT

APPLICATION

(REGULATION 3)

A person against whom any **specified proceedings** have been **initiated** AND are **pending** or **may be initiated**, may make an application to the Board in the Form specified in Part-A of the **Schedule-I**

REGULATION 2(F) DEFINES SPECIFIED PROCEEDINGS AS FOLLOWS

*Specified proceedings means the proceedings that may be initiated by the Board or have been initiated and are pending before the Board or **any other forum**, for the violation of securities laws, under Section 11, Section 11B, Section 11D, sub-Section (3) of Section 12 or Section 15-I of the SEBI Act or Section*



12A or Section 23-I of the Securities Contracts (Regulation) Act, 1956 or Section 19 or Section 19H of the Depositories Act, 1996, as the case may be

(2) The application made under sub-regulation (1) shall be accompanied by a non-refundable application fee as specified in Part-B of **Schedule I**

(3) The applicant shall make full and true disclosures in the application in respect of the alleged default.

(4) The applicant shall make one application for settlement of all the proceedings that have been initiated or may be initiated in respect of the same cause of action.

(5) An application that is not complete in all respects or does not conform to the requirements of these regulations shall be returned to the applicant.

(6) The applicant whose application has been returned under sub- regulation (5) may, within **fifteen days** from the date of communication from the Board, submit the complete and revised application that conforms to the requirements of these regulations.

LIMITATION

(REGULATION 4)

(1) An application in respect of any **specified proceeding** pending before the Board shall not be considered if it is made **after sixty days** from the date of show cause notice.

(2) Notwithstanding anything contained in sub-regulation (1), the Board may consider the application, if satisfied that there was sufficient cause for not filing it within the specified period and it is accompanied with non refundable fees as specified in Part-B of the Schedule-I: Provided that, where the application is filed after **sixty calendar days** from the expiry of the period specified in sub-regulation (1), the settlement amount determined in accordance with Schedule-II of these regulations shall be increased by twenty five percent: Provided further that, no such delayed application shall be considered if the application is filed **after one hundred and twenty calendar days** from the expiry of the period specified in sub-regulation (1) or after the first hearing, whichever is earlier.

SCOPE OF SETTLEMENT

SCOPE OF SETTLEMENT PROCEEDINGS

(REGULATION 5)

1. No application for settlement of any specified proceedings shall be considered, if:

- an earlier application with regard to the same alleged default had been rejected;
- the audit or investigation or inspection or inquiry, if any, in respect of any cause of action, is not complete, except in case of applications involving confidentiality; or
- monies due under an order issued under securities laws are liable for recovery under securities laws.

2. The Board may not settle any specified proceeding, if it is of the opinion that the alleged default,

- as market wide impact,
- caused losses to a large number of investors
- affected the integrity of the market.

3. Without prejudice to the generality of the foregoing provisions, for settling any specified proceeding the Board may inter alia take into account the following factors,

- whether the applicant has refunded the monies due, to the satisfaction of the Board;
- whether the applicant has provided an exit option to investors in compliance with securities laws, to the satisfaction of the Board;
- whether the applicant is in compliance with securities laws or any order or direction passed under securities laws, to the satisfaction of the Board;



- any other factor as may be deemed appropriate by the Board.
4. Without prejudice to sub-regulations (1) and (3), the Board may not settle the specified proceedings where the applicant is a wilful defaulter, a fugitive economic offender or has defaulted in payment of any fees due or penalty imposed under securities laws.
 5. Nothing contained in these regulations shall be construed to restrict the right of the **Panel of Whole Time Members** to consider or reject any application in respect of any specified proceeding without examination by the Internal Committee or the High- Powered Advisory Committee.

REJECTION OF APPLICATION**(REGULATION 6)**

- (1) An application may at any time be rejected on the following grounds:
 - (a) Where the applicant refuses to receive or respond to the communications sent by the Board;
 - (b) Where the applicant does not submit or delays the submission of information, document, etc., as called for by the Board;
 - (c) Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;
 - (d) Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers.
- (2) The rejection under sub-regulation (1) shall be communicated to the applicant:

WITHDRAWAL OF APPLICATION**(REGULATION 7)**

- (1) An application may be withdrawn at any time prior to the communication of the decision of the Panel of Whole Time Members under regulation 15.
- (2) An applicant who withdraws an application under sub-regulation (1) shall not be permitted to make another application in respect of the same default: Provided that, as may be recommended by the High-Powered Advisory Committee, such an application may be considered subject to an increase of at-least fifty percent over the settlement amount determined in accordance with Schedule-II of these Regulations.

EFFECT OF PENDING APPLICATION ON SPECIFIED PROCEEDINGS (REGULATION 8)

- (1) The filing of an application for settlement of any specified proceedings shall not affect the continuance of the proceedings save that the passing of the final order shall be kept in abeyance till the application is disposed of.
- (2) Where the application is filed in case of proceedings that may be initiated against the applicant, such proceedings shall not be initiated till the application is rejected or withdrawn: Provided that, the filing of an application shall not prohibit the initiation of any proceedings, in so far as may be deemed necessary for the purpose of issuance of interim civil and administrative directions to protect the interests of investors and to maintain the integrity of the securities markets.

TERMS OF SETTLEMENT**SETTLEMENT TERMS****(REGULATION 9)**

- (1) The settlement terms may include a settlement amount and/or non-monetary terms, in accordance with the guidelines specified in Schedule-II.
- (2) The non-monetary terms may include the following:
 - (a) Suspension or cessation of business activities for a specified period;
 - (b) Exit from Management;



- (c) Refraining from acting as a partner or Officer or director of an intermediary or as an Officer or director of a company that has a class of securities regulated by the Board, for specified periods;
 - (d) Cancel securities and reduce holdings where the securities are issued fraudulently, including bonus shares received on such securities, if any, and reimburse any dividends received, etc.
 - (e) Lock-in of securities;
 - (f) Provide enhanced training and education to employees of intermediaries and securities market infrastructure institutions;
 - (g) Submit to enhanced internal audit and reporting requirements.
- (3) The settlement amount, excluding the legal costs, shall be credited to the Consolidated Fund of India.
- (4) The application fee referred to in sub-regulation (2) of regulation 3 and the legal costs, if any, shall be credited to the Securities and Exchange Board of India General Fund.

Explanation. - Legal costs shall include liquidated costs, as may be determined by the Board, in respect of costs for obtaining appropriate orders from the Tribunal or Court under sub-regulation (2) of regulation 24.

FACTORS TO BE CONSIDERED TO ARRIVE AT THE SETTLEMENT TERMS (REGULATION 10)

While arriving at the settlement terms, the factors indicated in Schedule-II may be considered, including but not limited, to the following:

- conduct of the applicant during the specified proceeding, investigation, inspection or audit;
- the role played by the applicant in case the alleged default is committed by a group of persons;
- nature, gravity and impact of alleged defaults;
- whether any other proceeding against the applicant for non-compliance of securities laws is pending or concluded;
- the extent of harm and/or loss to the investors' and/or gains made by the applicant;
- processes that have been introduced since the alleged default to minimize future defaults or lapses;
- compliance schedule proposed by the applicant;
- any other factors necessary in the facts and circumstances of the case.

COMMITTEES

HIGH POWERED ADVISORY COMMITTEE (REGULATION 11)

- (1) The Board shall constitute a High-Powered Advisory Committee for **consideration and recommendation of the terms of settlement.**
- (2) The High-Powered Advisory Committee shall consist of a Judicial member who has been the Judge of the Supreme Court or a High Court and three external experts having expertise in securities market or in matters connected therewith or incidental thereto.
- (3) The term of the members of the High-Powered Advisory Committee shall be three years which may be extended for a further period of two years.
- (4) The quorum for a meeting of the High-Powered Advisory Committee shall be of three members.
- Explanation. - Meeting includes meeting through audio-video electronic means or through the medium of electronic video linkage.



INTERNAL COMMITTEE(S)**(REGULATION 12)**

Internal Committee(s) shall be constituted by the Board. The Internal Committee(s) shall comprise of an Officer of the Board not below the rank of Chief General Manager and such other Officers as may be specified by the Board.

PROCEDURE OF SETTLEMENT**PROCEEDINGS BEFORE THE INTERNAL COMMITTEE (REGULATION 13)**

(1) Save as otherwise provided in these regulations, an application shall be referred to an Internal Committee to examine whether the proceedings may be settled and if so to determine the settlement terms in accordance with these regulations.

(2) The Internal Committee may:

(a) call for relevant information, documents, etc., pertaining to the alleged default(s) in possession of the applicant or obtainable by the applicant;

(b) call for the personal appearance of the applicant before it:

Provided that a duly authorized representative of the applicant may represent on behalf of the applicant:

Explanation. - Personal appearance under this clause includes appearance through audio-video electronic means or through the medium of electronic video linkage as may be permitted by the Internal Committee.

(c) permit the applicant to submit revised settlement terms within a period not exceeding ten working days from the date of the Internal Committee meeting: Provided that the revised settlement terms received after ten working days, but within twenty working days may be considered subject to an increase of ten percent over the recommended settlement amount.

(3) The proposed settlement terms, if any, shall be placed before the High-Powered Advisory Committee

PROCEEDINGS BEFORE THE HIGH-POWERED ADVISORY COMMITTEE (REGULATION 14)

(1) The High-Powered Advisory Committee shall consider the proposed settlement terms placed before it along with the following:

- the application, undertaking and waivers of the applicant
- factors specified in regulation 10
- settlement terms or revised settlement terms proposed by the applicant;
- (d) any other relevant material available on record.

(2) The High-Powered Advisory Committee may seek revision of the settlement terms and refer the application back to the Internal Committee.

(3) The recommendations of the **High-Powered Advisory Committee shall be placed before the Panel of Whole Time Members.**

Action on the recommendation of High-Powered Advisory Committee (Regulation 15)

(1) The Panel of Whole Time Members shall consider the recommendations of the High-Powered Advisory Committee and may accept or reject the same:

Provided that where the recommendations of the High-Powered Advisory Committee to settle the specified proceedings are rejected, the panel of Whole Time Members shall record reasons for rejection of the recommendations: Provided further that where the recommendation of the High-Powered Advisory Committee to settle the specified proceedings are rejected, such decision of the panel of Whole Time Members shall be communicated to the applicant.



(2) remit the settlement amount forming part of the settlement terms, not later than [thirty] calendar days from the date of receipt of the notice of demand, which may be extended by the Panel of Whole Time Members for reasons to be recorded, by sixty calendar days, only after receipt of an application seeking extension of time within thirty days from the date of receipt of notice of demand

(3) Where the Panel of Whole Time Members does not accept the recommendation of the High-Powered Advisory Committee to settle the specified proceedings on the settlement terms recommended by it, the panel may return the application for re-examination of the settlement terms and thereafter the procedure as applicable in the case of an original application shall be followed by the Internal Committee and the High Powered Advisory Committee.

SUMMARY SETTLEMENT PROCEDURE

(REGULATION 16)

(1) Notwithstanding anything contained in Chapter VI (procedure for settlement), before initiating any specified proceeding, the Board **may** issue a notice of summary settlement in the format as specified in Part-A of Schedule-III, calling upon the noticee to file a settlement application under **Chapter-II (application for settlement)** and submit the settlement amount and/or furnish an undertaking in respect of other non-monetary terms or comply with other non-monetary terms, as may **be specified in the summary settlement notice** in respect of the specified proceeding(s) to be initiated for the following defaults,- i. Delayed disclosures, including filing of returns, report, document, etc.; ii. Non-disclosure in relation to companies exclusively listed on regional stock exchange; iii. Disclosures not made in the specified formats; iv. Delayed compliance of any of the requirements of law or directions issued by the Board; v. Such other defaults as may be determined by the Board. Provided that, the specified proceeding(s) shall not be settled under this Chapter, if in the opinion of the Board, the applicant has failed to make a full and true disclosure of facts or failed to co-operate in the required manner.

(2) Notwithstanding anything contained in the notice of settlement, the Board shall have the power to modify the enforcement action to be brought against the noticee and the notice of settlement shall not confer any right upon the noticee to seek settlement or avoid any enforcement action.

(3) The noticee may, **within thirty calendar days** from the date of receipt of the notice of settlement, -

- (a) file a settlement application in the Form specified in Part-A of Schedule-I along with non-refundable application fee as specified in Part-B and the undertakings and waivers as specified in Part-C of Schedule-I;
- (b) remit the settlement amount as specified in the notice of settlement;
- (c) comply or undertake to comply with other non-monetary terms as specified in the notice of settlement, as the case may be; and

Provided that, the Board may for reasons to be recorded, grant extension of time not exceeding a **further period of fifteen calendar days** for filing the settlement application, remittance of the settlement amount and/ or furnishing an undertaking in respect of any of the non-monetary terms or compliance with any of the nonmonetary terms specified in the notice of settlement.

(4) Upon being satisfied with the remittance of settlement amount and undertaking furnished in respect of the non-monetary terms or compliance with non-monetary terms, if any as detailed in the settlement notice, the Board shall pass an order of settlement under regulation 23.

SETTLEMENT NOTICE

(REGULATION 18)

(1) A notice of settlement in the format as specified in Part-B of Schedule-III, indicating the substance of the probable charges and enforcement actions, may, except in cases covered under Chapter VII (summary settlement procedure), be issued by the Board prior to the issuance of the notice to show cause so as to



afford the noticee an opportunity to file a settlement application under **Chapter-II, within fifteen calendar days** from the date of receipt of the settlement notice.

(2) Notwithstanding anything contained in the settlement notice, the Board shall have the right to modify the nature of the enforcement action to be initiated against the noticee and the charges stated in the notice shall not confer any right to seek settlement on the said basis or avoid any enforcement action due to modified charges.

(3) Where a noticee does not file the settlement application under this Chapter or withdraws the settlement application at any time prior to the communication of the decision of the Panel of Whole Time Members under regulation 15, the specified proceedings may be initiated.

SETTLEMENT WITH CONFIDENTIALITY

(REGULATION 19)

(1) An applicant seeking the benefit of confidentiality in return for admitting for the limited purpose of settlement of specified proceedings to be initiated and agreeing to provide substantial assistance in the investigation, inspection, inquiry or audit, to be initiated or on going, against any other person in respect of a violation of securities laws, shall fulfil the conditions of this Chapter, including -

- (a) cease to participate in the violation of securities laws from the time of the disclosure of information, unless otherwise directed by the Board;
- (b) provide and continue to provide complete and true disclosure of information, documents and evidence, which is in his possession or he is able to obtain, to the satisfaction of the Board in respect of the alleged contravention of the provisions of securities laws;
- (c) co-operate fully, continuously and expeditiously throughout the investigation, inspection, inquiry or audit and related proceedings before the Board; and
- (d) not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of the alleged violation.

Provided that an application made under this chapter shall be made only in cases prior to or pending investigation, inspection, inquiry or audit.

(2) Notwithstanding anything contained in this Chapter, where an applicant fails to comply with the conditions mentioned in this regulation, the Board may rely upon the information and evidence submitted by the applicant in any proceedings

(3) Without prejudice to sub-regulations (1) and (2), the Board may subject the applicant to further restrictions or conditions, as deemed fit, after considering the facts and circumstances of the case.

(4) For the purpose of seeking confidentiality, the applicant or its authorized representative may make an application containing all the relevant disclosures pertaining to the information as specified in Schedule-IV for furnishing the information and evidence relating to the commission of any violation of securities laws.

(5) Upon being satisfied the Board may assure the benefit of confidentiality and shall thereupon mark the status of the application depending upon its priority and convey the same to the applicant in writing.

(6) The Board may, for reasons to be recorded in writing, at any stage, reject the application if the information, documents or evidence is found to be incomplete or false to the knowledge of the applicant.

(7) The rejection of the application for confidentiality shall be communicated to the applicant.

PROCEDURE

(REGULATION 20)

(1) The provisions of Chapters IV to VI (settlement procedure) of these regulations may be applied mutatis mutandis to a settlement application filed under this Chapter and a settlement order passed accordingly.



(2) The information, documents and evidence provided by the applicant under this chapter shall be submitted in the manner specified by the Board.

CONFIDENTIALITY AND ASSURANCE (REGULATION 21)

For the purposes of providing the applicant with interim confidentiality and assurance from being proceeded with, the Board may not initiate regulatory measures when the Board has a reasonable belief that the information provided to it relates to a possible securities law violation that has occurred, is ongoing or about to occur.

CONFIDENTIALITY (REGULATION 22)

The following shall be treated as confidential,

- (a) the identity of the applicant seeking confidentiality; and
- (b) the information, documents and evidence furnished by the applicant under this Chapter:

Provided that, the identity of the applicant or such information or documents or evidence may not be treated as confidential if,

- the disclosure is required by law
- the applicant has agreed to such disclosure in writing
- there has been a public disclosure by the applicant

Settlement of the proceedings pending before the Tribunal or any court (Regulation 24)

(1) Save as otherwise provided in these regulations, the provisions with regard to settlement of specified proceedings shall mutatis mutandis apply to an application for settlement of any proceeding pending before the Tribunal or any court.

(2) The proposal of settlement along with the settlement terms or rejection thereof shall be placed before such Tribunal or court for appropriate orders.

SERVICE AND PUBLICATION OF SETTLEMENT ORDER (REGULATION 25)

Settlement orders shall be served on the applicant and shall also be published on the website of the Board:

Provided that settlement orders in matters relating to the confidentiality shall not, directly or indirectly, disclose the identity of the applicant, but shall indicate the provisions of securities laws which the applicant is alleged to have violated.

SETTLEMENT SCHEMES (REGULATION 26)

Notwithstanding anything contained in these regulations, the Board may specify the procedure and terms of settlement of specified proceedings under a settlement scheme for any class of persons involved in respect of any similar specified defaults.

Explanation. - A settlement order issued under a Settlement scheme shall be deemed to be a settlement order under these regulations.

Revocation of the settlement order (REGULATION 28)

(1) If the applicant fails to comply with the settlement order or at any time after the settlement order is passed, it comes to the notice of the Board that the applicant has not made full and true disclosure or has violated the undertakings or waivers, settlement order shall stand revoked and withdrawn and the Board shall restore or initiate the proceedings, with respect to which the settlement order was passed.

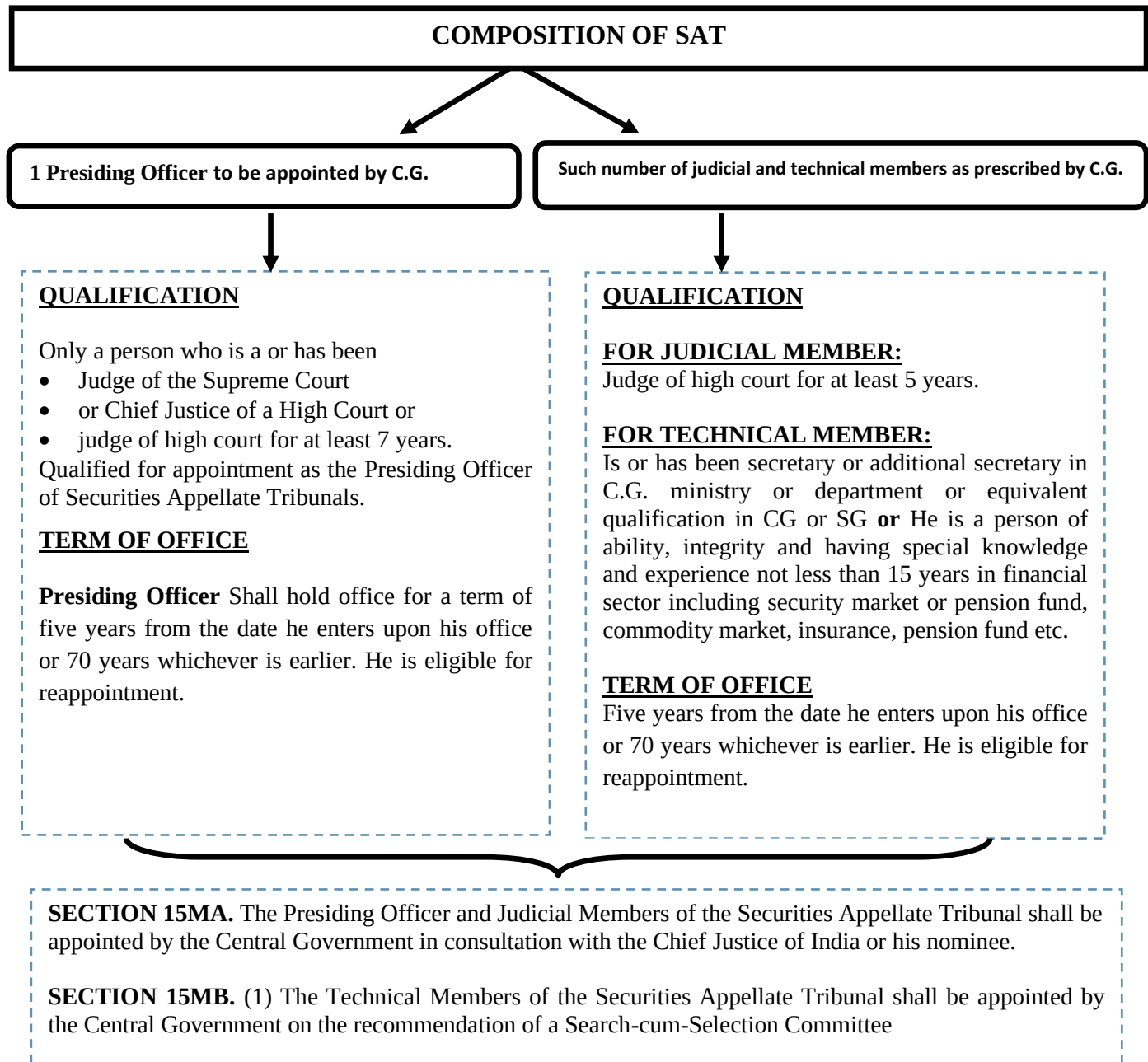
(2) Whenever any settlement order is revoked, no amount paid under these regulations shall be refunded.



APPEAL TO SECURITIES APPELLATE TRIBUNAL

SECURITIES APPELLATE TRIBUNAL

SEC. 15 k of SEBI act 1956 empowers C.G. to constitute 1 or more tribunal for making appeal against the order of SEBI and its adjudicating officers. these tribunal known as security appellate tribunal.



POWERS OF SECURITIES APPELLATE TRIBUNAL

The Securities Appellate Tribunals shall have, for the purposes of discharging their functions under this Act, 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) issuing commissions for the examination of witnesses or documents;
(e) reviewing its decisions;
(f) dismissing an application for default or deciding it ex-parte;
(g) setting aside any order of dismissal of any application for default or any order passed by it ex-parte;
(h) any other matter which may be prescribed.

Every proceeding before the Securities Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code and the Securities Appellate Tribunal shall be deemed to be a civil court for all the purposes under Code of Criminal Procedure, 1973.

Orders Constituting Appellate Tribunal to be Final and not to invalidate its Proceedings:**SECTION 15R**

No order of the Central Government appointing any person as the Presiding Officer or a Member of a Securities Appellate Tribunal shall be called in question in any manner, and no act or proceeding before a Securities Appellate Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of a Securities Appellate Tribunal.

Requirements for Appeal to the SAT:

- Section 15T and 15U deal with the appeal procedure and power of Securities Appellate Tribunals.
- Any person aggrieved by the decision of the recognised **stock exchange or adjudicating officer or any order of SEBI or IRDA or Pension fund regulatory and development authority** may appeal to SAT Within 45 days from the date of order on which a copy of order or receiving of decision by the appellant in such form and on such fees as prescribed.
- On receipt of appeal and after giving the parties to opportunity of being heard, pass order as thinks fit, confirming, modifying or setting aside the order. SAT shall Dispose of the appeal within 6 months.
- The SAT may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.
- The Securities Appellate Tribunal shall send a copy of every order made by it to SEBI and the parties to the appeal and to the concerned Adjudicating Officer.
- The appeal filed before the Securities Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal



LEGAL REPRESENTATION

Section 15V permits the Appellant either to appear in person or authorise one or more of **practising Company Secretaries**, Chartered Accountants, Cost Accountants or Legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

APPEAL TO SAT**SEC. 15T**

Any person aggrieved:-by an order of the **SEBI** may appeal to SAT within a period of **45 days** from the date of receiving the copy of the order of SEBI

**SAT (SECURITY APPEALATE TRIBUNAL)**

Any person aggrieved by any decision or order of **SAT** may file an appeal to the **Supreme Court** within **60 days** from the date of receiving a copy of the decision or order of SAT

**SUPREME COURT****APPEAL TO SUPREME COURT****SEC. 15Z**

Any person aggrieved by any decision or order of **SAT** may file an appeal to the **Supreme Court**. The appeal shall be filed within **60 days** from the date of receiving a copy of the decision or order of SAT. However, the Supreme Court may allow a farther period of 60 days for making an appeal, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the first 60 days.

Right to legal representation. (Section 15V of SEBI Act, Section 22C of Securities Contract(Regulation) Act, 1956 and Section 23C of Depositories Act, 1996)

The appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

Explanation. – For the purposes of this section, –

(a) “chartered accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;



(b) “company secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) “cost accountant” means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) “legal practitioner” means an advocate, vakil or any attorney of any High Court, and includes a pleader in practice.

Orders constituting Appellate Tribunal to be final and not to invalidate its proceedings (Section 15R of SEBI Act, 1992)

No order of the Central Government appointing any person as the Presiding Officer or a Member of a Securities Appellate Tribunal shall be called in question in any manner, and no act or proceeding before a Securities Appellate Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of a Securities Appellate Tribunal.

Procedures as per Securities Appellate Tribunal (Procedure) Rules, 2000

In exercise of the powers conferred by section 29 read with sections 15T and 15U of the Securities and Exchange Board of India Act, 1992, the Central Government hereby made the Securities Appellate Tribunal (Procedure) Rules, 2000.

Form and procedure of appeal (Rule 4)

(1) A memorandum of appeal shall be presented in the Form by any aggrieved person in the registry of the Appellate Tribunal within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.

(2) A memorandum of appeal sent by post shall be deemed to have been presented in the registry on the day it was received in the registry.

Sittings of Appellate Tribunal (Rule 5)

(1) The Appellate Tribunal shall hold its sitting either at a place where its office is situated or at such other place falling within its jurisdiction, as it may deem fit by the Appellate Tribunal.

(2) In the temporary absence of the Presiding Officer, Government may authorise one of the two other Members to preside over the sitting of the Tribunal either at a place where its office is situated or at such other place falling within its jurisdiction as it may deem fit by the Appellate Tribunal.



Language of Appellate Tribunal (Rule 6)

- (1) The proceedings of the Appellate Tribunal shall be conducted in English or Hindi.
- (2) No appeal, application, representation, document or other matters contained in any language other than English or Hindi, shall be accepted by Appellate Tribunal, unless the same is accompanied by a true copy of translation thereof in English or Hindi.

Appeal to be in writing (Rule 7)

- (1) The Registrar shall endorse on every appeal the date on which it is presented or deemed to have been presented and shall sign endorsement.
- (2) If, on scrutiny, the appeal is found to be in order, it shall be duly registered and given a serial number.
- (3) If an appeal on scrutiny is found to be defective and the defect noticed is formal in nature, the Registrar may allow the appellant to rectify the same in his presence and if the said defect is not formal in nature, the Registrar may allow the appellant such time to rectify the defect as he may deem fit. If the appeal has been sent by post and found to be defective, the Registrar may communicate the defects to the appellant and allow the appellant such time to rectify the defect as he may deem fit.
- (4) If the appellant fails to rectify the defect within the time allowed, the Registrar may by order and for reasons to be recorded in writing, decline to register such memorandum of appeal and communicate the order to the appellant within seven days thereof.
- (5) An appeal against the order of the Registrar shall be made within 15 days of receiving of such order to the Presiding Officer or in his temporary absence, to the Member authorized under sub-rule (2) of rule 5, whose decision thereon shall be final.

Fee (Rule 9)

- (1) Every memorandum of appeal shall be accompanied with a fee provided in sub-rule
- (2) and such fee may be remitted in the form of crossed demand draft drawn on any nationalised bank in favour of “the Registrar, Securities Appellate Tribunal” payable at the station where the registry is located. (2) The amount of fee payable in respect of appeal against adjudication orders made under Chapter VIA of the Act shall be as follows : –

Amount of penalty imposed	Amount of fees payable
Less than rupees ten thousand	Rs. 500
Rupees ten thousand or more but less than one lakh	Rs. 1,200



Rupees one lakh or more	Rs. 1200 plus Rs. 500 for every additional one lakh of penalty or fraction thereof, subject to a maximum of Rs. 1,50,000.

Amount of fee payable in respect of any other appeal against an order of the Board under the Act shall be rupees five thousand only

Contents of memorandum of appeal (Rule 10)

(1) Every memorandum of appeal filed under rule 4 shall set forth concisely under distinct heads, the grounds of such appeal without any argument or narrative, and such ground shall be numbered consecutively and shall be in the manner provided in sub-rule (1) of rule 7.

(2) It shall not be necessary to present separate memorandum of appeal to seek interim order or direction if in the memorandum of appeal, the same is prayed for.

Documents to accompany memorandum of appeal (Rule 11)

(1) Every memorandum of appeal shall be in five copies and shall be accompanied with copies of the order, at least one of which shall be a certified copy, against which the appeal is filed.

(2) Where a party is represented by an authorised representative, a copy of the authorisation to act as the authorised representative and the written consent thereto by such authorised representative, shall be appended to the appeal.

Plural remedies (Rule 12)

A memorandum of appeal shall not seek relief or reliefs therein against more than one order unless the reliefs prayed for are consequential.

Notice of appeal to the respondent (Rule 13)

Copy of the memorandum of appeal and paper book shall be served by the Registrar on the respondent as soon as they are registered in the registry, by hand delivery, or by Registered Post or Speed Post.

Filing of reply to the appeal and other documents by the respondent (Rule 14)

(1) The respondent may file five complete sets containing the reply to the appeal along with documents in a paper book form with the registry within one month of the service of the notice on him of the filing of the memorandum of appeal.

(2) Every reply, application or written representation filed before the Appellate Tribunal shall be verified in the manner provided for, in the Form.



(3) A copy of every application, reply, document or written material filed by the respondent before the Appellate Tribunal shall be forthwith served on the appellant, by the respondent.

(4) The Appellate Tribunal may, in its discretion, on application by the respondent allow the filing of reply referred to in sub-rule (1) after the expiry of the period referred to therein.

Date of hearing to be notified (Rule 15)

The Appellate Tribunal shall notify the parties of the date of hearing of the appeal in such manner as the Presiding Officer may by general or special order direct.

Hearing of appeal (Rule 16)

(1) On the day fixed or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Securities Appellate Tribunal shall, then, if necessary, hear the Board or its authorised representative against the appeal, and in such case the appellant shall be entitled to reply. During the course of the hearing of appeal the written arguments could be supplemented by time-bound oral arguments :

Provided that in case of temporary absence of the Presiding Officer or of the Member authorised by the Government under sub-rule (2) of rule 5, the Presiding Officer can authorise the other Member present on that day to hear the Board or authorised representative against the appeal.

(2) In case the appellant does not appear in person or through an authorised representative when the appeal is called for hearing, the Securities Appellate Tribunal may dispose of the appeal on the merits:

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Securities Appellate Tribunal that there was sufficient cause for his nonappearance, when the appeal was called for hearing, the Securities Appellate Tribunal shall make an order setting aside the ex parte order and restore the appeal.

Dress regulations for the Presiding Officer, Members and for the representative of the parties (Rule 17)

(1) The dress of the Presiding Officer shall be white or striped or black pant with black coat over white shirt and band or buttoned up black coat and band. The dress for the two other Members shall be white or striped or black pant with black coat over white shirt and black tie or buttoned up black coat. In the case of a female Presiding Officer or a Member, the dress shall be black coat over a white saree.

(2) Every authorised representative, other than a relative or regular employee of the party shall appear before the Appellate Tribunal in his professional dress if any, and if there is no such dress, a male, in a suit or buttoned-up coat over a pant or national dress that is a long buttoned-up



coat on dhoti or churidar pyjama, and a female, in a coat over white or any other sober coloured saree or in any other sober dress.

(3) All other persons appearing before the Appellate Tribunal shall be properly dressed.

Order to be signed and dated (Rule 18)

(1) Every order of the Appellate Tribunal shall be signed and dated by the Presiding Officer and the two other members. The Presiding Officer will have powers to pass interim orders or injunction, subject to reasons to be recorded in writing, which it considers necessary in the interest of justice.

(2) Orders shall be pronounced in the sitting of the Appellate Tribunal by the Presiding Officer or in case of the temporary absence of the Presiding Officer, by the Member authorized under sub-rule (2) of rule 5.

Publication of orders (Rule 19)

The orders of the Appellate Tribunal, as are deemed fit for publication in any authoritative report or the press may be released for such publication on such terms and conditions as the Presiding Officer may lay down.

Communication of orders (Rule 20)

A certified copy of every order passed by the Appellate Tribunal shall be communicated to the Board, the Adjudicating Officer and to the parties, as the case may be.

Orders and directions in certain cases (Rule 21)

The Appellate Tribunal may make, such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

Fee for inspection of records and obtaining copies thereof (Rule 22)

(1) A fee of rupees twenty, for every hour or part thereof of inspection subject to a minimum of rupees one hundred shall be charged for inspecting the records of a pending appeal by a party thereto.

(2) A fee of rupees five for a folio or part thereof not involving typing and a fee of rupees ten for a folio or part thereof involving typing of statement and figures shall be charged for providing copies of the records of an appeal, to a party thereto.



Working hours of the Appellate Tribunal (Rule 23)

- 1) The office of the Appellate Tribunal shall observe such public and other holidays as observed by the offices of the Central Government in the locality where the office of the Appellate Tribunal is situated.
- (2) The Appellate Tribunal shall, subject to any other order made by the Presiding Officer, remain open on working days from 10 AM to 6.00 PM. But no work, unless of an urgent nature, shall be admitted after 4.30 PM on any working day.
- (3) The sitting hours of the Appellate Tribunal shall ordinarily be from 10.30 AM to 1.00 PM and 2.00 PM to 5.00 PM, subject to any order made by the Presiding Officer.

Holiday (Rule 24)

Where the last day for doing any act falls on a day on which the office of the Appellate Tribunal is closed and by reason thereof the act cannot be done on that day, it may be done on the next day on which that office opens.

Functions of the Registrar (Rule 25)

- (1) The Registrar shall discharge his functions under the general superintendence of the Presiding Officer or in the temporary absence of the Presiding Officer, the Member authorized under sub-rule (2) of rule 5.

He shall discharge such other functions as are assigned to him under these rules by the Presiding Officer or in the temporary absence of the Presiding Officer, by the Member authorized under sub-rule (2) of rule 5, by a separate order in writing.

- (2) He shall have the custody of the records of the Appellate Tribunal.
- (3) The official seal of the Appellate Tribunal shall be kept in the custody of the Registrar.
- (4) Subject to any general or special direction by the Presiding Officer, or in the temporary absence of the Presiding Officer, the Member authorized under sub-rule (2) of rule 5, the official seal of the Appellate Tribunal shall not be affixed to any order, summons or other process save under the authority in writing from the Registrar.
- (5) The official seal of the Appellate Tribunal shall not be affixed to any certified copy issued by the Appellate Tribunal, save under the authority in writing of the Registrar.

Additional functions and duties of Registrar (Rule 26)

In addition to the functions and duties assigned in the rules, the Registrar shall have the following functions and duties subject to any general or special order of the Presiding Officer or in his temporary absence, the Member authorized under sub-rule (2) of rule 5, namely : –



- (i) to receive all appeals, replies and other documents;
- (ii) to decide all questions arising out of the scrutiny of the appeal before they are registered;
- (iii) to require any appeal presented to the Appellate Tribunal to be amended in accordance with the rule;
- (iv) subject to the directions of the Presiding Officer, or in his temporary absence, the member authorized under sub-rule (2) of rule 5, to fix date of hearing of the appeal or other proceedings and issue notices thereon;
- (v) to direct any formal amendment or records;
- (vi) to order grant of copies of documents to parties to proceedings; (vii) to grant leave to inspect the record of the Appellate Tribunal;
- (viii) to dispose of all matters relating to the service of notices or other processes, application for the issue of fresh notice or for extending the time for or ordering a particular method of service on a respondent including a substituted service by publication of the notice by way of advertisement in the newspapers; and
- (ix) to requisition records from the custody of any court or other authority

Seal and emblem (Rule 27) The official seal and emblem of the Appellate Tribunal shall be such as the Central Government may specify.

Appeal to Supreme Court (Section 15Z of SEBI Act, Section 22F of Securities Contract (Regulation) Act, 1956 and Section 23F of Depositories Act, 1996)

Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order.

The Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

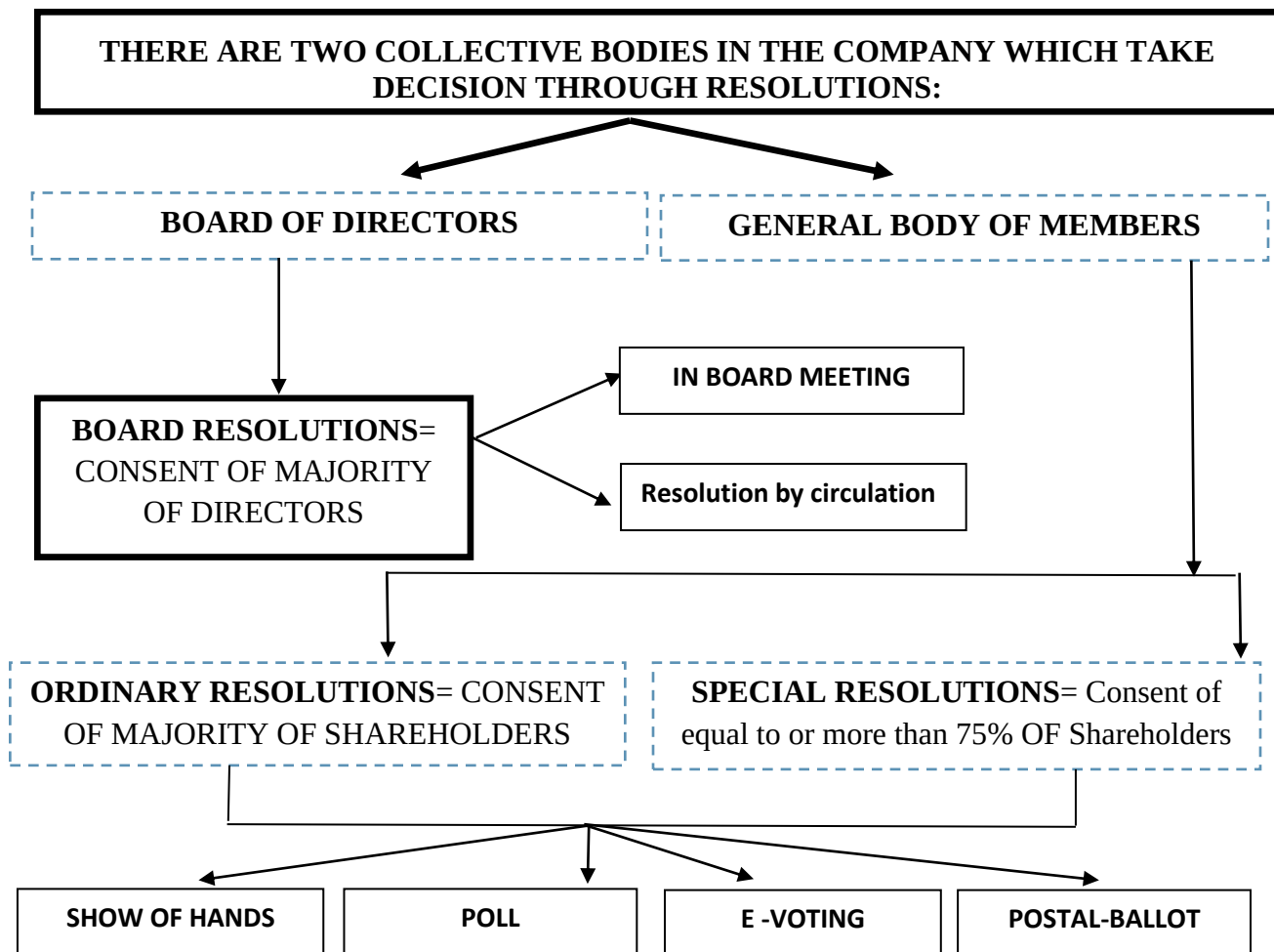


CHAPTER-35

DRAFTING OF RESOLUTIONS

CONCEPT OF RESOLUTION

A company is an artificial judicial person created by law having its own distinct entity form and capable of entering into contracts. Though company is bestowed with the characteristic of separate legal entity but it cannot take decision on its own. It is capable of acting in its own name, entering into contracts. It is capable of owning and holding property in its own name, sue others and to be sued by others in its name. Despite all these powers, since it is not a natural person, it expresses its will or takes its decisions through natural persons (i.e. directors or members) collectively which is known as “resolutions”.



IMPORTANT POINTS REGARDING DRAFTING OF NOTICES OF MEETINGS

1. Notice should be clear, concise to the point which any reader can make out quickly. Use of bold letters for key aspects is ideal.
2. Where the form of notice is prescribed by statutory rules or forms, it has necessarily to adhere to what is prescribed.



3. Notice shall be dated, signed by authorized person, mention date, place time and nature of meeting.
4. One of the important contents of the notice is to state the business to be transacted (agenda) at the meeting.
5. Explanatory statement requirement shall be complied with as regards to special business to be transacted at the meeting.
6. The notice should also state with reasonable prominence that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and the proxy need not be a member
7. One has to comply with Section 115 about special notice, proper serving of notice, duty to give notice in time, and provision of statutory length of notice etc.

PRACTICAL ASPECTS OF DRAFTING RESOLUTIONS

The following points should be remembered while drafting resolutions, both for Board and general meetings

a) Resolution use to be closed within “.....” (inverted quomas)
b) It use to begin with “RESOLVED THAT.....”
c) Mention the sections of Companies Act 2013, rules made thereunder or provisions of any other law pursuant to which decision is made. E.g. RESOLVED THAT pursuant to the provisions of section 161 of the Companies Act, 2013 and rules thereunder, and other applicable provisions of law for the time being in force,.....
d) All essential facts are included in the resolution - e.g., the resolution for re-appointment of a managing director should indicate that the re-appointment is subject to the approval of the Central Government if approval of the Central Government is required and should also cover the period of appointment, terms and conditions of such appointment.
e) Surplus and meaningless words or phrases should not be included in resolutions.
f) Resolutions must indicate the relevant provisions or sections of the Act and the Rules pursuant to which they are being passed.
g) If a resolution is one which requires the approval of the Central Government or confirmation of the National Company Law Tribunal/Court, this must be stated in the resolution.
h) A resolution must indicate when it will become effective.
i) A resolution must confine itself to one subject matter and two distinct matters should not be covered in one resolution.
j) A resolution should be crisp, concise and precise and should be flexible enough to take care of eventualities.
k) Where lengthy resolutions have to be approved, they should be divided into paragraphs and should be arranged in their logical order having regard to the subject matter of the resolution.
l) A resolution must be so drafted that anybody not present at the meeting or anybody referring to it at a later date will know clearly what the decision was at that meeting without referring to any other document.



1. SPECIMEN OF THE SPECIAL RESOLUTION FOR ALTERING ARTICLES OF A PRIVATE COMPANY CONVERTING IT INTO A PUBLIC COMPANY

TYPE OF RESOLUTION
TYPE OF MEETING

SPECIAL RESOLUTION
GENERAL MEETING

“RESOLVED THAT

- A. Pursuant to the applicable provisions of the Companies Act, 2013, the company be and is hereby converted into a public company
- B. The name of the company be and is hereby changed from..... Private Limited to..... Limited
- C. The regulations contained in the document submitted for consideration and approval of this meeting, and initialled by the chairman of the meeting for the purpose of identification, be and are hereby approved and adopted as the articles of association of the company in substitution for, and to the exclusion of, the present articles of association of the company.”

EXPLANATORY STATEMENT

The Board of directors of the company, at its meeting held on, discussed the pros and cons of a public limited company and a private limited company, and decided to convert the company into a public limited company and also decided that the present articles of association of the company, which were adopted by the company when it was incorporated as a private limited company, be also substituted by a new set of articles.

Since the proposed alterations, deletions, insertions etc. to the present articles of association were numerous; the Board decided that it would be convenient to adopt an altogether new set of articles of association incorporating all the proposed alterations.

Your directors commend the proposed special resolution for your consideration and adoption of the new set of articles of association of the company in place of the existing articles of association of the company.

None of the directors is concerned or interested in the proposed resolution.

2. SPECIMEN OF THE SPECIAL RESOLUTION FOR CHANGE OF NAME OF THE COMPANY

TYPE OF RESOLUTION
TYPE OF MEETING

SPECIAL RESOLUTION
GENERAL MEETING

“RESOLVED THAT

- A. subject to the approval of the Central Government, pursuant to the proviso to Section 13 of the Companies Act, 2013, as a consequence of the conversion of the company from a private limited company into a public limited company, the name of the company be and is hereby changed from “..... Private Limited” to “..... Limited”; and



- B. clause I (name clause) in the memorandum of association of the company be and is hereby altered by substituting the same with the following:

I. The name of the company is Limited.”

EXPLANATORY STATEMENT

The Board of directors of the company had, at its meeting held on, resolved that consequent upon conversion of the company from private limited company to public limited company, the name of the company be changed from “..... Private Limited” to “..... Limited” and accordingly clause I (name clause) in the memorandum of association of the company is to be altered by substituting the same with a clause as set out in the notice for approval of the shareholders of the company.

No director is concerned or interested in the proposed resolution.

3. SPECIMEN OF ORDINARY RESOLUTION FOR INCREASING THE AUTHORISED SHARE CAPITAL OF THE COMPANY

TYPE OF RESOLUTION
TYPE OF MEETING

ORDINARY RESOLUTION
GENERAL MEETING

“RESOLVED THAT pursuant to Section 61(1)(a) and other applicable provisions, if any, of the Companies Act, 2013 and Article ... of the Articles of Association of the company, the Authorised Share capital of the company be and is hereby increased from ` 50,00,000 (Rupees fifty lakh) divided into 5,00,000 (five lakh) equity shares of ` 10 each to ` 5,00,00,000/- (Rupees five crore) divided into 50,00,000 (fifty lakh) equity shares of ` 10 (Rupees ten) each by creation of 45,00,000 equity shares of ` 10 each ranking *pari passu* in all respect with the existing equity shares.”

(Note: If the Articles of Association prescribe that a special resolution is required for increase of authorized share capital, pass the resolution as a special resolution.)

EXPLANATORY STATEMENT

The directors of the company have felt that for profitable working of the company, the company needs more funds in the form of equity share capital. The present authorised share capital of the company is only ` 50,00,000 (Rupees fifty lakhs) divided into 5,00,000 (five lakh) equity shares of ` 10/- (Rupees ten) each and the entire authorised share capital has been issued, subscribed and paid up. The Board, therefore, decided that the authorized share capital of the company be increased to ` 5,00,00,000 (Rupees five crore) divided into 50,00,000 (fifty lakh) equity shares of ` 10/- (Rupees ten) each.

Hence the proposed resolution is recommended for consideration of and approval by the shareholders of the company.

None of the directors is concerned or interested in the proposed resolution.

4. SPECIMEN OF THE RESOLUTION FOR CONSOLIDATION OF SHARES

TYPE OF RESOLUTION
TYPE OF MEETING

ORDINARY RESOLUTION
GENERAL MEETING



“RESOLVED THAT

- A. Pursuant to Section 61(1)(b) and other applicable provisions, if any, of the Companies Act, 2013, and Article... of Articles of Association of the company, all the 5,00,00,000 (five crore) equity shares of ` 5 (Rupees five) each of the company be and are hereby consolidated into two crore and fifty lakh (2,50,00,000) equity shares of ` 10/- (Rupees ten) each
- B. all the present shareholders holding in all 2,00,00,000 (two crore) issued, subscribed and fully paid equity shares of ` 5 (Rupees five) each be issued, in lieu of their present shareholding, the number of fully paid consolidated equity shares of ` 10 (Rupees ten) each;
- C. the Board of directors of the company be and is hereby authorised to take all the necessary steps for giving effect the foregoing resolution, including recall of the existing share certificates, issue of new share certificates in lieu of the existing issued share certificates in terms of the foregoing resolutions and in accordance with the applicable provisions of the Companies Act, 2013 read with Companies (Share Capital and Debentures) Rules, 2014.”

5. SPECIMEN RESOLUTION OF THE BOARD FOR APPOINTMENT OF ADDITIONAL DIRECTOR

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“RESOLVED THAT pursuant to the provisions of article of the Articles of Association of the company, Shri “Y” who has signified his consent to act as a director, be and is hereby appointed as an additional director of the company to hold office till the next annual general meeting.”

“RESOLVED FURTHER THAT Shri Secretary/Director be and is hereby authorized to submit Form DIR 12 with the Registrar of Companies and to do all such acts and deeds as may be required to be done in this regard.”

6. SPECIMEN RESOLUTION OF THE BOARD TO FILL THE CASUAL VACANCY

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“RESOLVED THAT pursuant to the provisions of Section 161 and article..... of the Articles of Association of the company, Shri ‘X’ be and is hereby appointed as director to fill the casual vacancy caused by the death of Shri ‘Y’ whose office shall be liable to termination on the date up to which Shri ‘Y’ would have held office if he were alive.”

“RESOLVED FURTHER THAT Shri Secretary/Director be and is hereby authorized to submit Form DIR 12 with the Registrar of Companies and to do all such acts and deeds as may be required to be done in this regard.”

7. BOARD RESOLUTION FOR APPOINTMENT OF COMPLIANCE OFFICER

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING



“RESOLVED THAT the company do hereby appoint Mr., Deputy Company Secretary of the company who has ten years experience in Listed Companies, as Compliance Officer of the company who shall be responsible for monitoring the share transfer process (both physical and demat mode) and report to the Board in its each meeting and liaise directly with the authorities of the SEBI, Stock Exchanges, Registrar of Companies etc, the shareholders of the company and investors with respect to implementation of various clauses, rules, regulations and other directives of such authorities and investors services and complaints related matters and in compliance with the provisions of the Companies Act, 2013, Listing Agreement and Rules and Regulations framed thereunder.”

8. SPECIMEN RESOLUTIONS FOR APPOINTMENT OF COMPANY SECRETARY IN PRACTICE FOR SECRETARIAL AUDIT.

**TYPE OF RESOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**

“RESOLVED THAT M/s ABC & Co., Company Secretaries be and is hereby appointed as secretarial auditor of the company in terms of the provisions of Section 204 of the Companies Act, 2013 and to hold the office till the conclusion of the next Annual General Meeting on such remuneration as may be determined by the Board and agreeable to them.”

9. SPECIMEN OF BOARD RESOLUTION FOR THE APPOINTMENT OF FIRST AUDITOR

**TYPE OF RESOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**

“RESOLVED THAT the consent of the Board of directors be and is hereby given to the appointment of M/s ABC and Co., Chartered Accountants, as the Auditor of the Company to hold office up to the conclusion of the First Annual General Meeting of the company at a remuneration of ` in addition to the out of pocket expenses incurred by them in connection with audit of company accounts.”

RESOLVED FURTHER THAT the Secretary of the company be and is hereby directed to give intimation of the appointment to the Auditors so appointed within seven days of the date of this resolution.”

10. SPECIMEN OF ORDINARY RESOLUTION PASSED AT A GENERAL MEETING APPOINTING THE FIRST AUDITOR(S) WHERE BOARD FAILS TO APPOINT WITHIN THIRTY DAYS OF OF COMPANY'S REGISTRATION

**TYPE OF RESOLUTION
TYPE OF MEETING**

**ORDINARY RESOLUTION
GENERAL MEETING**

“RESOLVED THAT pursuant to provisos to Sub-section (6) of Section 139 of the Companies Act, 2013, Shri....., Chartered Accountant, ..., be and is hereby appointed as the auditor of the company to hold office until the conclusion of the first Annual General Meeting on a remuneration of ` plus reimbursement of out-of-pocket expenses that may be incurred by the auditor in the performance of his duties as auditor of the company.



Explanatory Statement

The company was registered on..... The Board of directors of the company failed to exercise its power under Sub-section (6) of Section 139 of the Companies Act, 2013 within thirty days of the date of registration of the company and did not appoint the first auditor of the company.

Therefore, in exercise of its power under the proviso to Sub-section (6) of Section 139 of the Act, the company may appoint the first auditor of the company by passing the proposed ordinary resolution as set out in the notice of the meeting.

None of the directors of the company is concerned or interested in the proposed resolution.

11. SPECIMEN OF ORDINARY RESOLUTION APPOINTING AUDITOR(S) OF THE COMPANY AT AN AGM

TYPE OF RESOLUTION
TYPE OF MEETING

ORDINARY RESOLUTION
GENERAL MEETING

“RESOLVED THAT pursuant to Sub-section (1) of Section 139 of the Companies Act, 2013, M/s. Chartered Accountants, ..., New Delhi, be and are hereby appointed as the auditors of the company to hold office to audit the financial accounts of the company for the financial year ended on a remuneration of ` (Rupees.....) and reimbursement of actual expenses that may be incurred by the auditors in the performance of their duty as auditors of the company.”

12. SPECIMEN BOARD RESOLUTION FOR KEEPING AND MAINTAINING BOOKS OF ACCOUNTS AT A PLACE OTHER THAN THE REGISTERED OFFICE

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“RESOLVED THAT pursuant to the proviso to Section 128(1) of the Companies Act, 2013, the books of accounts of the company be kept and maintained at the company’s head office at with effect from and that Mr., secretary of the company, be and is hereby authorised to file electronically E-Form No MGT - 14 with the Registrar of Companies at by affixing his digital signature thereon and with the requisite filing fees within the prescribed time of seven days hereof and to take all necessary actions in this respect.”

13. SPECIMEN BOARD RESOLUTION FOR APPROVAL OF ANNUAL ACCOUNTS

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“RESOLVED THAT draft of the audited Balance Sheet as at _____, Profit and Loss Account for the year ended on that date along with schedules and notes thereon as placed before the Board be and are hereby approved and the same be authenticated by the directors of the company as required under Section 134 of the Companies Act, 2013 and be sent to the Statutory Auditors of the company for their report thereon and thereafter be sent to the members of the company for adoption at the ensuing Annual General Meeting of the Company.”



14. SPECIMEN BOARD RESOLUTION FOR PREPARATION OF ANNUAL REPORT IN ABRIDGED FORM FOR MAILING TO THE MEMBERS

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“**RESOLVED THAT** pursuant to the provisions of First proviso of sub – section (1) of Section 136 of the Companies Act, 2013 and Rule 10 of the Companies (Accounts) Rules 2014, the Annual Reports comprising of the Balance Sheet, Profit and Loss Account etc. of the company for the financial year ended 31st March 2013 be also prepared, finalised and audited in the prescribed Form No AOC – 3 for sending to the members of the company.”

“**RESOLVED FURTHER THAT** the draft audited statement containing salient features of financial statements for the year ended 31st March 2013, prepared in the prescribed Form No. AOC – 3 in accordance with First proviso of sub – section (1) of Section 136 of the Companies Act, 2013 and Rule 10 of the Companies (Accounts) Rules 2014 as submitted to the meeting, be and are hereby approved and the same be authenticated by the directors of the company as required under Section 136 of the Act and be sent to the statutory auditors of the company for their report thereon and thereafter be sent to the members of the company for adoption at the ensuing annual general meeting of the company.”

15. SPECIMEN BOARD RESOLUTION FOR APPROVAL OF THE DIRECTORS’ REPORT

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

“**RESOLVED THAT** the draft Directors’ Report to the Shareholders of the company for the year ended 31st March 2013 prepared in accordance with the provisions of Section 134 of the Companies Act, 2013 together with its Annexures and also containing suitable explanation and fullest information on every reservation, qualification or adverse remarks contained in Auditors reports, as submitted to the meeting, be and is hereby approved and the same be signed by Shri..... Chairman of the company, by Shri..... Managing Director and Shri..... Director for and on behalf of the Board of Directors of the company.

16. SPECIMEN OF BOARD RESOLUTION FOR DECLARATION OF INTERIM DIVIDEND ON EQUITY SHARES

TYPE OF RESOLUTION
TYPE OF MEETING

BOARD RESOLUTION
BOARD MEETING

RESOLVED THAT

- A. An interim dividend of Rs. 2 (Rupees two) only on each fully paid no. of equity shares of Rs. 10 (Rupees ten) each of the company amounting to Rs..... be paid out of the profits of the company for the half year ended..... 2016 to those members of the company whose names would appear on the register of members of the company on the day of, 2016
- B. A bank account to be designated as “Interim Equity Dividend (2016) Account of Limited” be opened in the name of the company with..... Bank at its Branch at and a sum of Rs....., being the total interim dividend amount, be deposited in the said account within five days.



- C. Shri, Managing Director and Shri, the Company Secretary be and are hereby authorised to open the bank account by signing the account opening form and by furnishing to the said bank the required papers, documents, information etc. and completing all other required formalities for the purpose of opening the bank account and to make arrangements with the said bank for the payment at par, of the interim dividend within thirty days from the date of this resolution.
- D. Shri, Managing director and Shri, Company Secretary of the company for the time being, be and are hereby authorised to jointly sign the dividend warrants to be issued on the said bank and the said bank be and is hereby authorised to honour the interim dividend warrants jointly signed by the said authorised signatories, as and when presented for encashment.

17. SPECIMEN OF BOARD RESOLUTION TO ACQUIRE SHARES OF ANOTHER COMPANY

**TYPE OF REOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**

“RESOLVED THAT pursuant to Section 186 of the Companies Act, 2013, the consent of the Board of Directors of the company be and is hereby accorded to make investments of Rs. 50,00,00,000/- (Rupees Fifty Crore only) for acquisition of 5,00,000 equity shares of Rs.100/- each fully paid up in M/s XYZ Ltd. from various existing shareholders of M/s XYZ Ltd.

RESOLVED FURTHER THAT Mr. MD, Managing Director of the company be and is hereby authorised to make payment of consideration to the transferors and to do all such necessary act as may be necessary for this act.”

SOME MORE IMPORTANT RESOLUTIONS

Correct the following resolutions and re-draft them giving explanation as to why it need re-drafting :“Resolved that according to section 161(1), Rupak is appointed as an additional director to hold the office till Deepak returns to India, who is out of India for more than 6 months.”

The given resolution is for the appointment of alternate Director under **Section 161(2) of the Companies Act, 2013** but the term used is for additional director, which is held within Section 161(1)..

Redrafted resolution for appointment of Alternate Director:

“RESOLVED that pursuant to the provisions of Section 161(2) read with article of the Articles of Association of the Company, Shri Rupak be and is hereby appointed as Alternate Director to hold the office till Deepak returns to India, who is out of India for more than 6 months”

Buoyant Ltd. A loss incurring company, wants to appoint Jolly as Managing Director w.e.f. 15th march, 2009 on a total remuneration of Rs. 10 lakh per month (all inclusive). Its paid up capital is Rs. 5 crore, reserves Rs. 3 crore and term loans Rs. 10 crore. The company has accounting year ending on 31st march every year.

**TYPE OF REOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**



“RESOLVED THAT , as per the provisions of section 197 and 203 and subject to the approvals of shareholders and the Central Government and subject to the compliance of the requirement of **Schedule V of the Companies Act, 2013**, Mr. Jolly be and is hereby appointed the managing director of the company with effect from 15th march, 2009 on a remuneration of Rs. 10(ten) lakhs per month or Rs. 120 lakhs per annum inclusive all benefits and perquisites for a period of 3 years or lesser as may be approved by the Central Government and he shall not be liable to retire by rotation”.

Global Fashion Ltd. wants to appoint Amitabh as a director in place of Dharmendra who has resigned due to ill health.

**TYPE OF REOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**

“RESOLVED THAT, in terms of the provisions of **Section 161(4) of the companies Act, 2013** and article 56 of the Articles of Association of the company Mr. Amitabh be and is hereby appointed as a director of the company to fill up the casual vacancy resulted in the board of directors of the company due to the resignation of Mr. Dharmendra, due to his ill health and he shall hold the office up to the remaining term of the said resigned director”.

Note: The Section 161(4) of the Companies Act, 2013 empowers the company to fill in the casual vacancy resulted in the board of directors of the company, such appointee shall hold the office until the director who resigned would have held such office of the director. The Articles of Association should contain a provision for such appointment, which normally most of the Articles do have.

Agreement with Vivek as the managing Director of Grow Fast Ltd. For a period of 3 years at a remuneration of Rs. 20 lakh per month with perquisites allowable under Schedule V to the Companies Act, 2013, but with no commission. The company is consistently earning profits and the remuneration will be subject to the provisions of section 197. (Only main body of the resolution is to be drafted containing the duties, responsibilities and powers of the appointee.)

**TYPE OF REOLUTION
TYPE OF MEETING**

**ORDINARY RESOLUTION
GENERAL MEETING**

“RESOLVED THAT pursuant to **Schedule V to the Companies Act, 2013** and subject to the provisions of **Section 197 of the Companies Act, 2013**, the company be and is hereby appoint Shri Vivek resident of and aged 54 years as its Managing Director for a period of 3 years commencing from and Shri Vivek agrees to act as the Managing director (MD) of the company for the said duration on the following terms and conditions.

1. The MD shall work under the superintendence, control and direction of the Company’s Board, shall have the powers of general conduct and management of the business and affairs of the company in relation to the following function, namely (a).... (b)....(c)..... except in the matters which may be specifically required to be done by the Board either by the governing law or by the articles of the company.
2. The MD will exercise and perform such acts and duties as the Board may from time to time delegate to him. He will also do and perform all other acts, deeds and things which in the ordinary course of business, he may consider necessary, proper and in the interest of the company.



3. Without restricting the general powers and authority as mentioned above the MD will have following powers to be exercised on behalf of the company
4. The MD shall hold office for 3 years commencing from
5. The company shall pay to the MD the remuneration specified below in consideration of services as MD:
 - Salary at Rs. 20 lakh per month inclusive of DA
 - Perquisites as allowable under Schedule V.

Speed Ltd. Wants to recruit Anil as the managing director of the company, while he is already the Managing Director of Sprint Ltd. Advise the company referring to the provisions of the Companies Act, 2013 and draft a suitable Board resolution for the appointment.

**TYPE OF RESOLUTION
TYPE OF MEETING**

**BOARD RESOLUTION
BOARD MEETING**

"RESOLVED THAT consent of all the directors present at the meeting be and is hereby accorded to the appointment of Shri....., who is Managing Director of Sprint Ltd. Also, as the Managing Director of this company without any remuneration and the Managing Director shall exercise such powers and perform such functions as the Board of Directors may, from time to time require him to exercise and perform".

Draft the specimen resolutions with requisite explanatory statement, if necessary, for transacting the following items of business indicating the kind of meeting at which each resolution to be passed and the types of resolution required for Donating a sum of Rs. 2, 00,000 (rupees two lakhs) to the Navrozji Tata Education Fund.

**TYPE OF RESOLUTION
TYPE OF MEETING**

**ORDINARY RESOLUTION
GENERAL MEETING**

"RESOLVED THAT pursuant to the other applicable provisions, if any, of the Companies Act, 2013, approval be and is hereby accorded to the Board of Directors of the Company for donating a sum of Rs. 2,00,000 (rupees two lakhs only) to the Navrozji Tata Education Fund".

Explanatory Statement:

As a part of the Company's social uplift programme , the Board of Directors intend donating a sum of Rs. 2,00,000/- to the Navrozji Data Education Fund set up by Tata Sons Ltd. to promote higher education in the field of engineering and medical sciences. The Fund has a panel comprising eminent industrialists, scientists and doctors to select and award merit scholarships to deserving, capable students desiring to pursue advanced studies in engineering and medicine. The Board recommends in the accompanying resolution for the shareholder's approval. No director is interested in this item of business.



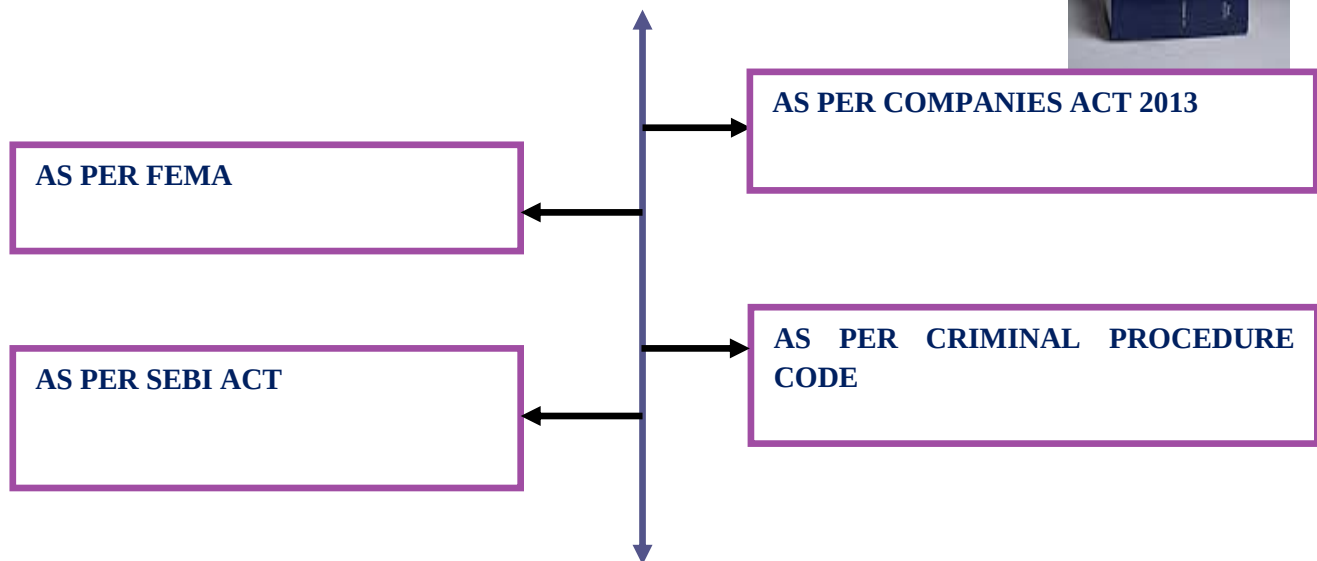
CHAPTER-36

COMPOUNDING OF OFFENCES

1. Compounding means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused.
2. The accused and the complainant then make a joint application to the court that the parties have come to terms and the case may not be proceeded with.
3. In General, offences which are of a private nature and relatively not serious are made compoundable. Compounding of Offence allows the accused to avoid the lengthy process of criminal prosecution, which would save cost, time, mental agony, etc. in return for payment of compounding charges.



COMPOUNDING OF OFFENCES UNDER VARIOUS ACT



COMPOUNDING OF CERTAIN OFFENCES UNDER COMPANIES ACT 2013

SECTION 441

Three kinds of offences are permitted to be compounded under this section:-

(a) An offence is punishable with fine only
(b) An offence is punishable with imprisonment or fine
(c) An offence which is punishable with imprisonment or fine or with both imprisonment

SPECIAL POINTS

1. An offence punishable with imprisonment only or with imprisonment and fine is not compoundable under this section.
2. The section empowers the NCLT to compound offences without any limit or where a maximum amount of fine which may be imposed by an offence does not exceed Rs. 25, 00,000 it may be compounded by the Regional Director .



3.	Any offence covered under this section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.
4.	The offences committed by a company or its officer within a period of three years from the date on which the similar offence was committed by it or him was compounded under this section, are not compoundable.
5.	Every application for the compounding of an offence shall be made to the Registrar of Companies who shall forward the same, together with its comments thereon, to the Company Law Board or the Regional Director, as the case may be. Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the Company, to the Registrar of Companies, within 7 days from the date on which the offence is so compounded.
6.	Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.
7.	Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.
8.	Any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

PERMISSION OF THE SPECIAL COURT

Before, the Companies (Amendment) Act, 2019, Section 441(6) provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973,

(a) any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences;

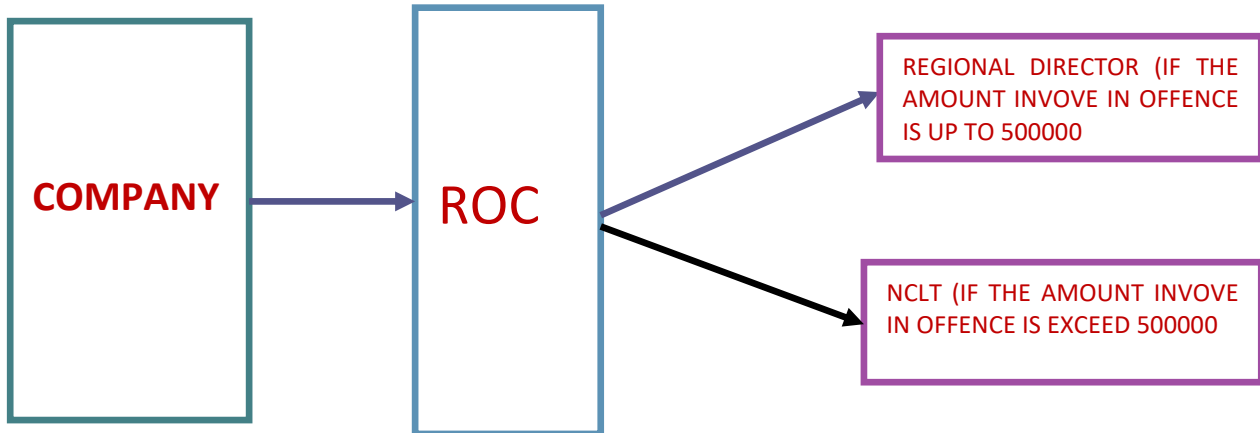
(b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

However, the committee to review offences under the Companies Act, 2013, has recommended that such requirement of clause (a) of sub-section (6) of section 441 should be omitted with the following justification:

“Clause (a) to sub-section (6) of section 441, which require the permission of the special court for compounding of offence, is a redundant provision. NCLT in its judgment dated 29.08.2017 in Cinopolis India Pvt. Ltd. V. ROC while relying on the interpretation of Section 621A of Companies Act, 1956. (corresponding to section 441 of CA, 2013) by Supreme Court in VLS Finance v. Union of India, held that a prior approval of Special court before compounding of offence by NCLT is not required.

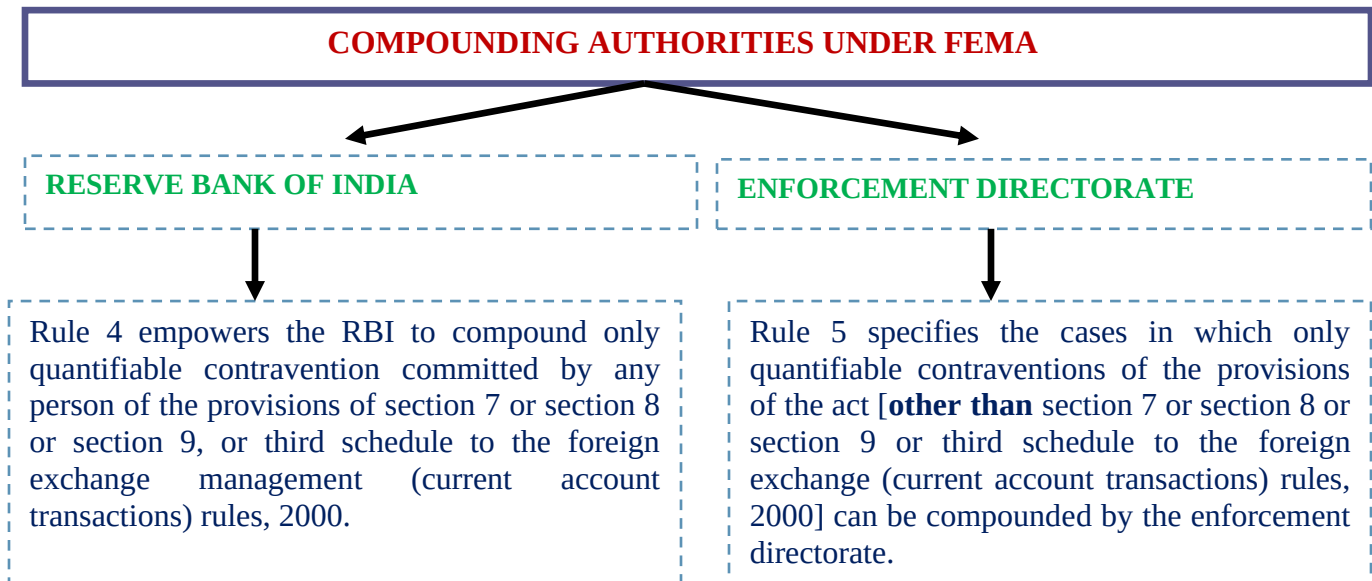
After, the amendment in section 441 in the Companies (Amendment) Act, 2019, now Section 441(6) read as under: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable





COMPOUNDING OF CONTRAVENTIONS UNDER FEMA, 1999

Section 15 empowers the directorate of enforcement or officers of the directorate of enforcement and of the reserve bank to compound the offences. This section provides that contravention under section 13 may be compounded **within 180 days** from the date of receipt of application. Sub-section (2) provides that where the contravention has been compounded, the accused person is relieved from further proceedings for the contravention.



SUM INVOLVED IN CONTRAVENTION	ADJUDICATING AUTHORITY
10 lakhs rupees or below	Assistant general manager of the RBI
more than rupees 10 lakhs but less than rupees 40 lakhs	Deputy general manager of RBI



40 lakhs or more but less than rupees 1 crore	General manager of RBI
rupees 1 crore or more	Chief general manager of the RBI

The benefit of above provisions shall not be available in case a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.

ENFORCEMENT DIRECTORATE CAN COMPOUND IN FOLLOWING MANNER

SUM INVOLVED IN CONTRAVENTION	ADJUDICATING AUTHORITY
5 lakh rupees or below	Deputy director of the directorate of enforcement
More than rupees 5 lakh but less than rupees 10 lakh	Additional director of the directorate of enforcement
10 lakh or more but less than rupees 50 lakh	Special director of the directorate of enforcement
Rupees 50 lakh or more, but less than rupees 1 crore	Special director with deputy legal advisor of the directorate of enforcement
1 crore rupees or more	Director of enforcement with special director of the enforcement directorate

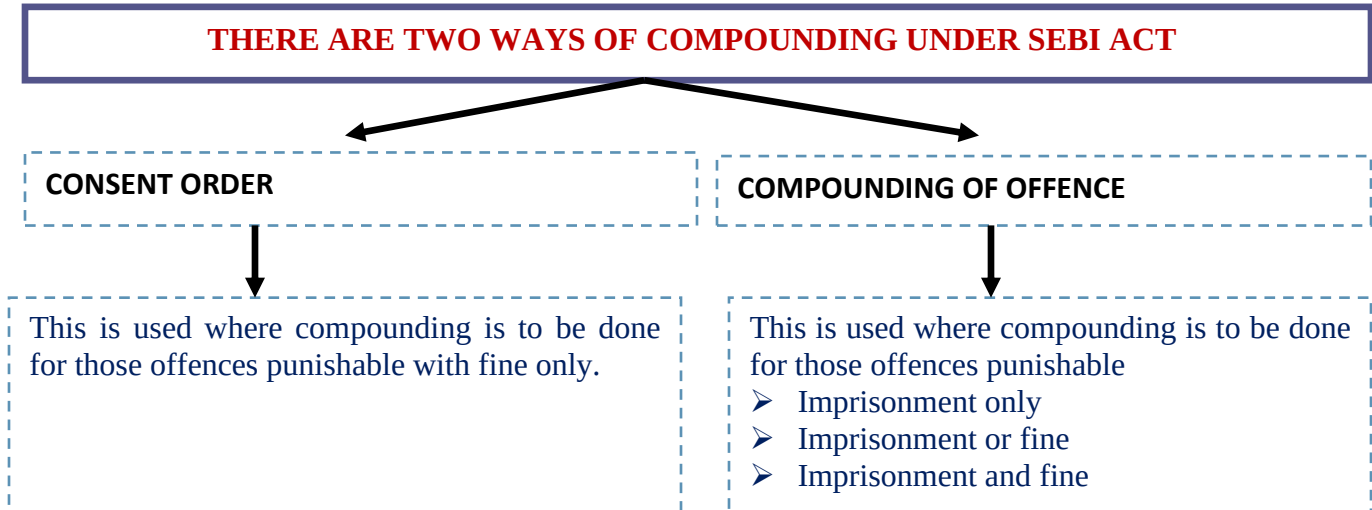
The benefit of above provisions shall not be available in case a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.

COMPOUNDING OF OFFENCES UNDER CODE OF CRIMINAL PROCEDURE, 1973

1. Section 320 of the Criminal Procedure Code, 1973 permits compounding of various offences under Indian Penal Code. Such compounding can be done either before or after institution of prosecution. After payment of such composition amount, prosecution will not be launched, or if it was launched, it will be withdrawn.
2. Where the offences are essentially of 'a private nature and relatively not quite serious, the CRPC considers it expedient to recognize some of them as compoundable offences; and some others as compoundable only with the permission of the Court.



COMPOUNDING OF OFFENCES UNDER SEBI ACT 1992



PROCESS OF COMPOUNDING OF OFFENCE

1. Section 24A of SEBI Act, 1992 permits compounding of offences by the court, in respect of criminal prosecution proceedings.
2. Section 24A provides that any offence **other than** (offence punishable with imprisonment only, or with imprisonment and also with fine), may either before or after the institution of any proceeding, be compounded by a court before which such proceedings are pending. This Section has the overriding effect over the provisions of CRPC, 1973.
3. So far as process of compounding of offences is concerned, any party who wishes to compound an offence shall file an appropriate application before the court where complaint is pending with a copy addressed to the Prosecution Division, Enforcement Department of SEBI's Mumbai office which will forward the application/ request to be placed before the High-Powered Committee.
4. The terms of compounding as recommended by the Committee and approved by the Competent Authority would be placed before the court by the Prosecution Division by way of written submissions or application, as appropriate, for passing orders as the court deems fit.
5. The final acceptance of any offer of compounding will come in to effect only upon the court passing the compounding order.



CONSENT ORDERS OF SEBI

1. Consent Order means "an order settling administrative or civil proceedings between the regulator and a person (Party) who may prima facie be found to have violated securities laws.
2. Legislature has recognized SEBI and its Adjudicating Officers to pass Consent Orders for



resolving the disputes in more smooth manner through negotiations and discussions instead of lengthy litigation.

3. Consent Order provides flexibility of wider array of enforcement and remedial actions which will achieve the twin goals of an appropriate sanction, remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays.
4. After passing Consent Order, the Consent Order will be published through press release and would be put on SEBI website. In cases where a Party undertakes compliances, it has to comply with the same as per agreed schedule.
5. Violation of Consent Order by a Party would invite appropriate action, including for violating SEBI orders, besides revival of the pending action. In this context any proceeding which had been kept in abeyance pending the consent process will begin from such stage at which it was suspended.
6. If SEBI rejects the offer of settlement, the person making the offer shall be notified of the same and the offer of settlement shall be deemed to be withdrawn.

FACTORS TO BE TAKEN INTO CONSIDERATION WHILE COMPOUNDING OF OFFENCES UNDER VARIOUS LAWS

1. Whether violation is intentional
2. Party's conduct in the investigation.
3. Gravity of charge i.e., charge like fraud, market manipulation or insider trading
4. History of non-compliance.
5. Whether there were circumstances beyond the control of the party
6. Consideration of the amount of investors' harm or party's gain.
7. Party has undergone any other regulatory enforcement action for the same violation.





PREVIOUS YEAR QUESTIONS AND ANSWERS

1. Write notes on Compounding of offences

ANSWER: Refer chapter 36

2. Write notes on the Compounding of offences under FEMA

ANSWER: Refer chapter 36

3. Write notes on the Consent Orders

ANSWER: Refer chapter 36

4. Distinguish between the Compounding order and consent order.

ANSWER: Refer chapter 36

5. Whether the court can allow compounding of this offence in the interests of justice to both the parties? What is the actual relevancy of such settlement?

The court cannot allow compounding an offence which is not compoundable. The supreme court made it clear that the court has in a long line of decisions rules that offence which are not compoundable under section 320 of the cr. P.C. cannot be allowed to be compounded even if there is any settlement between the complainant on one hand and the accused on the other **(Ramlal & Anr V. State of J & K)**

The settlement arrived at between the parties can be taken into consideration for the purpose of determining the quantum of sentence to be awarded to the accused. Thus the settlement is relevant for determining the quantum of sentence. **(Gulab Das V. State of M.P.)**

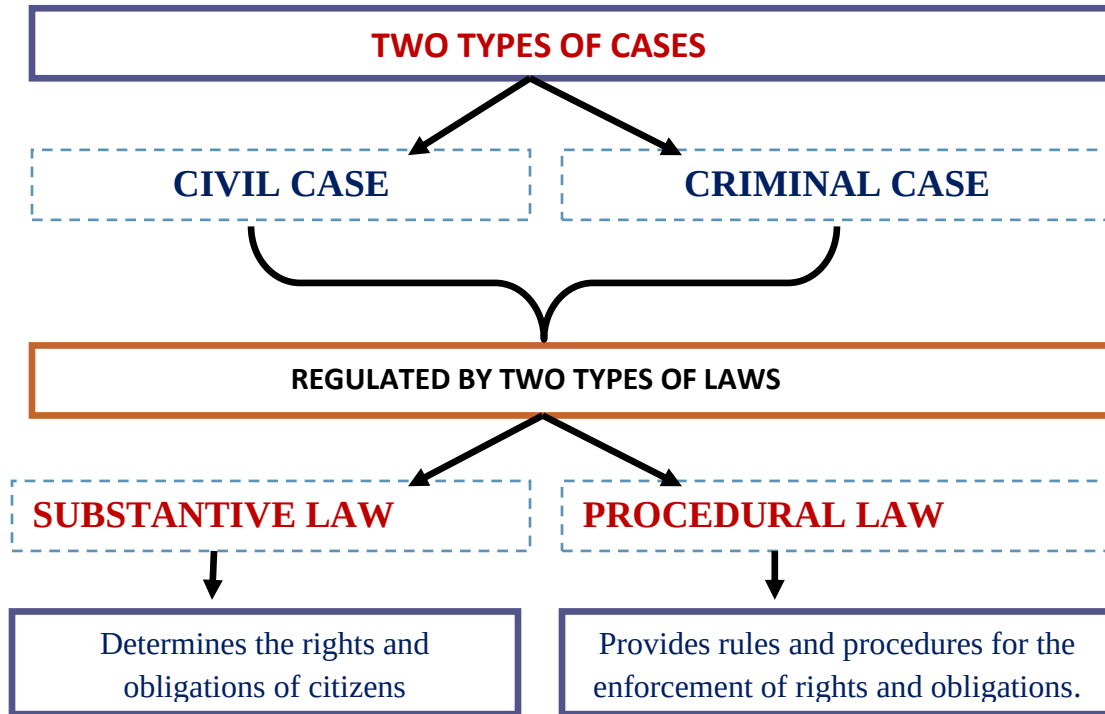


DRAFTING OF SUITS, APPEAL AND APPLICATIONS



CHAPTER 37

PROCEDURAL ASPECTS OF WORKING OF CIVIL COURTS



PROCEDURAL ASPECTS OF WORKING OF CIVIL COURTS

1. DIFFERENT STAGES OF A SUIT

1. INSTITUTION OF SUIT.
↓
2. ISSUE AND SERVICE OF SUMMONS.
↓
3. WRITTEN STATEMENT.
↓
4. DISCOVERY AND INSPECTION.
↓
5. APPEARANCE OF PARTIES.
↓
6. HEARING OF THE SUIT.
↓
7. JUDGMENT AND DECREE
↓
8. EXECUTION.



2. CONCEPT OF DECREE AND ORDER

"Decree" is defined in Section 2(2) of the Code as: - the formal expression of an adjudication which, conclusively determines the rights of the parties, With regard to all or any of the matters in controversy.

TWO TYPES OF DECREE

PRELIMINARY: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

FINAL: A decree is FINAL when NO further proceedings have to be taken before the suit can be completely disposed of.

DECREE HOLDER 2(3)}

Decree holder means any person in whose favor a decree has been passed or an order capable of execution has been passed

JUDGMENT DEBTOR 2(11)}

Judgment debtor means any person against whom a decree has been passed or an order capable of execution has been made.

ORDER

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

Generally no appeal lies from an order unless it is provided in law

DIFFERENCE BETWEEN DECREE AND ORDER

Basis	Decree	Order
Conclusiveness	Decrees adjudicates & conclusively determines the rights of parties	Order does not determine any rights.
Appeals	A decree is always appealable unless prohibited by law	Order is not appealable. (In some cases, it is allowed)
Second Appeals	Second appeal is sometimes allowed by the court.	No second appeal is allowed in any case.
finality	Decree may be preliminary or final	Order is always final



3. JURISDICTION

The Civil Procedure Code, 1908 stipulates that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred.

The inherent lack of jurisdiction cannot be cured even by consent of parties, which means if the court does not have any jurisdiction at all; the parties cannot subsequently confer it by an agreement. The onus of proving that the court does not have jurisdiction lies on the party who disputes the jurisdiction.

The jurisdiction is basically of three types

1. Pecuniary
2. Territorial:
3. As to subject matter: For example, Motor Vehicles Act provides for special tribunal for matters under it. Similarly disputes relating to terms of service of government servants go to Administrative Tribunals.

The first and fundamental rule governing jurisdiction is that suit shall be instituted in the court of lowest grade competent to try it.

PLACE OF SUING/FILING OF SUIT (TERRITORIAL)

1. According to Section 15 lay down that every suit shall be instituted in the Court of the lowest grade to try it.
2. According to Section 16, suits relating to immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situated.
3. According to Section 17 Where immovable property is situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated
4. According to Section 18 Where jurisdiction of Courts where immovable property is situated are uncertain, then any of the said Courts may proceed to entertain the suit.
5. According to Section 19 Suit for compensation for wrong done to the person or to movable property, may be instituted in any of the Courts within whose jurisdiction the defendant resides, or carries on business, or personally works for gain or where wrong was committed
6. According to Section 20 Other suits (where Sections 15, 16, 18 and 19 doesn't apply) may be instituted in any of the Courts within whose jurisdiction the defendant resides, or cause of action has arisen. In the case of a body corporate or company suit may be instituted in any of the Courts within Whose jurisdiction; -
• Its principal office is situated, or • Cause of action has arisen, <i>provided</i> it has a subordinate office (branch office) at such place.

CASE LAWS



S.NO.	CASE NAME	PROVISIONS
1	<i>Angile Insulations v. Davy Ashmore India Ltd.</i>	Where there might be two or more competent courts which could entertain a suit and if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an



		agreement would be valid
2	<i>Hakam Singh v. Gammon (India) Limited</i>	The Supreme Court held that the parties, by an agreement, cannot confer jurisdiction on a Court which it doesn't possess under the law. However, The parties can agree that only a particular Court will try a suit, where the two courts have jurisdiction to try a suit.

4. STAY

With the object of preventing courts of concurrent jurisdiction simultaneously trying two parallel suit in respect of the same matter in issue, Civil Procedure Code has vested inherent power in the court to stay the suit. The pendency of a suit in Foreign Court does not preclude the courts in India for trying a suit founded on same cause of action. The application for stay of suit is maintainable at any stage of the suit. The court does not have option to refuse on ground of delay.

5. RES JUDICATA AND RES SUB-JUDICE

DOCTRINE OF RES SUB-JUDICE /STAY OF SUIT [Section 10 of CPC]

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 where such suit is pending in the same or any other Court (**in India**) having jurisdiction to grant the relief claimed,

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.

Essential conditions for stay of suits

- There must be two suits instituted at different times;
- The matter in issue in the later suit should be directly and substantially in issue in the earlier suit;
- Such suit should be between the same parties;
- Such earlier suit is still pending either in the same Court or in any other competent Court.
- The court in which previous suit is pending has the jurisdiction to try such suit.

Section 10 is enacted to prevent the Courts of Concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue.



[M/s. Wings Pharmaceuticals (P) Ltd. and another v. M/s. Swan Pharmaceuticals and others]	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.

DOCTRINE OF RES JUDICATA [Section 11]

Meaning	Section 11 of the Civil Procedure Code deals with the doctrine of Res Judicata which imposes, bar or restraint on repetition of litigation of the same issues. It prevents two different decrees on the same subject. The doctrine underlines the general principle that one shall not be twice vexed for the same cause. Section 11 says that once a resjudicata, it shall not be adjudged again.
	This doctrine is based on the following grounds of public policy (a) There should be an end to litigation; (b) The parties to a suit should not be harassed to agitate the same issues or matters already decided. (c) The time of Court should not be wasted.
	For the applicability of the principle of res judicata the following conditions are required to be satisfied (a) The matter must be directly and substantially in issue in two suits; (b) The prior suit should be between the same parties or persons claiming under them; (c) The parties should have litigated under the same title; (d) The court which determined the earlier suit must be competent to try the latter suit; (e) The same question is directly and substantially in issue in the latter suit.
Construction of Res Judicata	The doctrine which provides that any matter which might or ought to have been made a ground of defence in such former suit shall be deemed to have been a matter directly or substantially in issue in such (former) suit. Hence as per doctrine of constructive Res judicata also, subsequent suit will be barred.
Bar of further suit [Section 12]	Section 12 of Civil Procedure Code provides that abatement of suit or its dismissal, for not bringing the legal representative on record bars a further suit.

DISTINGUISH BETWEEN RES SUBJUDICE AND RES JUDICATA

The doctrine of res Sub Judice bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit.

On the other hand, the, doctrine of res judicata bars the trial of a suit of an issue in which the manner directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title.



6. PLAINT

The entire legal machinery under the Civil Law is set in motion by filing of plaint and hence plaint is the actual starting point of all pleadings in a case. Though the law has not laid down any tight jacket formats for plaints, its minimum contents have been prescribed. (For details refer the chapter of pleadings)

7. SUMMONS

When the suit is duly instituted summons may be issued to Defendant to appear and answer the claim. Summons is an instrument used by the court to commence a civil action or proceedings and is a means to acquire jurisdiction over party. It is a process directed to a proper officer requiring him to notify the person named, that an action has been commenced against him, in the court from where process is issued and that he is required to appear, on a day named and answer the claim in such action.

Defendant to whom a summons has been issued may appear in person or by a pleader duly instructed or by a pleader accompanied by some person who is able to answer all questions.

8. APPEARANCE OF PARTIES

On the day fixed in the summons the Defendant is required to appear and answer and the parties shall attend the court unless the hearing is adjourned to a future day fixed by the court. If the Defendant is absent court may proceed ex-parte.

Where on the day so fixed it is found that summons has not been served upon Defendant as consequence of failure of Plaintiff to pay the court fee or postal charges the court may dismiss the suit.

Where neither the Plaintiff nor the Defendant appears the court may dismiss the suit. Such dismissal does not bar fresh suit in respect of same cause of action.

If the Defendant appears and Plaintiff does not appear and the Defendant does not admit the Plaintiff's claim wholly or partly, court shall pass order dismissing the suit.

If Defendant appears and admits part or whole of the claim the decree will be passed accordingly.

If the Plaintiff shows sufficient cause reopening of the matter is mandatory. What is sufficient cause depends upon facts and circumstances of each case and the court adopt liberal and generous construction which advances cause of justice and hence restoration is ordinarily not denied.

9. ADJOURNMENTS

Courts have the power to adjourn a case and take it up on a future date. Adjournments frequently sought by the parties contribute significantly to the delays caused in deciding the matters. The granting of adjournments is at the discretion of the court. The rules governing adjournments are considerably strict if applied in their true spirit.

10. EX-PARTE DECREES

A decree against the Defendant without hearing him or in his absence/in absence of his defence can be passed under the following circumstances: -



• Where any party from whom a written statement is required fails to present the same within the time permitted or fixed by the court.
• Where Defendant has not filed a pleading, it shall be lawful for the court to pronounce judgement on the basis of facts contained in the plaint, except against person with disability.
• Where the Plaintiff appears and Defendant does not appear when suit is called up for hearing and summons is property served the court may make an order that suit will be heard ex parte.

If an ex parte decree is passed and the Defendant satisfies that he was prevented by sufficient cause then he has the following remedies open:

• Prefer appeal against decree
• Apply for Review
• Apply for setting aside the Ex-parte Decree

11. PROCEEDING

The term 'proceeding' used in Section 397 (1) has a very wide connotation. It is not only confined to cases related to a commission or trial of an offence but include all judicial proceedings taken before an inferior Criminal Court even though they are not related to any specific offence. The real test is not the nature of the proceeding but nature of Court in which such proceeding is held. If it is held in an inferior Criminal Court, the revisional jurisdiction of the High Court or Sessions Judge would extend to such proceeding under Section 397 (1).

12. WRITTEN STATEMENT

The Defendant is required to file a written statement of his defence at or before the first hearing or such time as may be allowed along with the list of documents relied upon by him. If Defendant disputes maintainability of the suit or takes the plea that the transaction is void it must be specifically stated. A general denial of grounds alleged in the plaint is not sufficient and denial has to be specific. The denial should not be an evasive denial but it must be on point of substance. Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading shall be deemed to be admitted.

13. EXAMINATION OF PARTIES

Examination of parties is an important stage after appearance. At first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. Such admissions and denials shall be recorded. The examination may be an oral examination.

Where admission of facts have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for determination of any such question between the parties, make such order or give such judgement as it may think fit.



14. PRODUCTION OF DOCUMENTS

The parties or their pleaders shall produce at or before the settlement of issues, all documentary evidence of every description in their possession or power, on which they intend to rely, and which has not been filed in the court or ordered to be produced.

No documentary evidence in the possession or power of any party, which should have been but has not been produced in accordance with the aforesaid requirements, shall be subsequently admissible.

15. FRAMING OF ISSUES

The court shall at first hearing, after reading the plaint and written statement ascertain upon what material propositions of facts or law parties are at variance.

Court is required to pronounce judgement on all the issues. Issues may be framed from allegations made on oath by the parties or in answer to interrogatories or from contents of documents produced by either party. If the court is of the opinion that the case or any part thereof may be disposed of on issue of law only, it may first try it, if issue relates to:

- | |
|---|
| <ul style="list-style-type: none">• Jurisdiction of the court, |
| <ul style="list-style-type: none">• Bar to the suit created by law for the time being in force. |

Where the parties are at issue on some question of law or fact and issues have been framed by the court as herein-above provided, if the court is satisfied that no further argument or evidence than what the parties can at once adduce is required upon such of the issues as may be sufficient for decision of the suit and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues and if the finding thereon is sufficient for the decision, may pronounce judgement accordingly.

16. SUMMONING AND ATTENDANCE OF WITNESSES

On the date appointed by the court and not later than 15 days after the date on which issues are settled parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents.

The judge shall make or dictate on a typewriter or cause to be mechanically recorded, a memorandum of the substance of deposition of witnesses. A witness may be examined on commission also.

If signature of witness is not taken on any part of deposition or correction it does not make deposition invalid. The court may at any stage of a suit inspect any property or thing concerning which any question may arise.



17. AFFIDAVIT

S.NO.	PARTICULARS	PROVISIONS
1	Meaning 	1. An affidavit is a statement or a declaration on oath reduced to writing and sworn before that person who has the authority to administer such an oath. 2. The person executing an affidavit is called the deponent. Since the statement is being given on oath is an affidavit, the affidavit must contain correct and accurate particulars. The consequences of false affidavit may be disastrous and embarrassing. 3. The Courts have been given the power under Order XIX, Civil Procedure Code, 1908 by directing any person to prove a particular fact by an affidavit. 4. An affidavit must be verified and specified as to which of its contents are true on the basis of personal knowledge and as to which of its contents are believed to be true on the basis of information received by the deponent.
2	Contents	<u>Every affidavit must clearly and separately indicate the statements which are true to the</u> (a) Knowledge of the deponent; (b) Information received by the deponent; (c) Belief of the deponent; and (d) Information based on legal advice.
3	Points to be kept in mind while drafting affidavit	A. The deponent must be described in all particulars like: <i>I,..... S/o.....aged....., resident of.....</i> B. The affidavit must contain oath or affirmation by the deponent on the Following words: <i>I do hereby solemnly affirm and declare as under:</i> C. It should always be drawn in the first person. D. The allegations, if any, in the affidavit should not be vague. It must be clear and specific. E. Affidavit should be divided into paragraphs and numbered consecutively. F. Any place or person referred to in the affidavit must be specified with all particulars. G. Affidavit must not relate to any fact which is within the personal knowledge of some other person. H. It must be executed on a non-judicial stamp paper. I. Affidavits are chargeable with stamp duty under India Stamp Act, 1899. However, no stamp duty is chargeable for the affidavits filed in the Courts. Such affidavits are liable to payment of prescribed Court fees.



4	Counter affidavit - meaning	Counter affidavit means <i>pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner, in the form of an affidavit and/or supported by an affidavit.</i> It is generally used while filing pleadings on behalf of a defendant/respondent before the High Court and/or certain other Tribunals and Commissions etc. The rules of pleadings which are applicable to a written statement, apply to a counter affidavit equally. Filing of a counter affidavit is obligatory when the defendant/respondent is so required by the Court. Failure of the defendant/respondent to file a counter affidavit on the day fixed by, the Court, will not entitle him, as of right, thereafter to file it. It does not mean that the defendant/ respondent will be shut out once for all. He may be permitted by the Court to file it on a later date on sufficient grounds shown for not filing the same in time.
5	Affidavit in evidence	The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the law of Evidence. The law of Evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. In general the rules of evidence are same in civil and criminal proceedings. <u>IMPORTANT RULES RELATING TO DRAFTING OF AFFIDAVIT IN EVIDENCE</u> 1. In case, the petitioner himself was involved in the execution of a contract, he should file Affidavit-in-evidence. 2. The allegations or charges or grounds relating to facts should be re-produced duly supported by documentary evidence. 3. In case, the point or issue pertains to engineering, medical, technology, science or other complex or difficult issues, then the evidence of expert is to be filed in the form of his Affidavit. 4. If necessary, the said witness has to appear before the Forum for the purpose of cross-examination by the counsel for the other party. For example, hand-writing or finger print experts etc. 5. The party who is filing the affidavit-in-evidence should also file documents, papers or books or registers to demolish the defence or case set up by the opposite party. 6. It is also permissible for any party to bring any outside witness (other than the expert witness) in support of his case if the facts and circumstances of the case so warrant and permitted by the Court/Tribunal. 7. At the time of tendering affidavit-in-evidence, the party must bring along with it either the original of papers, documents, books, registers relied upon by it or bring with it the carbon copy of the same. It may be noted that only photocopy of any paper or



		<i>document (in the absence of its reply, original or carbon copy) cannot be relied upon and tendered as an evidence.</i>
6	Rule of adverse inference	It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party. The Court will be justified in drawing an adverse inference against that party. <u>Ms. Shefali Bhargava v. Indraprastha Appollo Hospital</u> It is equally incumbent upon a party to produce evidence of some expert where the issue involved is a complex or difficult one as for instance, issues pertaining to engineering, medical, technology or science etc.

AFFIDAVIT

IN THE HON'BLE HIGH COURT OF _____/SUPREME COURT-----

Petition No._____/2005

IN THE MATTER OF:

_____,s/o_____,aged_____,r/o_____

....Petitioner

Versus

_____,s/o_____,aged_____,r/o_____

....Respondent

I, _____, son of _____, aged _____, resident of _____, do hereby solemnly affirm and declare as under:

1. I am the petitioner in the aforesaid petition and fully aware of the facts of the case.
2. That the facts stated in the petition are true and correct to the best of my knowledge and belief.
3. The legal submissions made in the petition are believed to be true and all these may kindly be treated as a part of this affidavit, since not repeated for the sake of brevity.

Verification:

Verified at _____ on _____ that the contents of the present affidavit are true and correct. Nothing material has been concealed there from.

SD/-

Deponent



18. JUDGEMENT

Judgement means the statement given by the judge on ground of which a decree is passed. The court after the case has been heard shall pronounce judgement in open court either within one month of completion of arguments or as soon thereafter as may be practicable, and when the judgement is to be pronounced judge shall fix a day in advance for that purpose.

Where judgement is not pronounced within 30 days from the date on which hearing of case was concluded, the court shall record the reasons for such delay.

The last paragraph of the judgement shall indicate in precise terms the relief, which has been granted by such judgement. Every endeavor shall be made to ensure that the decree is drawn as expeditiously as possible and in any case within 15 days from the date on which the judgement is pronounced.

The court also has the power to award 'cost'. If on any date fixed for hearing, a party to the suit fails to take step or obtains adjournment for producing evidence, the court may also award costs for causing delay. If the court finds, that the claim or defence as against the objector is false or vexatious to the knowledge of the party by whom it has been put forward, and if such claim is disallowed, abandoned or withdrawn, court holding the claim false or vexatious may order compensatory costs.

19. DECREE AND EXECUTION

After the decree is passed the process of execution which involves actual implementation of the order of the court through the process of the court starts the entire process of executing of decree.

EXECUTION OF DECREE

Application for execution of a decree shall be made by a holder of a decree who desires to execute it to the appropriate court which passed it or to the officer appointed in this behalf. In case the decree has been sent to another court than the application shall be made to such court or the proper officer thereof. Application for execution of a decree may be either (1) Oral; or (2) written.

APPLICATION FOR EXECUTION OF A DECREE MAY BE EITHER ORAL OR WRITTEN.

Oral Application:

Where a decree is for payment of money the court may on the oral application of the decreeholder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgement debtor, prior to the preparation of a warrant if he is within precincts of the court.

Written Application:

Every application for the execution of a decree shall be in writing signed and verified by the applicant.

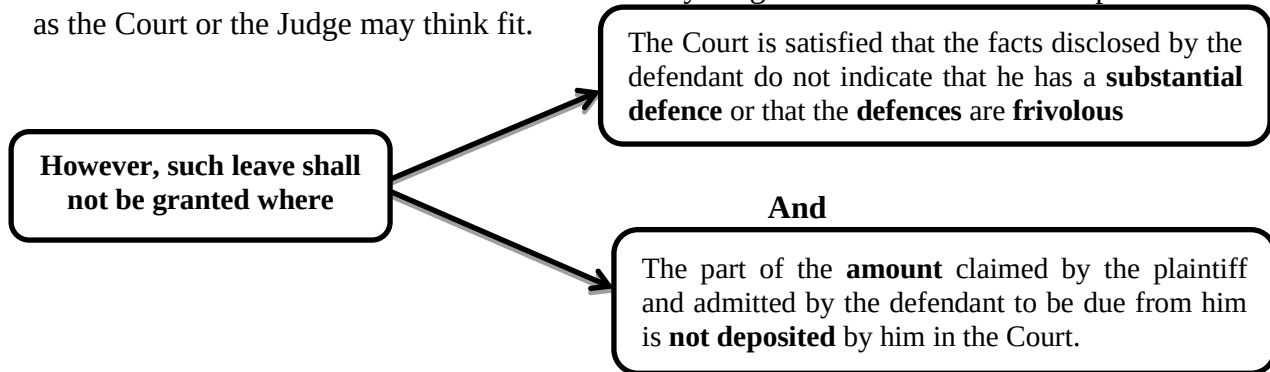
Contents of applications

1. The No. of the suit
2. The name of the parties
3. The date of the decree
4. Whether any appeal has been preferred from the decree
5. The amount of costs (if any) awarded
6. The name of the person against whom execution of the decree



20. SUMMARY PROCEDURE [Order 37]

The object of summary procedure is to prevent unreasonable obstruction by a defendant. 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 term as the Court or the Judge may think fit.



A procedure by way of summary suit applies to suits upon **bill of exchange, hundies or promissory notes**, or where the plaintiff desires to proceed under the provisions of Order 37.

21. CONCEPT OF CAVEAT

Section 148-A of the civil procedure code speak about Caveat. Caveat means Beware. It is a warning or caution given by a party to the court not to take any action or grant any relief to the applicant without notice being given to the party lodging the caveat. After lodging a caveat, it remains in force for 90 days. It shall not remain in force after the expiry of 90 days from the date on which it was lodged. Caveat is very common in testamentary proceedings.

A caveat may be filed by any person who is going to be affected by an interim order likely to be passed on an application which is expected to be made in a suit or proceeding instituted or about to be instituted in a Court.

According to Section 148A sub-Section (1) Where an application is expected to be made or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

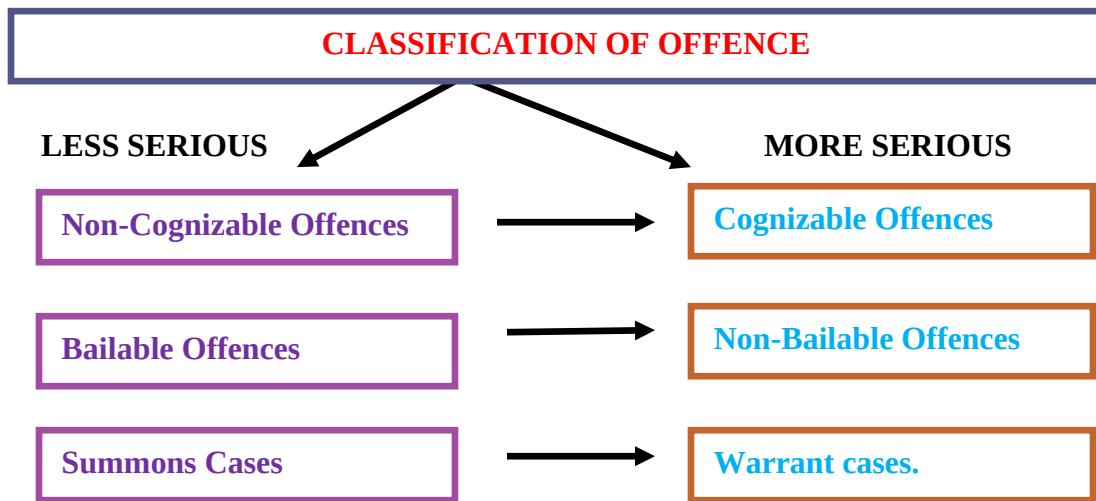


CHAPTER 38

PROCEDURAL ASPECTS OF WORKING OF CRIMINAL COURTS

OFFENCE

Section 2(n) of the Cr.P.C. defines the word "offence" to mean any act or omission made **punishable** by any law for the time being in force or Section 40 of the I.P.C. which states that "offence" denotes a thing made punishable by the Code.



BAILABLE OFFENCE AND NON-BAILABLE OFFENCE

1. 'Bail' means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.
2. An "anticipatory bail" is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-Bailable offence, but has not yet been arrested
3. An opportunity of hearing must be given to the opposite party before granting anticipatory bail.
4. A "Bailable offence" means an offence which is shown as Bailable in the First Schedule or which is made Bailable by any other law for the time being in force. Non-Bailable" offence means any other offence.



SPECIMEN BOND AND BAIL-BOND

BOND AND BAIL BOND FOR ATTENDANCE BEFORE COURT

I, _____(name), of _____(place), having been arrested or detained without warrant by the Officer in charge of police station (or having been brought before the Court of _____), charged with the offence of _____, and required to give security for my attendance before such Officer of Court on condition that I shall attend such Officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees. Dated, this day ____ of _____, 2023 .

(Signature)

COGNIZABLE OFFENCE AND NON-COGNIZABLE OFFENCE

"Cognizable offence" means an offence in which, a police officer may, arrest any person without warrant. Generally, cognizable offence are more serious in nature and heavy punishment are prescribed for these kind of offence.

"Non-cognizable offence" means an offence in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer.

In order to be a cognizable case under Section 2(c) of the Code, it would be enough if one or more (not ordinarily all) of the offences are cognizable.

SUMMONS AND WARRANT CASES

WARRANT CASE

A **"Warrant case"** means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding **two years**. In other words, those cases which are punishable with imprisonment for two years or less are summons cases, the rest are all warrant cases.



Different Stages of Criminal Trial in a Warrant Case when instituted by the police report

First Information Report: An FIR is information given by someone (aggrieved) to the police relating to the commitment of an offense.



Investigation: The next step after the filing of FIR is the investigation by the investigating officer and then conclusion is filed to the Magistrate as a police report.



Charges: If after considering the police report and other important documents the accused is not discharged then the court frames charges under which he is to be tried.



Plea of guilty: After framing of the charges, the accused is given an opportunity to plead guilty, and the responsibility lies with the judge to ensure that the plea of guilt was voluntarily made. The judge may upon its discretion convict the accused.



Prosecution evidence: After the charges are framed, and the accused pleads not guilty, then the court requires the prosecution to produce evidence to prove the guilt of the accused. The prosecution is required to support their evidence with statements from its witnesses. This process is called examination in chief.



Statement of the accused: Section 313 of the Criminal Procedure Code gives an opportunity to the accused to be heard and explain the facts and circumstances of the case.



Defence evidence: An opportunity is given to the accused to produce evidence so as to defend his case. The defense can produce both oral and documentary evidence.



Judgement: The final decision of the court with reasons given in support of the acquittal or conviction of the accused is known as judgement.



Stages of Criminal Trial in a Warrant Case when Private Complaint institutes case

1. It may sometimes happen that the police refuses to register a FIR.
2. In such cases one can directly approach the criminal court under Section 156 of CrPC.
3. On the filing of the complaint, the court will examine the complainant and its witnesses to decide whether any offence is made against the accused person or not.
4. After examination of the complainant, the Magistrate may order an inquiry into the matter by the police and to get him submit a report for the same.
5. After examination of the complaint and the investigation report, the court may come to a conclusion whether the complaint is genuine or whether the prosecution has sufficient evidence against the accused or not.
6. If the court does not find any sufficient material through which he can convict the accused, then the court will dismiss the complaint and record its reason for dismissal.
7. If the court thinks that the prosecution has a genuine case and there are sufficient material and evidence with the prosecution to charge the accused then the Magistrate may issue a warrant or a summon depending on the facts and circumstances.

SUMMON CASES

According to Section 2(w) of Code of Criminal Procedure, 1973, Those cases in which an offence is punishable with an imprisonment of fewer than two years is a summon case. A summon case doesn't require the method of preparing the evidence. Nevertheless, a summon case can be converted into a warrant case by the Magistrate if after looking into the case he thinks that the case is not a summon case.

Important points about summons case

• A summons case can be converted into a warrant case.
• The person accused need not be present personally.
• The person accused should be informed about the charges orally. No need for framing the charges in writing.
• The accused gets only one opportunity to cross-examine the witnesses.

The different stages of criminal trial in a summon case are given from Section 251 to Section 259 of the Code of Criminal procedure.

Stages of Criminal Trial in a Summons Case

Pre-trial: In the pre-trial stage, the process such as filing of FIR and investigation is conducted.

Charges: In summons trials, charges are not framed in writing. The accused appears before the court or is brought before the court then the Magistrate would orally state the facts of the offense he is answerable.

Plea of guilty: The Magistrate after stating the facts of the offence will ask the accused if he pleads guilty or has any defense to support his case. If the accused pleads guilty, the Magistrate records the statement in the words of the accused as far as possible and may convict him on his discretion.



Plea of guilty and absence of the accused: In cases of petty offences, where the accused wants to plead guilty without appearing in the court, the accused should send a letter containing an acceptance of guilt and the amount of fine provided in the summons. The Magistrate can on his discretion convict the accused.

Prosecution and defense evidence: In summons case, the procedure followed is very simple and elaborate procedures are eliminated. If the accused does not plead guilty, then the process of trial starts. The prosecution and the defense are asked to present evidence in support of their cases. The Magistrate is also empowered to take the statement of the accused.

Judgement: When the sentence is pronounced in a summons case, the parties need not argue on the quantum of punishment given. The sentence is the sole discretion of the judge. If the accused is acquitted, the prosecution has the right to appeal. This right to appeal is also extended to the accused.

SUMMARY TRIAL

Cases which generally take only one or two hearings to decide the matter comes under this category. The summary trials are reserved for small offences to reduce the burden on courts and to save time and money. Those cases in which an offence is punishable with an imprisonment of not more than six months can be tried in a summary way. The point worth noting is that, if the case is being tried in a summary way, a person cannot be awarded a punishment of imprisonment for more than three months.

The trial procedure is provided from Section 260 to Section 265 of the Code of Criminal Procedure, 1973.

STAGES OF CRIMINAL TRIAL IN SUMMARY CASES

- The procedure followed in the summary trial is similar to summons-case.
- Imprisonment up to three months can be passed.
- In the judgement of a summary trial, the judge should record the substance of the evidence and a brief statement of the finding of the court with reasons.

COMPLAINT

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report.

The requisites of a complaint are:-

(a) an oral or a written allegation;
(b) some person known or unknown has committed an offence;
(c) it must be made to a magistrate; and
(d) it must be made with the object that he should take action.

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant.



DISTINGUISH BETWEEN THE FOLLOWING: COMPLAINT AND PLAINT

Complaint under section 2(d) of the criminal procedure code means any allegation made orally or in writing to a magistrate, with a view to his taking action under this code that some person whether known or unknown has committed an offence but it does not include a police report.

However, a report made by the police officer in a case which discloses after investigation the commission of a non-cognizable offence shall be deemed to be a complaint and the police officer making the report as a complainant.

A complaint in a criminal case is what a plaint is in a civil case, order 6 R. 1 of civil procedure code (C.P.C.) defines “pleading”. It means either a plaint or a written statement. Plaint is the statement of claim, in writing and filed by the plaintiff. In which he sets out his cause of action with all necessary particulars.

CRIMINAL MISCELLANEOUS PETITION

In any case Civil/Criminal/Writ when any Miscellaneous Petition is moved, the same is registered as Civil Miscellaneous Petition/Criminal Miscellaneous Petition/or as Civil/Criminal Writ Miscellaneous Petition. There is no worrying distinction, all are subject to jurisdiction invoked by the petitioner.

**BAIL**

Bail means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

An “*anticipatory bail*” is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (State of Assam v. R.K. Krishna Kumar).

Specimen Bail Application before a Magistrate during Police Enquiry under s. 437, Cr.PC 1973

In the Court of..... Magistrate.....

The State.....

Versus

Accused AB son of TZ, Village: Thana:

In the matter of petition for bail of accused

AB, during police enquiry

The humble petition of AB the accused above-named



Most respectfully showeth:

1. That your petitioner was arrested by the police on 5th March 2013 on mere suspicion. That nearly a month has passed after the arrest but still the Investigating Police Officer has not submitted a charge-sheet.
2. That your petitioner was not identified by any inmate of the house of CM where the burglary is alleged to have taken place, nor any incriminating article was found in his house.
3. That your petitioner has reason to believe that on GS with whom your petitioner is on bad terms and who is looking after the case for complainant has falsely implicated your petitioner in the case out of grudge.
4. That your petitioner shall fully co-operate with the police.
5. That your petitioner is not likely to abscond or leave the country.

Your petitioner prays that your Honour may be pleased to call for police papers and after perusing the same be pleased to direct the release of your petitioner on bail.

And your petitioner, as in duty bound, shall ever pray.

Advocate

AB

Pleader

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the permission of the Court to act in such proceeding.

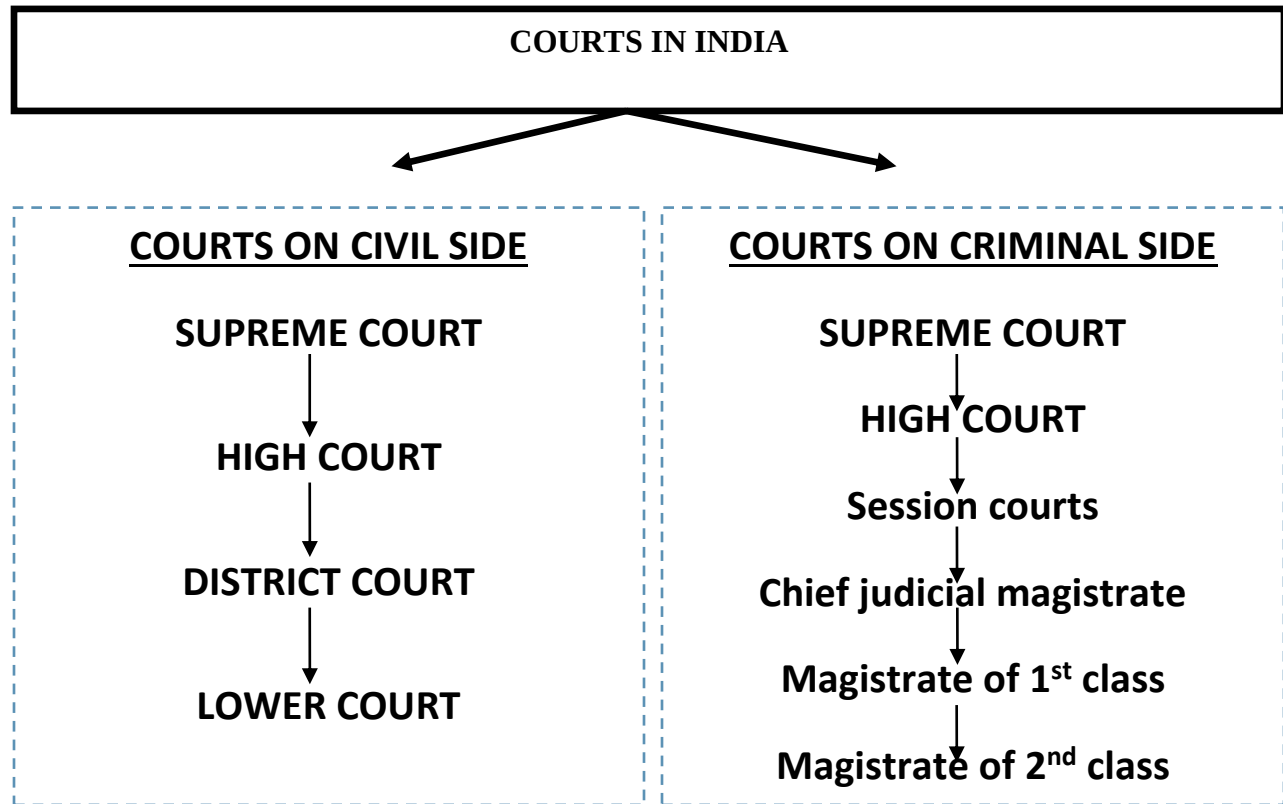
It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor

A “public prosecutor” means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor.

Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.



COURTS IN INDIA

S.NO.	TYPES OF COURT	FEATURES
<u>1</u>	Supreme Court of India	Supreme Court of India is the highest level of court of Indian juridical system which is established as per Part V, Chapter IV of the Constitution of India. It plays the role of the guardian of the Constitution of India. Supreme Court has the power to exercise extra ordinary jurisdiction to hear any appeal related to any matter for which any court or tribunal had decided with judgment through the option of special leave petition except the case of tribunal related to Armed Forces. Supreme Court has the power to withdraw or transfer any case from any High Court. The Supreme Court has the authority to review any verdict ordered. The order of Supreme Court is binding on all courts across India.
<u>2</u>	High Courts of India	Article 226 of Constitution of India has given the power to the High Courts to issue different writs for the enforcement of Fundamental Rights guaranteed under the Constitution. High



		Courts also hear appeals against the orders of lower courts. Article 227 of Indian Constitution has empowered all High courts to practice superintendence over all the courts of tribunal effective within the regional jurisdiction of the High Court. All the High Courts have the power to pronounce punishment for contempt of court. The High Courts are confined to the jurisdiction of State, group of States or Union Territory. The subordinate courts are covered by the administrative power of the High Courts under which they function.
<u>3</u>	Lower Courts of India	The District Court in India are established by the respective State Government in India for every district or more than one district taking into account the number of cases, population distribution in the district. These courts are under administrative control of the High Court of the State to which the district concerned belongs. The court at the district level has a dual structure that runs parallel- one for the civil side and one for the criminal side. The civil side is simply called the District Court and is headed by the district judge. There are additional district judges and assistant district judges who are there to share the additional load of the proceedings of District Courts. These additional district judges have equal power like the district judges for the jurisdiction area of any city which has got the status of metropolitan area as conferred by the state government.
<u>4</u>	Revenue Courts	There is a government apparatus to deal with revenue matters. These are 'courts' but are not a part of Judiciary because they come under the administration of the State governments. Revenue courts deal with matters pertaining to stamp duty, registration etc. At the lowest level, we have the 'Tehsildar' or Assistant Tehsildar. Above it is the office of the 'Sub-Divisional Officer' (SDO). Then comes the office of District Collector and above it is the 'Board of Revenue'. The Board of Revenue is the highest decision making body at the State level.



FIRST INFORMATION REPORT (FIR).

Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him.

Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. The above information given to a police officer and reduced to writing is known as **First**

**Information Report (FIR).**

In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate.

Any **person aggrieved by a refusal** on the part of an officer in charge of a police station to record the information may send the substance of such information in writing to the **Superintendent of Police** concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him.

The provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case. **RAMESH KUMARI V. STATE OF DELHI**

SPECIMEN FORM OF FIRST INFORMATION REPORT

To The Officer-in-Charge

..... (Name of the Police Station)

Sir

This is to inform you that my cycle has been stolen from the cycle stand in the daily market last evening. Last evening, before I went to the market, I placed my green model Hero Cycle in the cycle stand No. 1 as usual. I had locked the cycle. The cycle bears the No. I had bought it only a month ago and it was almost new. The cycle had a full gear case, a carrier and a side basket. When such mishap occurred I was buying vegetables in the market. I asked everybody who were present there about the cycle. It was all in vain. I request you to kindly register a case of theft and initiate the necessary investigation to recover the stolen cycle.

Yours faithfully,

..... (Your Name)



LEGAL NOTICE AND ITS REPLIES

A legal notice is basically a legal intimation that is sent to the opponent, it indicates that the aggrieved is preparing a lawsuit to be filed against the concern, in the case the demand that is mentioned in the notice does not get fulfilled. Therefore, a legal notice can be defined as a formal communication to any legal entity or to a person, informing the other party about the intention of undertaking legal proceedings against them. The legal notice serves the purpose of giving an opportunity to the opposite party to reconsider his legal position and to make amendments or afford restitution without proceeding to a Court of Law. The notice helps to settle the disputes outside the Court. Majority of matters settle before the trial commences. The notice gives the opportunity to the opposite party to rethink or reconsider their stance. To avoid a legal dispute the parties can take necessary actions if in their opinion the case can be settled. The parties can settle the matter through negotiation, mediation or arbitration. The Legal Notice acts as a warning against the offender, a fair chance is given to both the parties to resolve their dispute, and provide an amicable settlement. Legal notice must mention the following points.

• Name and address of the parties
• Facts and grievances
• Compensation
• Signature

The procedure of sending a legal notice includes –

• The legal notice must be addressed to the person against whom the grievances arise.
• A legal notice must be sent on a plain paper or on the letterhead of a lawyer.
• The legal notice must categorically mention the time period in which the addressee must respond to the notice, the time period can be 30 to 60 days. The time period must be stipulated within which the other party is expected to fulfil the demands.
• The legal notice should be signed by the lawyer as well as the sender.
• The legal notice must be sent either through a registered post or courier. It is advisable to ensure that the acknowledgement is retained.

Replying to a legal notice is the mix of the process of replying to a written statement and drafting of notice. The reply starts with the mention of the basic details of the legal notice received - date, details of the entity on behalf of whom the legal notice was sent etc. It may also contain mention of claims of legal notice received as false, or something of similar nature. The legal notice then starts with preliminary objections and then moves on to “reply on merits” - replying to the legal notice point/paragraph wise, and may not necessarily contain such a heading. This process is very similar to the drafting of a written statement or rejoinder.



Specimen Format: Legal Notice: Filed by Vendor for payment of immovable property

Ref. No. _____

Dated _____

REGD.

A.D.

SUB.: LEGAL NOTICE

To,

Dear Sir/Madam,

Pursuant to the instructions from and on behalf of my client _____, resident of _____ I do hereby serve you with the following Legal Notice: –

- i. That my client had entered into an agreement of sale dated ____ with you.
- ii. That the sale agreement was for the selling of house no. ____, situated at _____ for a consideration of Rs. ____.
- iii. That according to the clause ____ of the agreement, the said transaction is to be completed within ____ months from the date of said agreement.
- v. That my client was and is still willing and ready to execute a sale deed in your favour or in favour of any person as you may direct in accordance with the terms of the said agreement, but it couldn't be done because of the default of the payment.

I hereby call upon you to have the deed of conveyance executed by my client against payment of the balance of the consideration money on or before the ____ day of _____, 20__ in terms of the said agreement, failing which the said agreement will stand cancelled and the earnest money paid by you will stand forfeited. However, this is without prejudice to the rights of my client to recover all costs, damages, losses and expenses incurred by him by reason of your default in performing the said agreement. A copy of this Notice is kept in my office for record and further necessary action and you are also advised to keep the copy safe as you would be asked to produce in the court

(.....)

Advocate



NOTICE OF SUIT UNDER S. 80, C.P.C. FOR SUING THE STATE GOVERNMENT

Notice to the Collector of a district

Notice under s. 80, C.P. Code

TO The Collector of the District of.....

P.O.....

Dt.....

Sir,

Under instructions from my client Sri.....son of.....by caste.....by occupation.....residing at.....P.O.....P.S.....Dt..... I give you this notice under s. 80, C.P.C. and state that my aforesaid client intends to sue the Government of West Bengal (or, name the State) on expiry of two months, after service of this notice, on the cause of action and for reliefs appearing herein below :

- (a) Cause of action (give in brief/acts giving rise to cause of action).
- (b) Reliefs claimed (give here reliefs which the plaintiff would sue for).

Yours faithfully,

EVIDENCE- DEFINITION / TYPES

“Evidence” means and includes:-

- (a) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called **oral evidence**;
- (b) All documents (including electronic records) produced for the inspection of the Court; such documents are called **documentary evidence**.



TYPES OF EVIDENCE

ORAL EVIDENCE:

It means and indicates all the statements which the court permits or requires to be made before it by witnesses, in relation to matters of facts under enquiry.

DOCUMENTARY EVIDENCE

Documents produced for the inspection of the Court is called Documentary Evidence. Section 60 provides that the contents of a document must be proved either by PRIMARY OR BY SECONDARY EVIDENCE.

Primary evidence- means the document itself produced for the inspection of the Court

Secondary evidence- is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy.

CIRCUMSTANTIAL EVIDENCE

Evidence that is drawn not from direct observations of a fact at issue but from events or circumstances that surrounds it is called circumstantial evidence.

For example- from the evidence that the person was seen running away from the place of crime, a judge may infer that the person may have committed the crime.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write notes on the Rule of adverse inference?

ANSWER: Refer chapter 38

2. Write notes on the Affidavits?

ANSWER: Refer chapter 38

3. Distinguish between 'affidavit' and 'petition'

ANSWER: Refer chapter 38

4. What are the rules and guiding principles that should be kept in mind while drawing up an affidavit?

ANSWER: Refer chapter 38

5. Mention the important considerations while drafting an affidavit in evidence

ANSWER: Refer chapter 38

6. Explain the Counter affidavit

ANSWER: Refer chapter 38

7. State the ten essential ingredients of an affidavit conforming to the provisions of order XIX.

ANSWER: Refer chapter 38

8. Explain the following: Relevance of counter affidavit in pleadings.

ANSWER: Refer Page 361 chapter 29

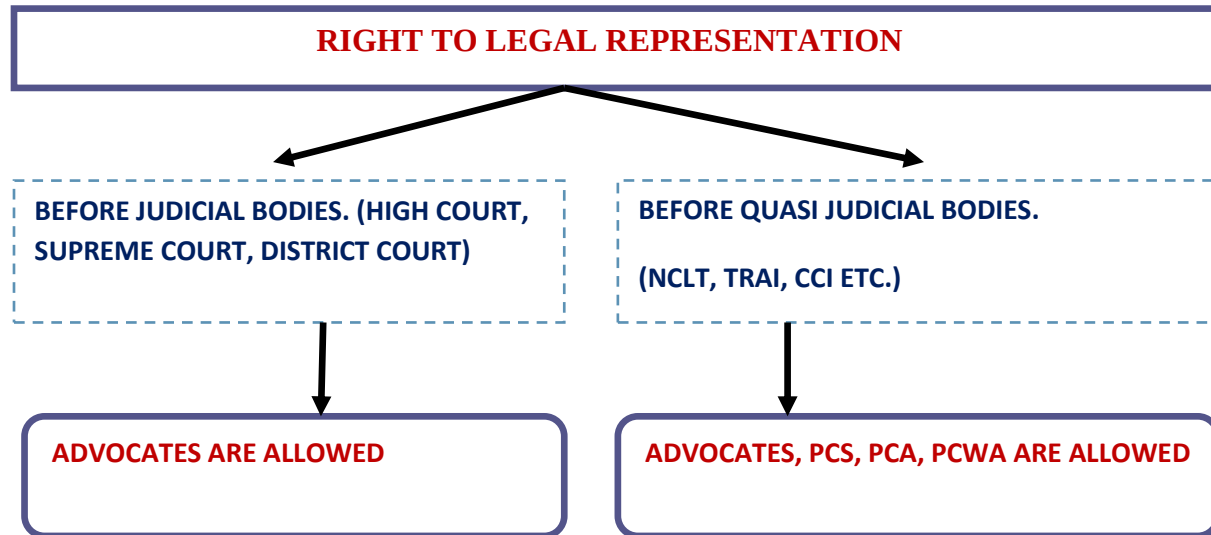
In the light of judicial pronouncements, discuss the following: It is well settled that evidence should be tailored strictly according to pleadings.

The provisions of sections 101, 102, 103, 106, 109, 110 and 111 of the Indian evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly according to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings (**Habib khan vs. valasula Devi**) the following must be kept in mind while preparing the affidavit-in-evidence by the parties.



CHAPTER-39

APPEARANCES AND PLEADINGS-1



LEGAL REPRESENTATION BEFORE JUDICIAL BODIES

A person can be represented before a **Court only by an Advocate**. However, in case of **Quasi-judicial bodies** are concerned, a person can be represented by an **Advocate as well as by a Practising Company Secretary/ Chartered Accountant/ Cost Accountant**.

Company Law Board/NCLT, Competition Commission of India (CCI), Securities Appellate Tribunal (SAT) Telecom Regulatory Authority of India (TRAI) etc. are the various Quasi-judicial bodies before which **Practising Company Secretary** can appear as an authorized representative.

RIGHT TO LEGAL REPRESENTATION UNDER VARIOUS ACTS

1. UNDER THE COMPANIES ACT

According to **Section 432** of companies act 2013 the applicant or the appellant may either appear **in person** or **authorise one or more company secretaries** or chartered accountants or cost accountants or legal practitioners or **any officer** to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

Company Secretaries who are in job can appear for and on behalf of Employer Company, by virtue of powers given under a **power of attorney** while appearing before NCLT/NCLAT.



SOME OF THE KEY PROVISIONS RELATED TO APPEARANCE UNDER THE COMPANIES ACT, 2013, ARE AS FOLLOWS:

1. Appearance before the Registrar of Companies (ROC)
The ROC is a regulatory authority responsible for administering the provisions of the Companies Act, 2013. Companies and their officers may be required to appear before the ROC in relation to various compliance matters, such as filing of returns and other documents, inspection of books and records, and verification of registered office address.
2. Appearance before the National Company Law Tribunal (NCLT)
The NCLT is a quasi-judicial body that adjudicates disputes and grievances related to companies and their affairs. Parties may be required to appear before the NCLT in various types of proceedings, such as merger and acquisition approvals, insolvency and bankruptcy proceedings, and disputes related to the interpretation of the Companies Act, 2013.
3. Appearance before the Serious Fraud Investigation Office (SFIO) The SFIO
is a specialized investigating agency that is empowered to investigate cases of fraud and financial irregularities related to companies. Parties may be required to appear before the SFIO in connection with investigations related to corporate fraud, money laundering, and other financial crimes.
4. Appearance before the Securities and Exchange Board of India (SEBI):
SEBI is a regulatory authority that is responsible for regulating and overseeing the securities market in India. Companies and individuals may be required to appear before SEBI in connection with various compliance and enforcement matters, such as insider trading, market manipulation, and disclosure requirements.
In conclusion, under the Companies Act, 2013, there are various situations where a person may be required to appear before regulatory or quasi-judicial authorities. It is important to comply with these requirements and to seek legal advice and representation as necessary to protect one's rights and interests.

POWER TO REFUSE REGISTRATION AND APPEAL AGAINST REFUSAL

PRIVATE COMPANY

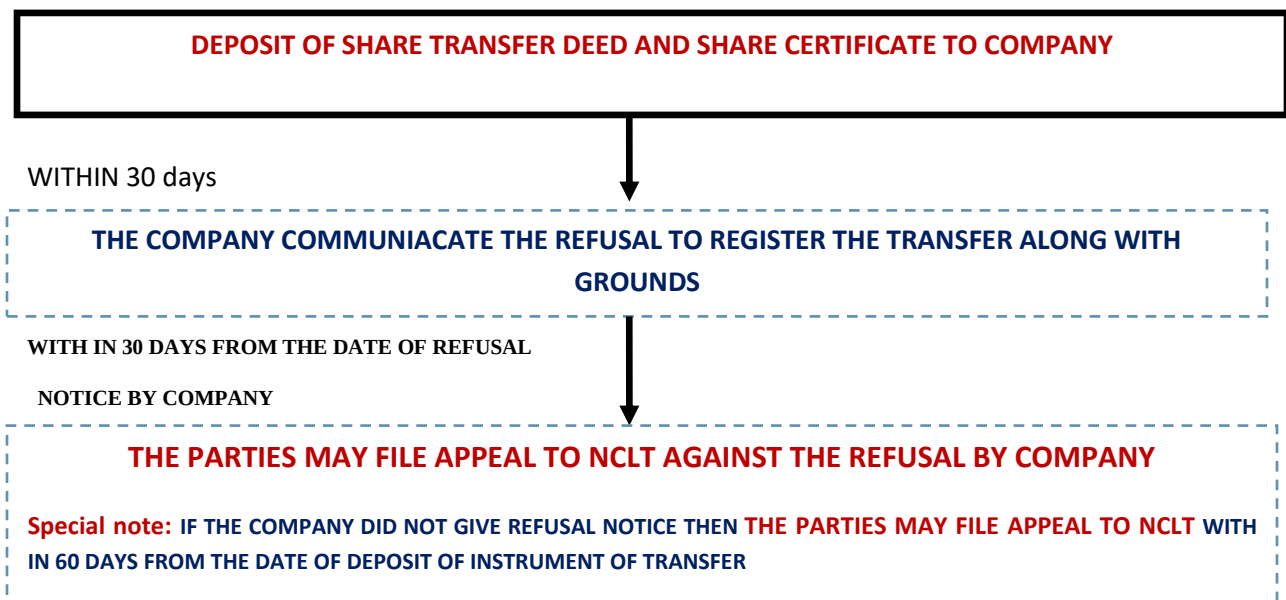
According to **section 58(1)** of the Companies Act, 2013, if a private company limited by shares refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any securities or interest of a member in, the company, **it shall, within a period of thirty days** from the date on



which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

If a private company limited by shares refuses to register the transfer or transmission, the transferee may appeal to the TRIBUNAL against the refusal within 30 days from the date of receipt of the notice or in case no notice has been sent by the company, within 60 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company. [Section 58 (3)]

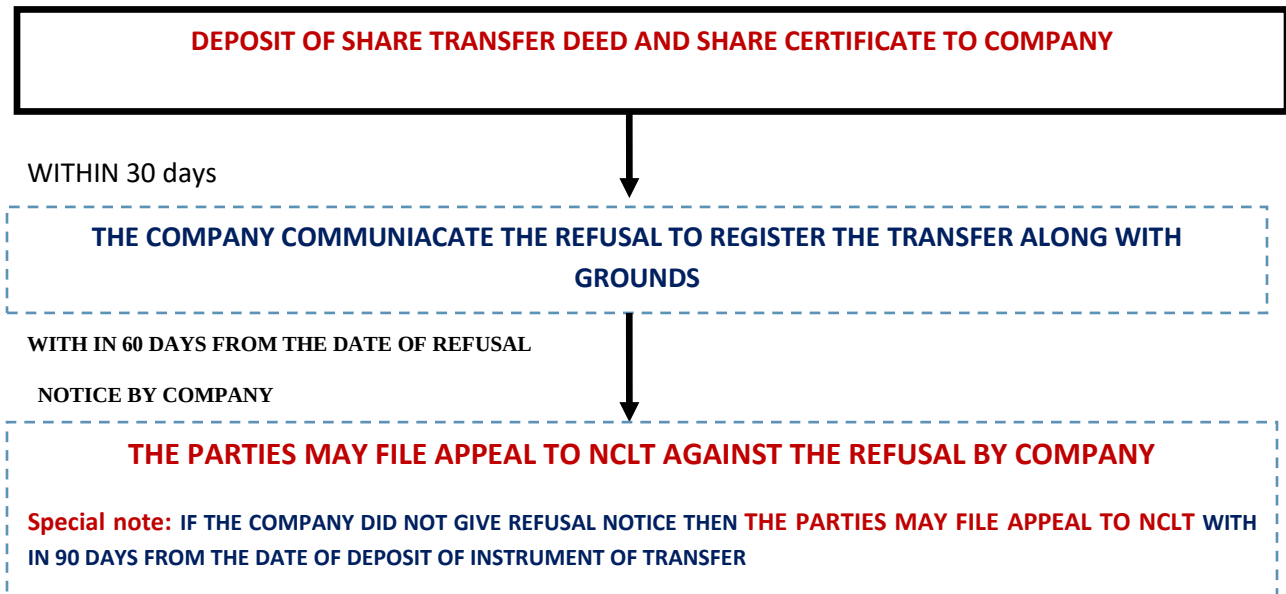
CHART ANALYSIS ON SECTION 58 (PRIVATE COMPANY)



According to section 58(4) of the Companies Act, 2013, a public company may on sufficient cause, refuse, to register the transfer of, securities **within a period of thirty days** from the date on which the instrument of transfer, or the intimation of transmission, as the case may be, is delivered to the company. In such a case the public company may send an intimation of the refusal.

If a public company without sufficient cause refuses to register the transfer of securities within 30 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal [Section 58 (4)]



CHART ANALYSIS ON SECTION 58 (PUBLIC COMPANY)**ORDER OF TRIBUNAL**

The Tribunal, while dealing with an appeal made as stated above may, after hearing the parties, either dismiss the appeal, or by order

- a) Direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within 10 days of the receipt of the order; or
- b) Direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved. [Section 58 (5)]

If a person contravenes the order of the Tribunal, he shall be punishable with imprisonment for a term which shall not be less than 1 year but which may extend to 3 years and with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees. [Section 58 (6)]

Appeal to NCLT against notice of refusal to transfer shares

If a **private company** refuses the registration of securities the transferee may appeal to NCLT against the refusal in Form **NCLT-1** within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company.

If a **public company without sufficient cause** refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within



ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to NCLT in **Form NCLT-1**.

Refusal to transfer shares- whether permissible?

The grounds/reasons on which a Public Company can refuse to register transfer of shares have not been specifically enumerated under the Companies Act. However, the provision of 111A (2) of the Companies Act, 1956 allowed the Board of Directors to refuse to register transfer of shares “for sufficient cause” Gujarat Machinery Manufactures Ltd. v. Nile Ltd.(2001) 105 Com Cas 817 (CLB). It is now well-settled that the words “sufficient cause” should not be given a restricted meaning. The Company is fully entitled to examine as to whether formalities required, such as signatures, stamp etc., have been fulfilled and that transfer would not involve violation of any other provision of the Companies Act, SEBI Act, or Regulations issued by SEBI, SICA or any other law for the time being in force. The Company, however, cannot act arbitrarily and will have to justify its action if questioned by the Company Law Board. It may be noted that under the scheme of Sec 108A to 108D of Companies Act, 1956, the Central Government while granting or declining to grant the approval for acquisition of shares, required to examine various factors such as :

• the impact of the acquisition on the management of the company,
• whether such an impact is desirable, the existing legal obligation of the company,
• whether such transfer itself would place the company in a situation to make a breach of certain existing contractual obligations of the company, thereby exposing the company to an action in law etc.

The company can thus also refuse to register transfer of shares on these grounds.

Proforma of Appeal

Rule 70 of NCLT Rules, 2016 provides for the appeals against refusal for registration of transfer or transmission of securities under Section 58 or for rectification of register of members under Section 59 shall be made to the Tribunal by way of a petition in Form NCLT- 1. The petition/appeal shall be on legal size either white or green paper. The margin on the left hand side shall be one and half inch and on right hand side only half inch. On the top, margin be one and half inch and on the both bottom, half inch. The petition shall be accompanied by the following documents :-

Each page of the petition be signed by the petitioner/ appellant (without rubber stamp) and last page of the petition be also signed with rubber stamp, if any. All Annexures to be filed shall have to be certified as true copy.



Supporting Documents-Where the company is the petitioner:

• Copy of the memorandum and articles of association
• Latest audited balance sheet and profit and loss account, auditor's report and director's report
• Authenticated copy of the extract of the Register of Members
• Copy of the resolution of the Board or Committee of Directors (where applicable) I Any other relevant documents I Affidavit verifying the petition. (Format as given in Form NCLT-6), The affidavit shall have to be attested either by the Notary Public or by Oath Commissioner.

Bank draft evidencing payment of application fee. Bank Draft to be in the name of Accounts Officer, NCLT.

- Memorandum of appearance with copy of the Board Resolution or the executed Vakalatnama, as the case may be. (Format as given in Form NCLT-12). The Vakalatnama to be affixed with Stamp of Rs.5/- and must be signed by the person in whose favour it is given. If the Vakalatnama has been given for the petition to be filed in Delhi in any Court, Tribunal or Quasi-Judicial Authority, as per judgment of the Delhi High Court, the Advocate must certify that the persons signing the Vakalatnama has signed in his presence.

Two extra copies of the petition. The supporting affidavit to be notarized only on the original of the petition.

IMPORTANT POINTS:

- a) The petition to be filed must also always be page numbered and proper Index be also prepared.
- b) The Memo of Parties be also prepared – Proforma is given in Form **NCLT-12**.
- c) In Delhi, the Registry of NCLT insist List of Dates and List of Events comprising of $\frac{3}{4}$ pages to be kept at the top of the petition.

Where the petition is made by any other person:

- Documentary evidence in support of the statements made in the petition including the copy of the letter written by the petitioner to the company for purpose of registering the transfer of, or the transmission of the right to, any share, or interest in, or debentures as also a copy of the letter of refusal of the company.
- Copies of the documents returned by the company.
- Any other relevant document.
- Affidavit verifying the petition. (Format as given in Form NCLT-6)
- Bank draft evidencing payment of application fee.
- Memorandum of appearance with copy of the Board's Resolution or the executed Vakalatnama, as the case may be. (Format as given in Form NCLT-12)



- Two extra copies of the petition.

A copy of such appeal shall be served on the concerned company at its registered office immediately after filing of the petition with the Tribunal.

Advertisement detailing petition

As per Rule 35(1) of Companies NCLT Rules, 2016 the petitioner shall advertise the petition in Form NCLT-3A at least 14 days before the date fixed for hearing at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the proposed company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.

Rule 35(2) of Companies NCLT Rules, 2016:

Every such advertisement shall state:

- (a) the date on which the application, petition/ reference was presented;
- (b) the name and address of the applicant petitioner and his authorized representative, if any;
- (c) the nature and substance of application, petition/ reference;
- (d) the date fixed for hearing;
- (e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition/ reference at the hearing shall send a notice of his intention to the petitioner or his authorized representative so as to reach him not later than two days previous to the day fixed for hearing.

Rule 35(3) of Companies NCLT Rules, 2016: Where the advertisement is being given by the company, then the same shall also be placed on the website of the company, if any.

Rule 35(4) of Companies NCLT Rules, 2016: An affidavit shall be filed to the Tribunal with such proof of advertisement or of the service, as may be available in, not less than 3 days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served.

Rule 35(5) of Companies NCLT Rules, 2016: Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit.

Rule 35(6) of Companies NCLT Rules, 2016: The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.



Notice to Opposite Party

Rule 37(1) of NCLT Rules, 2016 states that the Tribunal shall issue notice in Form NCLT-5 to the respondent to show cause against the application or petition on a date of hearing specified in the notice. Such notice in Form No. NCLT.5 shall be accompanied by a copy of the application with supporting documents.

Rule 37(2) of NCLT Rules, 2016: If the respondent does not appear on the date specified in the notice in Form NCLT-5, the Tribunal, after according reasonable opportunity to the Respondent, shall forthwith proceed exparte to dispose of the application.

Rule 37(3) of NCLT Rules, 2016: Where any objection of any person whose interest is likely to be affected by the proposed petition, he may either in person or through authorized representative file a reply accompanied with an affidavit along with copies of such documents on which it relies, with an advance service to the petitioner or applicant to the Registrar of Companies and Regional Director on or before the date of hearing and such reply and copies of documents shall form part of the record.

Filing of Affidavit under Rule 39 of NCLT Rules, 2016

The Tribunal may direct the parties to give evidence, if any, by affidavit. Every affidavit as to evidence to be filed before the Tribunal shall be in Form **NCLT-7**.

NCLT to dismiss Appeal or Direct Rectification

Rule 70(4) of the NCLT Rules, 2016 provides that the Tribunal may, while dealing with a petition under Section 58 or 59, at its discretion, make-

- (a) order or any interim order, including any orders as to injunction or stay, as it may deem fit and just;
- (b) such orders as to costs as it thinks fit; and
- (c) incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights shares.

Appeal against the Rectification of Register of Members

Section 59 deals with Appeal against the Rectification of Register of Members.

If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal to NCLT in Form NCLT-1 or to a



competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

As per Rule **70(5) of NCLT Rules, 2016** on any petition under section 59, the Tribunal may-

- (a) decide any question relating to the title of any person who is a party to the petition to have his name entered in, or omitted from, the register;
- (b) generally decide any question which is necessary or expedient to decide in connection with the application for rectification.

Who can file an Appeal?

Unlike an appeal under Section 58 on refusal to register the transfer/ transmission of Securities, wherein only transferee can appeal to Tribunal, an appeal under section 59 for rectification of Register of members can be made by a member of the company or any aggrieved person or by the Company itself.

Further in case of foreign members or debenture holders residing outside India, the appeal can be preferred at competent court outside India. In this regard, Central Government will specifically notify competent courts outside India which could hear matters for rectification.

Time Limit for filing of Appeal

It is important to note for seeking rectification under this Section there is no time limit provided. As per the decided case laws under section 111A of 1956 Act, courts have held though there is no time limit, the aggrieved person should approach court within reasonable time. Section 137 of Limitation Act also may come into play wherein limitation of three years may start from date of knowledge of cause of action.

Rest procedure for appeal against the Rectification of Register of Members is same as mentioned for appeal against refusal or register of transfer or transmission of securities by the company to the Tribunal as mentioned above.

APPEALS BEFORE NCLAT

Section 420 of the Companies Act, 2013 states that the National Company Law Tribunal may pass any orders it thinks fit, as long as it gives the parties before it, an opportunity of being heard. The powers of the Tribunal are, therefore, extremely wide and there are no restrictions on the kind of relief that it can grant in a particular case.

The Tribunal may also rectify any mistake that is apparent on the face of the record within two years from the date of the order



In view of the enormous powers of the Tribunal, an attempt is being made to highlight the provisions for making appeals from the orders of the Tribunal.

Appeal from the Orders of NCLT – Section 421

(1) any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) no appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Section 421 of Companies Act 2013 seeks to provide appeal against the order of the Tribunal in the Appellate Tribunal. It provides that appeal may be filed within 45 days from the date of order and in case Appellate Tribunal is satisfied that delay is justified then further period of 45 days is allowed. The Appellate Tribunal after according an opportunity of hearing may confirm, modify or set aside order of the Tribunal and provide copy of order to the Tribunal and parties to appeal.

At this point our enlightened reader's mind may be interrupted with many questions as to: who is a person aggrieved? What is the interpretation of limitation period in this clause? What all will be construed as sufficient cause? etc.

“Any person aggrieved”

In common judicial parlance the term person aggrieved by a decision includes :

a) a person whose interests are adversely affected by the decision; or

(b) in the case of a decision by way of the making of a report or recommendation – a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.



A party or a person is aggrieved by a decision only when it operates directly and injuriously upon his personal, pecuniary or proprietary rights. A person who feels disappointed with the result of a case is not a person aggrieved. The order must cause him a legal grievance by wrongfully depriving him of something.

Who is a 'person aggrieved' also was debated and decided in catena of judicial pronouncements. In *FERTILIZER COOPERATION KAMGAR UNION v. UNION OF INDIA*, the Court found that question of 'person aggrieved' is different from the question whether the petitioner is entitled to relief as prayed by him. The expression 'person aggrieved' denotes an elastic and to some extent an elusive concept. According to traditional theory, only a person whose right has been infringed can apply to the court but the later view as referred to above has liberalised the concept of aggrieved person and the right duty pattern commonly found in adversarial litigation has been given up. The only limitation is that such a person should not be a total stranger known as meddlesome interloper.

In the case of *Ayaaub Khan Noor Khan Pathan v. State of Maharashtra* the Hon'ble

Supreme Court has held that only a person who has suffered a legal injury can challenge an act/action/order etc. in a court of law by way of a writ under Article 226 of the Constitution of India. Writs under Article 226 of the Constitution of India are maintainable either for the purpose of enforcing a legal or fundamental right or when there is a sustainable complaint by the petitioner that there has been a breach of statutory duty on part of the authority qua him and to his prejudice thus making out a judicially enforceable right of his for enforcement. It has been held in the aforesaid case by the Hon'ble Supreme Court that it is implicit in the exercise of the extraordinary equitable jurisdiction of the High Courts that the relief prayed for must be for the enforcement of a legal right. A "legal right" has been held to mean entitlement arising out of legal rules. Concluding in para 17 of the aforesaid report on the question as to **who is a "person aggrieved"**, the Hon'ble Supreme Court has held that "in view of the above, law on the said point can be summarised to the effect that a person who raises a grievance must show how he has suffered a legal injury".

LIMITATION PERIOD FOR FILLING APPEAL

Section 421(3) of Companies Act, 2013

The appeal lies to the Appellate Tribunal within 45 days from the date of communication of the order of the Tribunal. The limitation period can be further extended by 45 days if the Appellate Tribunal is satisfied that the appellant was prevented by sufficient cause from filling the appeal.

The Supreme Court in the case of *N. Balakrishnan v. M. Krishnamurthy* AIR 1998 SC 3222 has held that unless there is a deliberate, malafide or gross negligence, reasonable delay should be condoned in as much as a person does not benefit by filing a petition with delay. Once no



malafides or illegal motive can be imputed to a person to file a petition with delay, delay should ordinarily be condoned.

A question arises, Whether provisions of Section 5 of Limitation Act, 1963, are applicable to an appeal filed under Section 421 of Companies Act 2013.

Words used in (3) proviso to Section 421 of 2013 Act are “not exceeding 45 days” thereby clearly prescribing time limit of only 45 days, in addition to initial period of 45 days allowed under Section 421(3), to enable a party to file an appeal against the orders of Tribunal. The said proviso clearly shows that power vested in Appellant Tribunal to condone delay on sufficient cause being shown is directory and subject to discretion vested in the Appellant Tribunal. However, maximum period to extent of which such delay is capable of being condoned is mandatorily prescribed and not open to exercise of any discretion. Therefore, words “not exceeding 45 days” would amount to an express exclusion within meaning of Section 29(2) of the Limitation Act, 1963 and would therefore bar application of Section 5 of Act, 1963 to Section 421 of Companies Act 2013. In view thereof, scheme of Act, 2013, surely supports curtailment of Appellant Tribunal’s powers by exclusion of operation of Section 5 of Act, 1963.

The legislative intent as reflected from the Companies Act, 2013, resulting in the constitution of the NCLAT and the Section 421 providing for a limited appeal make it abundantly clear that the Legislature intended to restrict:

the power of the Appellant Tribunal to condone the delay beyond the period exceeding 45 days and thus prescribed in a mandatory language as under:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

The hon’ble Supreme Court in Union of India v. Popular Construction, if there were any residual doubt on the interpretation of the language used in Section 10F, the legislative intent behind the constitution of the Company Law Board and the object of insertion of Section 10F would resolve the issue involved of curtailment of the court’s power with the exclusion of the operation of Section 5 of the Limitation Act, 1963.

Delay shall be condoned when special statute itself expressly provides for it.”

MANOHAR LAL SHARMA V. UNION OF INDIA (UOI)

As to the applicability of Section 5 of the Limitation Act, the learned judge considered the question in the light of the law laid down by the apex court in Union of India v. Popular Construction Co.



“There is no dispute that the Companies Act, 1956, is a special law. Under the normal circumstances, the provisions of the Limitation Act will have application to all appeals and applications under the Companies Act, unless a different period of limitation is prescribed. As noticed herein above, the company law itself has prescribed a period of limitation for filing the appeal and also for condonation of delay. Hence, condonation of delay for filing the appeal beyond the prescribed period of limitation is by virtue of the proviso to Section 10F. This proviso can be considered to be akin to Section 5 of the Limitation Act. However, the proviso imposes limitation for extension of time in filing the appeal beyond the prescribed period of limitation, the expression used in Section 10F being ‘further period not exceeding, sixty days’... The proviso to Section 10F has created an absolute bar for extension of period of limitation beyond sixty days apart from the period of limitation of sixty days prescribed under Section 10F. The expression ‘not exceeding’ does not permit any further extension and it seems that the true import, purport and construction of the proviso is to restrict the total period of limitation to 120 days, i.e., sixty days principal and sixty days by extension subject to existence of sufficient cause in a given case. Any other interpretation would amount to committing violence to the statute itself which is impermissible under law.

YET AGAIN, THE COURT RULED

it is abundantly clear that where particular statute does not apply to Section 5 of the Limitation Act expressly or even impliedly in a special or local law itself, it shall be presumed that the exclusion is express. Section 29(2) of the Act not only excludes the application of Section 5 of the Limitation Act but also other sections from Sections 4 - 24 (inclusive). Thus, Section 14 also stands excluded from its application for purposes of either condoning the delay or exclusion of the period on the ground envisaged therein notwithstanding existence of sufficient cause. Thus, even if the period spent before the Hon’ble Delhi High Court constitutes sufficient cause for extension of period under Section 5 read with Section 14 of the Limitation Act, these sections cannot be applied de hors proviso to Section 10F to extend the limitation beyond sixty days in addition to the original period of sixty days (total 120 days) for filing an appeal as proviso to Section 10F does not permit such extension.”

Any appeal filed beyond the maximum period prescribed in the special statutes will be barred by limitation. *Kabul Chawla v. CPI India Real Estate Ventures Limited and Ors.* Therefore no appeal will be entertained by the Appellate Tribunal after the expiry of 45+45=90 days.

In ‘*Union of India vs. M/s. Popular Construction*, the Supreme Court has held that the provisions of Section 5 cannot be invoked since in Section 34(3) of Arbitration Act, 1996, while fixing the time period for filing objections challenging the Award of the Arbitral Tribunal, the words used “but not thereafter” – meaning thereby the legislature intended that no further time can be granted to the petitioner for filing objections under Section 34(3) of Arbitration Act, 1996 by invoking the provisions of Section 5 of Limitation Act. Therefore, to sum up, if the words used in any particular legislation convey legislative intent that the petitioner shall not be entitled to



further time by invoking the principle of Section 5 of Limitation Act, then the provisions Limitation Act, 1963 shall not apply.

“SUFFICIENT CAUSE”

A litigant who failed to file an Appeal before the appellant Tribunal within the permissible time period as fixed then he can file it after the expiry of the prescribed time period provided he has “sufficient cause” for non-filing the Appeal within the time period. In *Dinabandhu Sahu v. Jadumoni, Mangaraj*, the Supreme Court approved the dicta in *Krishna v. Chathappan*, that ‘sufficient cause’ should receive a liberal construction so as to advance substantial justice, when no negligence, nor inaction, nor want of bonfide is imputable to the appellant. If sufficient cause is shown, the court has to exercise its discretion in favour of the appellant. The true guide for the court in its exercise of such discretion is whether the appellant had acted with reasonable diligence in prosecuting his appeal. But the circumstances of each case must be examined to see whether they fall within or without the terms of this general rule.

Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, the Supreme Court has ruled thus:

What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

What colour the expression “sufficient cause” would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncontrollable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory.

APPEAL FROM AN ORDER OR DECISION”

A similar phrase has been used in several statutes. The expression “any decision or order”, is of wide amplitude and would include all orders or decisions passed by the Board. Cf. *Kantilal Shah*



v. CC. The expression is wide enough to include interlocutory orders passed by the board. An appeal against an order which did not decide the rights of the parties is maintainable. Gharib Ram Sharma v. Daulat Ram Kashyab.

Where in a case before the Bombay High Court, during the pendency of an appeal against dismissal of a winding up petition, an application was made to CLB [now Tribunal under the 2013 Act] for appointment of an administrator for prevention of mismanagement under section 398 of 1956 Act [corresponding to section 241 of the 2013 Act] and the same was admitted under an order that the matters of mismanagement would not be raised in the winding up petition and an appeal was made to the same High Court against this order also. The court refused to dismiss it summarily but ordered that if an administrator was appointed by the CLB, 14 days' time should be given to any aggrieved party to prefer an appeal against an order. Thakur Savadikar & Co. (P.) Ltd. v. S.S. Thakur.

An order of the CLB in a matter for reference to arbitration under section 8 of the Arbitration and Conciliation Act, 1996 is not appealable in view of the fact that section 5 of that Act permits appeals to judicial authorities only in the matters specified in that section and the order of reference is not one of those matters. Hind Samachar Ltd. v. Union of India (UOI) and Ors.

“OPPORTUNITY OF BEING HEARD”

SECTION 421(4) OF COMPANIES ACT 2013

Opportunity to be heard means the chance to appear before a court or Tribunal to present evidence and argument before being punished by governmental authority. An opportunity to be heard before penalty or punishment is imposed for contempt is an indispensable essential to the administration of due process of law as contemplated by the constitutional inhibition. Notice and an opportunity to be heard are the hallmarks of due process. However, due process does not always require an adversarial hearing. The violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal constitution. An opportunity to be heard ordinarily includes the following three rights:

- the right to receive fair notice of the hearing;
- the right to secure the assistance of counsel; and
- the right to cross examine adverse witnesses

WHAT IS “OPPORTUNITY OF BEING HEARD”?

The Karnataka High Court in Karibasappa Kuravateppa Maradibankar vs. Assistant Commissioner held:

It is well settled that the right of oral or personal hearing is not an essential element of natural justice. No doubt, a person sought to be proceeded against is entitled to a right of defence, but that does not necessarily imply a personal hearing. Even an opportunity to file a written



representation complies with the principles based on the requirement of natural justice... It is well settled that whether oral hearing should be given or written representation will meet the ends of justice depends on the facts of each case. It is only in such cases which require determination of disputed question of fact, where personal hearing becomes incumbent. If not otherwise provided in the statute itself, 'hearing' does not mean grant of a personal hearing as mandatory. In the present case, the facts were not at all in dispute. The decision of the Assistant Commissioner is based on clear and unambiguous provisions of law. Therefore, non- grant of personal hearing cannot be said to be fatal.

The requirement of the rule of natural justice is that the parties whose civil rights are to be affected by a quasi judicial authority must have a reasonable opportunity of being heard in their defence. "stating it broadly and without intending it to be exhaustive.....rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which it relies, that the evidence of opponent should be taken in his presence and he should be given the opportunity of cross examining the witness examined by the party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

Expeditious disposal by Tribunal and Appellate Tribunal

Section 422 of the Companies Act 2013 provides for expeditious disposal of applications and petitions filed before the Tribunal and Appellate Tribunal. Where the Tribunal or the Appellate Tribunal does not dispose of the matter before it within three months of its presentation, the Tribunal or the Appellate Tribunal is required to record the reasons for such delay. And after considering the reasons so recorded the President or the Chairperson, as the case may be, has the discretion to extend the period for disposal of the matter, not exceeding ninety days.

Appeal to Supreme Court (Section 423)

Any person aggrieved by an order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the Appellate Tribunal to him on any question of law arising out of such order.

The Supreme Court may allow it to be filed within a further period not exceeding sixty days, if it is satisfied, that the appellant was prevented by sufficient cause from filing the appeal with this period.

Power under Article 226 and 227 not taken away

It was held in *L. Chandra Kumar V. Union of India* and *Satyanarayan v. Atmaram* that the High Court's power under Articles 226 & 227, being a part of the basic structure of the Constitution, can never be taken away. Practically, however, since a direct appeal has been provided to the Supreme Court under section 423 of the Companies Act, 2013, the High Court will not interfere



in a writ petition from the order of the Tribunal or the Appellate Tribunal unless there is a violation of the principles of natural justice or a lack of jurisdiction.

PROCEDURE FOR FILING AN APPEAL BEFORE NCLAT AGAINST THE ORDERS OF NCLT.

Rule 23 of NCLAT Rules, 2016- Presentation of appeal

- (1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
- (2) Every appeal shall be accompanied by a certified copy of the impugned order of NCLT.
- (3) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.
- (4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.
- (5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.
- (6) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal.

Rule 23 of NCLAT Rules, 2016- Number of copies to be filed

The appellant or petitioner or applicant shall file three authenticated copies of appeal or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

Rule 24 of NCLAT Rules, 2016- Endorsement and verification

At the foot of every appeal or pleading there shall appear the name and signature of the authorised representative and every appeal or pleadings shall be signed and verified by the party concerned in the manner provided by these rules.

Rule 25 of NCLAT Rules, 2016- Translation of document

- (1) A document other than English language intended to be used in any proceeding before the Appellate Tribunal shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by the authorised representative engaged on behalf of parties in the case.



Fee for filing an Application

Rule 55 of NCLAT Rules, 2016 (1) Fee for filing appeal or interlocutory application, and process fee shall be Rs. 5000/-.

(2) The fee and process fee shall be deposited by separate demand draft or Indian Postal Order favouring the Pay and Accounts Officer, Ministry of Corporate Affairs, payable at New Delhi.

The Appellate Tribunal may, to advance the cause of justice and in suitable cases, waive payment of such fee or portion thereof, taking into consideration the economic condition or indigent circumstances of the petitioner or appellant or applicant or such other reason, as the case may be.

AFFIDAVITS**Rule 67 of NCLAT Rules, 2016- Title of affidavits.**

Every affidavit shall be titled as “Before the National Company Law Appellate Tribunal.” followed by the cause title of the application or other proceeding in which the affidavit is sought to be used.

Rule 68 of NCLAT Rules, 2016. Form and contents of the affidavit.

The affidavit as per Form NCLAT-4 shall conform to the requirements of order XIX, rule 3 of Civil Procedure Code, 1908 (5 of 1908).

Rule 69 of NCLAT Rules, 2016. Persons authorised to attest.

Affidavits shall be sworn or attested by a Notary Public or Oath Commissioner who shall affix his official seal.

Rule 70 of NCLAT Rules, 2016. Affidavits of illiterate, visually challenged persons.

Where an affidavit is sworn or affirmed by any person who appears to be illiterate, visually challenged or unacquainted with the language in which the affidavit is written shall be in Form NCLAT-5, the attester shall certify that the affidavit was read, explained or translated by him or in his presence to the deponent and that he seemed to understand it, and made his signature or mark in the presence of the attester.

Rule 71 of NCLAT Rules, 2016. Identification of deponent.

If the deponent is not known to the attester, his identity shall be testified by a person known to him and the person identifying shall affix his signature in token thereof.



Rule 72 of NCLAT Rules, 2016-. Annexures to the affidavit.

(1) Document accompanying an affidavit shall be referred to therein as Annexure number and the attester shall make the endorsement thereon that this is the document marked putting the Annexure number in the affidavit.

(2) The attester shall sign therein and shall mention the name and his designation.

FILING OF INTERLOCUTORY APPLICATION**Rule 31 of NCLAT Rules, 2016-**

Every interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in Form NCLAT-2 and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing a affidavit supporting the application.

2. UNDER THE TRAI ACT

According to **Section 17** of the Telecom Regulatory Authority of India (TRAI) Act, 1997 the applicant or the appellant may either appear **in person** or **authorise one or more company secretaries or** chartered accountants or cost accountants or legal practitioners or **any officer** to present his or its case before the Appellate Tribunal.

APPELLATE AUTHORITIES

Section 18 of the TRAI Act provides that an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the **Supreme Court**. However, no appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

Every appeal under this section shall be preferred within a period of **ninety days** from the date of the decision or order appealed against. However, the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

APPEARANCE UNDER THE TRAI ACT, 1997

Section 17 of the Telecom Regulatory Authority of India (TRAI) Act, 1997 authorizes Company Secretaries to present his or its case before the Appellate Tribunal. As per the Explanation appended to the Section ‘Company Secretary’ means a Company Secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub- section (1) of Section 6 of that Act.

The Telecom Regulatory Authority of India (TRAI) is an independent regulatory authority established under the TRAI Act, 1997, to regulate the telecommunications industry in India. The TRAI Act, 1997, empowers the TRAI to issue regulations, guidelines, and orders for the



telecommunication sector in India. In this context, the TRAI may require certain parties to appear before it in various proceedings.

Some of the key provisions related to appearance under the TRAI Act, 1997, are as follows:

1. Appearance before the TRAI in tariff-related matters

The TRAI has the power to regulate the tariffs charged by telecom service providers in India. In this context, the TRAI may hold hearings and require telecom service providers and other parties to appear before it to provide evidence and arguments on tariff-related matters.

2. Appearance before the TRAI in consumer-related matters

The TRAI is responsible for protecting the interests of telecom consumers in India. In this context, the TRAI may hold hearings and require telecom service providers and other parties to appear before it to provide evidence and arguments on consumer-related matters, such as quality of service, billing disputes, and complaints related to unsolicited commercial communications.

3. Appearance before the TRAI in licensing-related

matters The TRAI is responsible for granting and revoking licenses for telecom service providers in India. In this context, the TRAI may hold hearings and require parties to appear before it to provide evidence and arguments on licensing-related matters, such as eligibility criteria, license fees, and conditions for license renewal.

4. Appearance before the TRAI in disputes and grievances

The TRAI has the power to adjudicate disputes and grievances related to the telecommunications industry in India. In this context, the TRAI may hold hearings and require parties to appear before it to provide evidence and arguments on disputes and grievances related to telecom services, licenses, and tariffs.

In conclusion, under the TRAI Act, 1997, parties may be required to appear before the TRAI in various proceedings related to the regulation of the telecommunications industry in India. It is important to comply with these requirements and to seek legal advice and representation as necessary to protect one's rights and interests.

3. UNDER THE SEBI ACT

According to **Section 15V** of the Securities and Exchange Board of India (SEBI) Act, 1992 the appellant may either appear **in person** or **authorise one or more company secretaries or** chartered accountants or cost accountants or legal practitioners or **any officer** to present his or its case the Appellate Tribunal, as the case may be.



APPELLATE AUTHORITIES

Any person aggrieved:-by an order of the **SEBI** may appeal to SAT within a period of **45 days** from the date of receiving the copy of the order of SEBI

**SAT (SECURITY APPEALATE TRIBUNAL)**

Any person aggrieved by any decision or order of **SAT** may file an appeal to the **Supreme Court** within **60 days** from the date of receiving a copy of the decision or order of SAT

**SUPREME COURT****APPEAL TO SAT SEC. 15T**

Any person aggrieved:-

- (a) by an order of the SEBI, made under SEBI Act, 1992 or the rules or regulations made thereunder; or
- (b) by an order made by an adjudicating officer under SEBI Act, 1992, may prefer an appeal to Securities Appellate Tribunal.

However, no appeal shall lie to SAT from an order made by SEBI or adjudicating officer, with the **consent of parties**.

The appeal to SAT shall be filed within a period of **45 days** from the date of receiving the copy of the order of SEBI or adjudicating officer, as the case may be. However, SAT may entertain an appeal after the expiry of 45 days, if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal, SAT may confirm, modify or set aside the order appealed against, after giving an opportunity of being heard. It shall send a copy of every order made by it to the SEBI; Concerned Adjudicating Officer; and Parties to Appeal.

APPEAL TO SUPREME COURT SEC. 15Z

Any person aggrieved by any decision or order of **SAT** may file an appeal to the **Supreme Court**. The appeal shall be filed within **60 days** from the date of receiving a copy of the decision or order of SAT. However, the Supreme Court may allow a farther period of 60 days for making an appeal, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the first 60 days.



APPEARANCE UNDER THE SEBI ACT, 1992

Securities and Exchange Board of India (SEBI) Act, 1992 under Section 15V permits the appellant either to appear in person or authorise one or more of practising Company Secretaries, Chartered Accountants, Cost Accountants or Legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

The Securities and Exchange Board of India (SEBI) is the regulator of the securities market in India. SEBI is empowered under the SEBI Act, 1992 to regulate and oversee the functioning of securities markets, to protect the interests of investors and to promote the development of the securities market in India. SEBI has the power to investigate, regulate, and take enforcement action against companies, intermediaries, and individuals engaged in the securities market. In this context, the SEBI Act, 1992 provides for various provisions related to appearance before SEBI.

Some of the key provisions related to appearance under the SEBI Act, 1992, are as follows:

1. Appearance before SEBI in compliance-related matters

SEBI has the power to investigate and take enforcement action against companies and intermediaries engaged in the securities market for non-compliance with SEBI regulations and guidelines. In this context, SEBI may issue show cause notices and require parties to appear before it to provide evidence and arguments on compliance-related matters.

2. Appearance before SEBI in investigations

SEBI has the power to investigate cases related to market manipulation, insider trading, and other fraudulent practices in the securities market. In this context, SEBI may require parties to appear before it to provide evidence and arguments in connection with investigations.

3. Appearance before SEBI in adjudication proceedings

SEBI has the power to adjudicate disputes and grievances related to the securities market. In this context, SEBI may require parties to appear before it to provide evidence and arguments in connection with adjudication proceedings related to violations of SEBI regulations and guidelines.

4. Appearance before SEBI in appeals

The SEBI Act, 1992 provides for appeals against SEBI orders and decisions to the Securities Appellate Tribunal (SAT) and to the Supreme Court. In this context, parties may be required to appear before SAT or the Supreme Court to provide evidence and arguments in connection with appeals.



Under the SEBI Act, 1992, parties may be required to appear before SEBI in various proceedings related to the regulation of the securities market in India. It is important to comply with these requirements and to seek legal advice and representation as necessary to protect one's rights and interests.

4. UNDER THE COMPETITION ACT

Basics & Introduction Of competition act 2002	Competition can be defined <u>as a process of economic rivalry between market players to attract customers.</u> These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighbourhood shopkeeper. In their pursuit to outdo rival enterprises, market players either adopt <u>Fair means</u> (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) <u>Or</u> Indulge in <u>Unfair measures</u> (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.). Therefore, in the interest of consumers, and the economy as a whole, Competition Act, 2002 was passed to promote an environment that facilitates fair competitive outcomes in the market, curb(to stop / prevent) anti-competitive behaviour and discourage market players from adopting unfair measures.
Salient Features Of This Act	○ Prevent practices having an appreciable adverse effect on competition, ○ To promote and sustain competition in the market and ○ To protect the interests of consumers and to ensure freedom of trade. ○ Prohibiting anti-competitive policy on competition, ○ Creating awareness by imparting training on competition issues. ○ To regulate combinations. ○ To protect the interest of consumers.

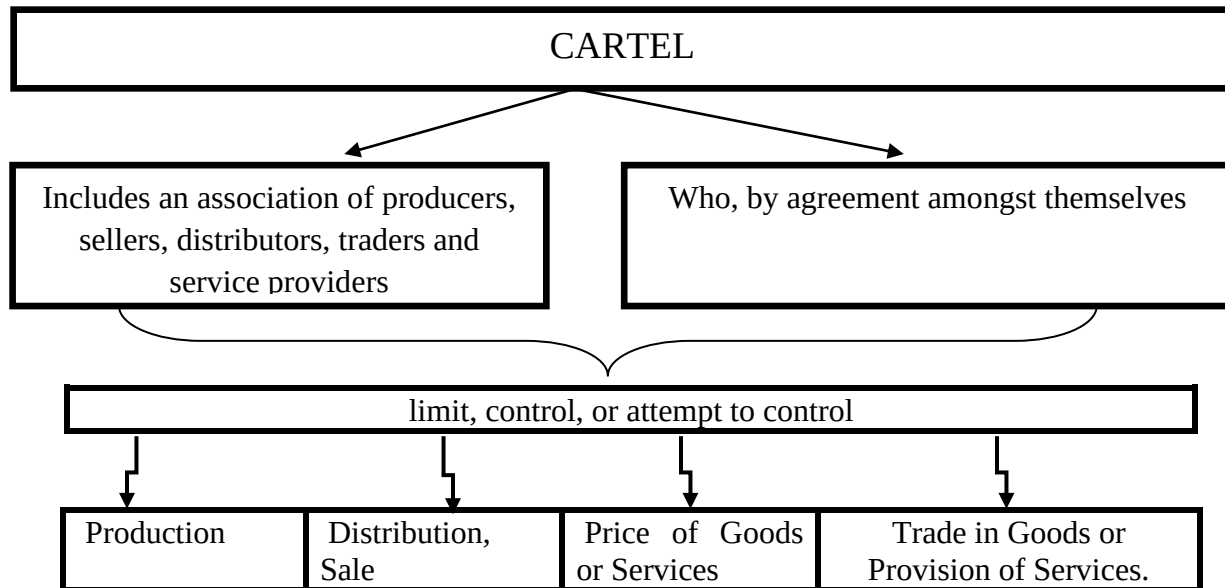
IMPORTANT DEFINITIONS UNDER COMPETITION ACT 2002

Agreement	Agreement includes any arrangement or understanding– a) Whether or not, such agreement, understanding or action is formal or in writing; b) Whether or not, such agreement, understanding or action is intended to be enforceable by legal proceedings.
	Goods mean goods as defined in the Sale of Goods Act, 1930 and include the following:- (a) Products manufactured, processed or mined;



Goods	(b) Debentures, shares and stocks after allotment; (c) In relation to “goods supplied”, goods imported in India
Consumer	Consumer means any person who:- Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any person who uses those goods with the approval of the person buying those goods, whether such purchase of goods is for resale or for any commercial purpose or for personal use, Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any person who is the beneficiary of those services with the approval of hirer or avail or of those services, whether such hiring or availing of services is for any commercial purpose or for personal use.
Cartel	• "Cartel" includes an association of: • Producers, • Sellers, • Distributors, • Traders or • Service providers,- • who by agreement amongst themselves, limit, control or attempt to control the: • Production, distribution, sale or • Price of, or trade in goods or provision of services.
Enterprise	Enterprise means a person or department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind
Relevant market	Relevant market means the market, which may be determined by the Commission with reference to ‘relevant product market’ or ‘relevant geographic market’ or with reference to both the markets. <u>Relevant geographic market:</u> Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas. <u>Relevant product market:</u> Relevant Product Market means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use.



CHART ANALYSIS ON CARTEL**APPELLATE AUTHORITIES**

According to Sections 35 and 53S of the Competition Act, 2002 the applicant or the appellant may either appear **in person** or **authorise one or more company secretaries** or chartered accountants or cost accountants or legal practitioners or **any officer** to present his or its case before the Competition Commission of India and Competition Appellate Tribunal

APPELLATE AUTHORITIES

Any person aggrieved by any decision of **Competition Commission of India** may prefer an appeal **NCLAT** within a period of **60 days** from the date of receiving the copy of the order of CCI

NCLAT

Section 53T of the Act provides that any person aggrieved by any decision or order of Appellate Tribunal may file an appeal to the Supreme Court. (Within **60 days** from the date of receiving a copy of the decision or order of Appellate Tribunal)

SUPREME COURT

APPELLATE AUTHORITIES

APPEAL TO NCLAT

According to **Section 53B** of the Act, any person aggrieved by any decision or order of **Competition Commission of India** may prefer an appeal to the **Appellate Tribunal**.

The appeal to Appellate Tribunal shall be filed within a period of **60 days** from the date of receiving the copy of the order of CCI. However, Appellate Tribunal may entertain an appeal after the expiry of 60 days, if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal, Appellate Tribunal may confirm, modify or set aside the order appealed against, after giving an opportunity of being heard. It shall send a copy of every order made by it to CCI and Parties to Appeal.

APPEAL TO SUPREME COURT

Section 53T of the Act provides that any person aggrieved by any decision or order of Appellate Tribunal may file an appeal to the Supreme Court.



The appeal shall be filed within **60 days** from the date of receiving a copy of the decision or order of Appellate Tribunal. However, Supreme Court may entertain an appeal after the expiry of 60 days, if it is satisfied that there was sufficient cause for not filing it within that period.

APPEARANCE UNDER THE COMPETITION ACT, 2002

Competition Authorities and the Companies world over avail services of professionals to guide and advise them on various aspects of competition law. Professionals also assist companies in designing, implementing and maintaining effective competition compliance programmes.

Sections 35 of the Competition Act, 2002 authorises Company Secretaries in practice to appear before Competition Commission of India. Besides, there are a number of concepts and terms such as value of assets, turnover, determination of market, relevant market, geographic market which require active professional involvement and advice. Further, Competition Act, 2002 provides a number of factors to be considered by the Competition Commission of India in determining appreciable adverse effect on competition.

The Competition Act, 2002 is the primary legislation governing competition law in India. The Competition Commission of India (CCI) is the regulatory body responsible for enforcing competition law in India. The CCI has the power to investigate, regulate, and take enforcement action against companies, intermediaries, and individuals engaged in anti-competitive practices. In this context, the Competition Act, 2002 provides for various provisions related to appearance before the CCI.



Some of the key provisions related to appearance under the Competition Act, 2002 are as follows:

1. Appearance before the CCI in complaint and information matters

The CCI has the power to initiate investigations into anti-competitive practices based on complaints or information received from various sources. In this context, the CCI may issue notices and require parties to appear before it to provide evidence and arguments in connection with such investigations.

2. Appearance before the CCI in combination matters

The CCI has the power to review mergers, acquisitions, and other forms of combinations that may have an adverse effect on competition in India. In this context, the CCI may require parties to appear before it to provide evidence and arguments in connection with such reviews.

3. Appearance before the CCI in appeal and review matters

The Competition Act, 2002 provides for appeals against CCI's orders to the National Company Law Appellate Tribunal (NCLAT) and to the Supreme Court. In this context, parties may be required to appear before the NCLAT or the Supreme Court to provide evidence and arguments in connection with such appeals.

4. Appearance before the CCI in leniency matters

The Competition Act, 2002 provides for a leniency program to encourage companies and individuals to come forward and disclose anti-competitive practices. In this context, parties seeking leniency may be required to appear before the CCI to provide evidence and arguments in connection with such disclosures.

Under the Competition Act, 2002, parties may be required to appear before the CCI in various proceedings related to the regulation of competition in India. It is important to comply with these requirements and to seek legal advice and representation as necessary to protect one's rights and interests.

APPEARANCES - SOME DO'S AND DON'TS

Do's

- | |
|--|
| <ul style="list-style-type: none"> • Ensure that the dress code is properly followed not only for company secretary in practice who is going to appear before NCLT but also, by a person accompanying him as an assistant. |
| <ul style="list-style-type: none"> • Carry all papers, documents, reference materials etc. If, possible carry extra copies of material, for submission to NCLT and the opponent. Reach at the place of hearing before time. |
| <ul style="list-style-type: none"> • Study the case thoroughly. Know the weak and strong points of the case. |



• Prepare a list of points on which arguments would be addressed to the Court.
• Study the decided case laws.
• Wherever possible, study the cases decided by the member of NCLT in similar matters earlier. This will facilitate to know the mind of member of NCLT, how he decides or interprets situation, whether he is strict etc.
• Note down important dates, case citation and important event. If possible memorize the same. Even if everything is memorised keep one printed copy of summary. Always make photocopies of judgment relied upon by you. Also prepare paper book of those judgment and should be page numbered.
• Decide what you are going to speak before NCLT and what points to be covered and emphasized.
• One must be able to counter any matters or points raised by the members of the NCLT or opposite party. Since this situation will have to be dealt extempore for which you must be thorough about your client's case. If you are not well prepared for case, request for time to submit your representation in a short time.
• Prepare for eventualities like if judgment comes against your client, opposite party asking for adjournment etc.
• Maintain the decorum of the office of NCLT.
• Maintain your independent view.
• During the hearing, wherever possible make the atmosphere humorous & to appreciate the Court on any given opportunity for its dexterity.
• Please supply photocopies of extracts of sections of various acts on which reliance has been placed during arguments for convenience of the court while the Court is writing the judgment.
• While addressing the arguments to the NCLT, be polite and soft and at the same time firm and confident. While arguments, please do not leave an impression that you are unsure" on law and /or facts.

Don'ts

• If you are not aware of any matter, do not speak lie or imaging anything. Rather inform
• NCLT clearly and seek time to clarify the point from your client.
• Do not forget to carry relevant papers, materials and documents.
• Do not forget to be in dress code.
• Do not speak in language other than official language of NCLT.
• Do not speak in between while member of NCLT or other party is speaking.
• Never use words or language derogatory or insulting to others.
• Even if you know things better, do not impress upon NCLT that you are superior.
• Do not look at pocket of client or benefits to client.



- Never promise to client on outcome of the case before NCLT.

APPELLATE AUTHORITIES UNDER THE INCOME-TAX ACT, 1961

Appeal against the order of the Income-tax Officer lies with the Appellate Assistant Commissioner or the Commissioner (Appeals) or Commissioner of Income-tax. Appeal against the order of the Appellate Assistant Commissioner or the Commissioner (Appeals) can be preferred by the assessee or the income-tax department and such appeal lies with the Appellate Tribunal. Appeal against the order of the Appellate Tribunal by way of reference by the Tribunal can also be preferred by the assessee or the income-tax department and such appeal lies to the High Court. The Order of the High Court on the reference can be challenged either by the assessee or by the income-tax department by preferring an appeal to the Supreme Court which is the final appellate authority.

APPEAL TO COMMISSIONER (APPEALS)

Section 246 A (1) of the Income-tax Act provides that any assessee aggrieved by any order of an Income-tax Officer, as prescribed in the section may appeal to the Commissioner (Appeals) against such order.

Every appeal against an order specified in sub-section (2) which is pending immediately before the appointed day before a Deputy Commissioner (Appeals) and any matter arising out of or commenced with such appeal and which is so pending shall stand transferred on that day to the Commissioner (Appeals) and the Commissioner (Appeals) may proceed with such appeal or matter from the stage at which it was on that day:

Provided that the appellant may demand that before proceeding further with the appeal or matter, the previous proceeding or any part thereof be re-opened or that he be re-heard. Such an appeal shall be in the prescribed Form No. 35.

APPEAL BY PERSON DENYING LIABILITY TO DEDUCT TAX

Section 248 of the Act states that where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

APPEALS TO APPELLATE TRIBUNALS

According to **Section 253** of the Act:

(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Commissioner (Appeals) under section 154, section 250, section 271, section 271A or section 272A; or
- an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets



requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or
○ an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or
○ an order passed by a Commissioner under section 12AA or under clause (vi) of sub-section (5) of section 80G or under section 263 or under section 271 or under section 272A or an order passed by him under section 154 amending his order under section 263 or an order passed by a Chief Commissioner or a Director General or a Director under section 272A;
○ an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or
○ section 153A or section 153C in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order.
○ an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C with the approval of the Commissioner as referred to in sub-section (12) of section 144BA or an order passed under section 154 or section 155 in respect of such order.

every such appeal shall be filed within sixty days of the date on which the order sought to be/ appealed against is communicated to the assessee or to the Commissioner, as the case may be.

STATEMENT OF THE CASE TO THE HIGH COURT

Section 256(1) of the Act lays down : “The assessee or the Commissioner may within sixty days of the date upon which he is served with notice of an order under Section 254, by an application in the prescribed form (Form No. 37) accompanied where the application is made by the assessee by a fee of two hundred rupees require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this Section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court.

STATEMENT OF CASE TO THE SUPREME COURT

Section 257 of the Act makes provisions for reference of a case by the Appellate Tribunal to the Supreme Court. It lays down: “If, on an application made under Section 256 of the Act, the Appellate Tribunal is of the opinion that, on account of a conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme Court, the Appellate Tribunal may draw up a statement of the case and refer it through its President direct to the Supreme Court.

APPEAL TO THE SUPREME COURT

According to Section 261 of the Act, an appeal shall lie in Supreme Court from any judgment of the High Court delivered on a reference made under Section 256 or an appeal made to High Court in respect of an order passed under Section 254 in any case which the High Court certifies to be a fit one for appeal to the Supreme Court.



APPELLATE AUTHORITIES UNDER THE INCOME-TAX ACT, 1961

The Income Tax Act, 1961 (the Act) is the primary legislation that governs the taxation of income in India. The Act provides for various appellate authorities to hear appeals and review orders passed by lower tax authorities. These appellate authorities play a crucial role in ensuring the effective implementation of the provisions of the Act and providing taxpayers with a mechanism to challenge tax assessments and orders.

The following are the appellate authorities under the Income Tax Act, 1961:

1. Commissioner of Income Tax (Appeals) [CIT(A)]

The CIT(A) is the first appellate authority under the Act. It hears appeals filed by taxpayers against the orders passed by the Assessing Officer (AO) in relation to the assessment of income tax. The CIT(A) has the power to confirm, modify, or set aside the order of the AO.

2. Income Tax Appellate Tribunal (ITAT)

The ITAT is the second appellate authority under the Act. It hears appeals filed by taxpayers against the orders passed by the CIT(A) and other tax authorities. The ITAT is an independent judicial body and has the power to confirm, modify, or set aside the order of the CIT(A) or any other tax authority.

3. High Court

High Court has the jurisdiction to hear appeals against the orders passed by the ITAT. The High Court can hear appeals on questions of law arising out of the order of the ITAT.

4. Supreme Court of India

The Supreme Court of India is the highest appellate authority under the Act. It can hear appeals against the orders passed by the High Court on questions of law.

The appellate authorities under the Income Tax Act, 1961, provide a mechanism for taxpayers to challenge tax assessments and orders. These authorities ensure that the implementation of the provisions of the Act is fair and impartial and that taxpayers' rights are protected.



PROCEDURE FOR APPEARANCE

1. Preparation of the case Before appearing before a regulatory or quasi-judicial authority, it is essential to prepare the case thoroughly. This includes reviewing all relevant documents, identifying key legal issues, and preparing arguments and evidence to support the case.
2. Appointment of legal counsel It is advisable to appoint legal counsel who is experienced in representing clients before the specific regulatory or quasi-judicial authority. Legal counsel can provide valuable guidance and represent the client in the proceedings.
3. Compliance with procedural rules It is essential to comply with all procedural rules and deadlines of the regulatory or quasi-judicial authority. Failure to comply with these rules can result in adverse consequences, including dismissal of the case.
4. Conduct during the proceedings It is important to maintain a professional and respectful demeanor during the proceedings. This includes addressing the authority with appropriate language, presenting arguments clearly and concisely, and refraining from any behavior that may be deemed disrespectful or disruptive.
5. Compliance with orders It is important to comply with any orders or directions given by the regulatory or quasi-judicial authority. Failure to comply with these orders can result in adverse consequences, including fines, penalties, or other sanctions.

APPEARANCE UNDER REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

The Real Estate (Regulation and Development) Act, 2016 (RERA) is a legislation enacted by the Indian Parliament to regulate and promote the real estate sector. The Act provides for the establishment of Real Estate Regulatory Authorities (RERAs) in each state and union territory of India to oversee the implementation of the Act and to resolve disputes related to real estate projects. The Act also provides for the establishment of an Appellate Tribunal to hear appeals against orders and decisions of the RERAs.

As per Section 56 of the Real Estate (Regulation and Development) Act, 2016 a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of applicant or appellant as the case may be.

Hence a Company Secretary holding certificate of practice can –

- Represent a person (promoter) before any real estate regulatory authority for registration of real estate project,
- Represent a person before real estate appellate tribunal.
- Represent a person before Adjudicating Officer.



In this context, the RERA provides for various provisions related to appearance before the RERAs and the Appellate Tribunal. Some of the key provisions related to appearance under the RERA are as follows:

1. Appearance before the RERA in complaint matters

The RERA provides for the filing of complaints by aggrieved parties against real estate developers and promoters for non-compliance with the provisions of the Act. In this context, parties may be required to appear before the RERA to provide evidence and arguments in connection with such complaints.

2. Appearance before the RERA in registration matters

The RERA provides for the registration of real estate projects by developers and promoters. In this context, parties may be required to appear before the RERA to provide evidence and arguments in connection with the registration of such projects.

3. Appearance before the RERA in dispute resolution matters

The RERA provides for the resolution of disputes related to real estate projects by the RERAs. In this context, parties may be required to appear before the RERA to provide evidence and arguments in connection with such disputes.

4. Appearance before the Appellate Tribunal in appeal matters

The RERA provides for the filing of appeals against orders and decisions of the RERAs to the Appellate Tribunal. In this context, parties may be required to appear before the Appellate Tribunal to provide evidence and arguments in connection with such appeals.

Under the RERA, parties may be required to appear before the RERAs and the Appellate Tribunal in various proceedings related to the regulation and promotion of the real estate sector in India. It is important to comply with these requirements and to seek legal advice and representation as necessary to protect one's rights and interests.

APPEARANCE UNDER THE RESERVE BANK OF INDIA ACT, 1934

Under the Reserve Bank of India Act, 1934, certain provisions require the appearance of Company Secretaries for specific matters related to banking and financial institutions. When Company Secretaries are required to make an appearance, they play a crucial role in ensuring compliance with regulatory requirements and facilitating communication between the organization and the Reserve Bank of India (RBI). Here are some key considerations for the professionals appearing under The Reserve Bank of India Act, 1934.

1. Understand the provisions: Familiarize yourself with the relevant provisions of The Reserve Bank of India Act, 1934 that require the appearance of Company Secretaries. The study of the



specific sections and regulations to grasp the scope of responsibilities and obligations associated with these appearances.

2. Prepare relevant information: Gather all the necessary information, documents, reports, and records related to the matter at hand. This may include financial statements, compliance reports, board resolutions, or any other relevant documentation that pertains to the appearance.

3. Consult with internal stakeholders: Engage with relevant internal stakeholders, such as senior management, legal teams, and compliance departments, to understand the organization's position, address any concerns, and ensure alignment with the RBI's requirements.

4. Engage legal counsel, if necessary: Depending on the complexity of the matter and the potential legal implications, it may be advisable to seek guidance from legal counsel experienced in RBI-related matters. They can provide legal advice and help you navigate the regulatory requirements.

5. Prepare for the appearance: Develop a clear understanding of the issues to be discussed during the appearance and prepare your responses accordingly. Consider the questions that may arise and ensure that you have a comprehensive understanding of the organization's compliance status and any remedial actions taken, if applicable.

6. Maintain professionalism: When appearing before the RBI, maintain a professional demeanor. Dress appropriately, arrive on time, and demonstrate respect towards the RBI officials. Engage in constructive dialogue and provide accurate information in a clear and concise manner.

7. Comply with RBI's instructions: Follow any specific instructions or guidelines provided by the RBI regarding the appearance. This may involve providing requested information or documents, adhering to timelines, or following any other procedural requirements specified by the RBI.

8. Facilitate communication: As a Company Secretary, you play a crucial role in facilitating effective communication between the organization and the RBI. Ensure that accurate and relevant information is conveyed during the appearance, and address any queries or concerns raised by the RBI officials.

9. Take notes and maintain records: Keep detailed records of the discussions, decisions, and outcomes of the appearance. Maintain accurate minutes of meetings, correspondence, and any other relevant documentation for future reference.

10. Follow up and compliance: After the appearance, collaborate with internal stakeholders to address any follow-up actions required by the RBI. Ensure that the organization promptly complies with any directives, rectification measures, or additional information requests provided by the RBI.



It is important to note that the specific procedures and requirements for Company Secretaries appearing under The Reserve Bank of India Act, 1934 may vary depending on the particular circumstances and the RBI's instructions. Collaborating closely with internal stakeholders and seeking appropriate legal advice can help ensure compliance and successful outcomes.

APPEARANCE BEFORE THE ENFORCEMENT DIRECTORATE

The Company Secretaries may be required to appear before the Enforcement Directorate (ED) in cases related to financial offenses, money laundering, or economic crimes. As a Company Secretary, your role is crucial in facilitating compliance and providing relevant information. The general guidelines which are applicable to Appearance under RBI is same as when appearing before the Enforcement Directorate.

It is important to note that the specific procedures and requirements for appearances under the Enforcement Directorate Act may vary depending on the nature of the case, the specific provisions invoked, and the Enforcement Directorate's instructions. Working closely with legal counsel and following their guidance is essential to ensure compliance, protect your rights, and effectively navigate the proceedings.

APPEARANCE BEFORE THE STOCK EXCHANGES

When making an appearance before stock exchanges, it typically involves matters related to compliance, regulatory requirements, or specific inquiries related to trading activities or listed securities. The general guidelines which are applicable to Appearance under RBI and ED are same as when appearing before the Stock Exchanges.

The specific procedures, rules, and requirements for appearances before stock exchanges can vary depending on the exchange, the nature of the case, and the specific rules and regulations in place.

APPEARANCE BEFORE THE IPR AUTHORITIES

When making an appearance before Intellectual Property Rights (IPR) authorities, it typically relates to matters such as trademark registrations, patent applications, copyright disputes, or other intellectual property-related issues. The general guidelines which are applicable to Appearance under RBI, ED and Stock Exchanges are same as when appearing before the IPR Authorities. The specific procedures, rules, and requirements for appearances before IPR authorities may vary depending on the jurisdiction and the specific intellectual property laws in place.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. Write a short note on functions and responsibilities of Telecom Regulatory Authority of India (TRAI).

The functions and responsibilities of the Authority include the following:

2. Ensuring technical compatibility and effective inter-connection between different operators/service providers
3. Revenue sharing arrangement between different service providers
4. Spelling out and ensuring time frames for making available local and long-distance circuits between service providers
5. Protecting consumer interests
6. Protecting national security quality standards
7. Strict enforcement of service quality standards
8. Fixation of tariffs for telecom service and ensuring price regulations
9. Ensuring effective compliance of universal service obligations
10. Resolution of dispute between service providers

2. Explain the following:

Provisions relating to appeal to the securities appellate tribunal under the securities and exchange board of India Act. 1992

ANSWER: Refer chapter 39

3. Enumerate the appellate authorities under the telecom regulatory authority of India Act, 1997.

ANSWER: Refer chapter 39



CHAPTER-40

APPEARANCES AND PLEADINGS-II

PLEADINGS - MEANING

1. The present-day system of pleadings in our country is based on the provisions of the Civil Procedure Code. For one, words 'plaints' and 'complaints' are nearly synonymous.
2. Pleadings are statement of facts in writing drawn up and filed in a court by each party to the case. Order 6, Rule 1 of the Code of Civil Procedure, 1981 defines Pleadings as a Plaint or a written statement.
3. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties.
4. Provisions relating to pleadings in civil cases are meant to give each side, intimation of the case of the other so that it may be met to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular cause of action must take.
5. The whole object of pleading is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of being forward such evidence as may be appropriate.



FUNDAMENTAL RULES OF PLEADINGS

1)	That a pleading shall contain, only a statement of facts, and not Law;
2)	That a pleading shall contain all material facts and material facts only.
3)	That a pleading shall state only the facts on which the party pleading relies and not the evidence by which they are to be proved,
4)	That a pleading shall state such material facts concisely, but with precision and certainty.

RULE I: FACTS AND NOT LAW:

The duty of the pleader is to set out the facts upon which he relies and not the legal inferences to be drawn from them.

It is for the judge to draw such inferences from those facts as are permissible under the law of which he is bound to take judicial notice.

A judge is bound to apply the correct law and draw correct legal inferences and facts, even if the party has been foolish to make a written statement about the law applicable of those facts.

The parties should not take legal pleas but state the facts on the basis of which such legal conclusions may logically follow and which the court would take a judicial notice of.



RULE II: MATERIAL FACTS:

The second fundamental rule of pleading is therefore, that every pleading shall contain and contain only, a statement of the material fact as on which the party pleading relies for his claim or defence. This rule is embodied in Order VI Rule 2 and it requires that -

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|---|
| <ul style="list-style-type: none"> • The party pleading must plead all material facts on which he intends to rely for his claim or defence as the case may be; and |
| <ul style="list-style-type: none"> • He must plead material facts only, and that no fact which is not material should be pleaded, nor should the party plead evidence, nor the law of which a Court may take a judicial notice |

Exception to the General Rules:

Condition Precedent: The performance or occurrence of any condition precedent need not be pleaded as its averments shall be implied in the pleading. But where a party chooses to contest the performance or occurrence of such condition, he is bound to set-up the plea distinctly in his pleading. This follows from the provision contained in Order VI Rule 6 C.P.C. which runs thus:

“Any condition Precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.”

Presumption of Law: Order VI Rule 13, C.P.C., provides that neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied.

Matters of Inducement: Another exception to the general rule is regarding facts which are merely introductory. Such facts only state the names of the parties, their relationships, their professions and such circumstances as are necessary to inform the court as to how the dispute has arisen. Such facts are hardly necessary or material to the pleading, but they are generally tolerated and are set in the pleadings by both the parties in order to facilitate the court to take a stock of the situation of the parties. It is better if such prefatory remarks are cut down to the minimum.

RULE III: FACTS NOT EVIDENCE:

The third fundamental rule of pleadings is that only facts must be stated and not the evidence there of there is a tendency among the litigants to mix up the bare facts with the facts which are in reality the evidence. At the stage of pleading, the court and the opposite party should be supplied with the facts and such contentions on which the claim is founded; the plaintiff must keep the facts in evidence for a later stage of evidence.

At the initial stage only, the former facts have to be narrated, and when the state of evidence comes, then the other facts will be represented as a part of evidence in order to establish the first set of facts. The reason behind the rule stating evidence is that if the evidence were also allowed to be stated in the pleading that there shall remain no limit of details and the chief object of the pleading would disappear.

Evidence also consists of facts. How then to distinguish between the two kinds of facts (i.e. material facts and evidence)?



Long back in Ratti Lalv. Raghu, the question was answered thus: Material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

Evidence also consists of facts and in order to distinguish between the two kinds of facts, the material facts on which the party pleading relies for his claim or defence are called **facta probanda** and the facts by means of which they (i.e. material facts) are proved are called **facta probantia**.

Rule IV: Facts to be stated concisely and precisely:

Order VI Rule 2 enjoins that every pleading must state the material facts concisely, but with precision and certainty. This rule is that the material rule is that the material facts should be stated in the pleading in a concise form but with precision and certainty the pleading shall be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figure. What this rule means is that the pleading should be brief and to the point.

There should be no obscurity or vagueness or ambiguity of any sort otherwise the very purpose of pleading will be defeated.

The following points should be kept in mind while drafting a pleading

• The names of persons and places should be accurately given and correctly spelt; spellings adopted at one place should be followed throughout the pleading.
• Facts should be stated in active and not in the passive voice omitting the nominative.
• All circumstances and paraphrases should be avoided.
• ‘Terse’, ‘Short’, ‘Blunt’ sentences should be used as far as possible. All ‘its’ and ‘buts’ should be avoided.
• Pronouns like “he” “she” or “that” should be avoided if possible.
• The plaintiff and the defendant should be referred not only by their names. It is better to use the word “plaintiff” or “defendant”.
• Things should be mentioned by their correct names and the description of such things should be adhered to throughout.
• Where an action is founded on some statute, the exact language of the statute should be used.
• In any pleading, the use of “if”, “but” and “that” should be, as far as possible, avoided. Such words tend to take away the “certainty” and can cause ambiguity.
• Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

SIGNING OF PLEADING

Order VI Rule 14 makes it obligatory that the pleading shall be signed by the party and his pleader (if any). Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.



VERIFICATION OF PLEADING:

• Order VI Rule 15, states every pleading shall be verified at the foot by the by any of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
• The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verified upon on received and believed to be true.
• The verification shall be signed by the person making it and the date on which and the place at which it was signed.
• The aim of verification is only to fix responsibility of the statements made in the pleading upon same one before the court proceeds to adjudicate upon them.
• A person making a false verification is liable to be punished under the Indian Penal Code, as making a false statement is by itself an offence

LEGAL PLEADINGS/WRITTEN SUBMISSIONS

Legal pleadings/submissions should be taken under the heading “preliminary submissions/objections”. While taking such plea one should ensure that the legal provisions and/or interpretation, thereof, is very clear and directly applicable to the issues involved in the matter. Thus, where an unregistered agreement/contract forms the basis of a claim set up by a party and such an agreement/ contract compulsorily requires registration under Section 17 of the Registration Act, a legal plea should be taken that since the agreement/contract is not a registered document, the same could not be looked into or relied upon by the Court for the reasons that the same cannot be read in evidence. Similarly, all other legal submissions which go to the root of the controversy and which are sufficient as well as material for adjudication of the issues involved, should be taken in opposition to the claims put forth by the opponent. Some illustrations are as under:

• Suit is not maintainable for want of statutory notice etc.
• Complaint does not disclose cause of action.
• Plaintiff has no right to sue.
• Suit barred by principles of res-judicata.
• Suit barred by principles of waiver, estoppel, acquiescence.
• Suit is barred by special enactment.
• Court has no jurisdiction.
• Suit is barred by limitation.
• Suit is premature, and so on.

Some of these are known technically as ‘special defences’. In a suit based on contract, defendant may admit that he made the contract, but may avoid the effect of admission by pleading performance, fraud, release, limitation etc.



WITNESSES IN PLEADINGS

Witnesses in Pleadings is not defined in Code of Civil Procedure, 1908. It can be presumed in form of affidavit and notarised document. The term “affidavit” is also not defined in the Code but it generally means “a sworn statement in writing made especially under oath or on affirmation before an authorised officer or Magistrate.” Order 19 deals with the affidavits. An affidavit is, to put it simply, a written declaration of facts that is sworn in front of a witness with the power to conduct oaths. Every affidavit must be written and should only include facts, not conclusions. The person who makes it and signs it is known as Deponent. In the affidavit, the contents are true and correct to the knowledge of the person who signed it and he has nothing concealed material therefrom.

The affidavit must be paragraphed and numbered as per the provision of the code. It should be duly attested by the Notary or Oath commissioner appointed by the court of law. According to Code of Civil Procedure Affidavit should be notarized by Notary only and same should not be attested either by Chartered Accountant or Company Secretary or Cost Accountant. The duty of the notary and oath commissioner is to ensure that the signature of the deponent is not forged. The purpose of notarisation is to certify genuineness and proper execution of documents in order to prevent fraud. Notarisation is done by a notary public appointed by the state or central government.

He is also authorised to administer oath and take an affidavit from any person. A notarised document is complete once the notary signs it and stamps it with a notary seal, his registration number and date. He also makes an entry of the notarial act in his register. A notary is considered an impartial witness who verifies that parties to an agreement have signed it and have entered into the agreement knowingly and willingly.

IMPROPER ADMISSIONS IN PLEADINGS

Improper admissions is not used anywhere in CPC, however admission is defined. An admission is a statement made by the parties to a legal proceeding, either oral, documentary or contained in electronic form, which suggests an inference with respect to any fact in issue or relevant fact. Order XII Rule 6 of the Civil Procedure Code, 1908 provides for judgment on admissions and being an enabling provision, it is neither mandatory nor pre-emptory, but discretionary. Order XII Rule 1 provides that a party can admit the case of the other party, entirely or partially, by giving a notice. The notice should be in writing. Under Rule 2, a party may issue a notice to the other party to admit or refuse to admit any document. The opposite party has to admit the document within 7 days of the service of notice. If the party on whom the notice is served refuses or neglects to admit the document, the onus of bearing the cost of proving the document will be on the refusing or neglecting party. If a notice of admission has been issued by one party and the other party does not specifically deny the document or does not admit it in his pleading or reply, it will be deemed that the document has been admitted. The only exception is where the opposite



party is a disabled person. Order 12 Rule 3A confers the power on the court to call upon any party to admit a document and to record the admission or denial of the party. The proviso to Rule 4 clarifies that admissions made by virtue of a notice under a particular proceeding cannot be used against the party making the admission in any other proceedings relating to any other suit. Under Order 12 Rule 6, the Courts have the power to make a judgement in regards to any oral or written admission made by the parties at any stage of the proceedings. Such admission may be made in the pleading or otherwise. In the case of *Karan Kapoor v. Madhuri Kumar* the Apex Court noted that the power under Order 12 Rule 6 should be exercised only where the admission of documents or facts is clear, unambiguous and categorical. The admissions made in the present case were neither clear nor categorical and therefore the judgment of the Trial Court was liable to be set aside.

Rejections in pleadings - Order 7, Rule 11

When any plaint is presented to the court, then it is the first duty of the court to examine the plaint properly for the determining, whether it should be tried, or returned, or rejected and in order to determine the question regarding the rejection of the plaint, and it is also the responsibility of the court to take consideration of other material facts too. Order 7 rule 11 of CPC mentions the provisions, where the plaint should be rejected. The plaint will be rejected in the following cases: -

1. Where plaint does not disclose the cause of action,
2. Where relief claimed is undervalued,
3. Where plaint is insufficiently stamped,
4. Where suit is barred by law,
5. Where plaint is not in duplicate, and
6. Where there is non-compliance with statutory provisions.

Under order 7 rule 11 the grounds for rejection are not exhaustive. A plaint can be rejected on other grounds also, for example, if the plaint is signed by the person not authorised by the plaintiff and if the defect is not cured within the time granted by the court, the plaint can be rejected. Likewise, where the plaint is found to be vexatious and meritless, not disclosing a clear right to sue, the court may reject the plaint under this rule.

CLOSING ARGUMENT

Closing arguments are very important stage for a hearing. It requires a professional to present before the tribunal what he intends a tribunal to decide. Effective closing arguments can turn the



case around in case of doubts in the minds of the members of the tribunal. Therefore, closing arguments should be made with extra caution and preparation.

OTHER IMPORTANT POINTS

- | |
|--|
| 1. Make a note of all important points and ensure the coverage of all the points during the hearing. Additional notes of the arguments of the other Party's professional can also be supportive. |
| 2. Keep sufficient copies of the material you want the tribunal to reply such as copy of the Act, Cases, reference books etc. |
| 3. Understand the intention of the client for filling the case and act according to the extent possible. |
| 4. Take the advice from the client with respect to all the possible reliefs he may agree. |
| 5. Keep the record of all the hearings he/she is handling and maintain a diary so that no case hearing is missed by mistake. |

WRITTEN PLEADINGS

Some of the **important factors** which may be borne in mind while making *written pleadings* are as under

1. Quote relevant provisions in the petition
2. Draft prayers for interim relief which satisfy your requirements;
3. Do not suppress facts;
4. Highlight material facts, legal provisions and Court decisions, if any;
5. State important points at the outset together with reference to relevant provisions/judgement.



IF YOU ARE OPPONENT

1. File your reply to the petition at the earliest opportunity
2. Submit your reply to each paragraph of the petition.
3. Take all possible preliminary contentions together with reference to relevant law point and judgement



IF YOU ARE FOR THE PETITIONER

1. File your rejoinder upon receiving the reply at the earliest opportunity
2. Meet clearly with the specific points raised by the opponent in the reply affidavit



Points should be kept in mind while drafting a pleading

1. The names of persons and places should be accurately given and correctly spelt; spellings adopted at one place should be followed throughout the pleading.
2. Facts should be stated in active and not in the passive voice omitting the nominative.
3. All 'its' and 'buts' should be avoided.
4. Pronouns like "he" "she" or "that" should be avoided if possible.
5. The plaintiff and the defendant should be referred not only by their names. It is better to use the word "plaintiff" or "defendant".
6. Things should be mentioned by their correct names and the description of such things should be adhered to throughout.
7. Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph (Order VI Rule 2).
8. The division of the pleading into paragraphs should be so done as to endure that each paragraph deals with one fact.
9. Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

PLAINT STRUCTURE

A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which he seeks the assistance of the court. Order VII of the Civil Procedure Code, 1908 deals with plaint.

As per Order VII, R.1 CPC, every plaint must contain the following things:

1. The name of the Court in which the suit is brought;
2. The name, description and place of residence of the plaintiff;
3. The name, description and place of residence of the defendant
4. Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
5. The facts constituting the cause of action and when it arose
6. The facts showing that the Court has jurisdiction;
7. The relief which the plaintiff claims;
8. Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
9. A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.



SOME POINTS TO BE KEPT IN MIND WHILE DRAFTING PLAINT

1. Where the plaintiff seeks the recovery of money, the plaint must state the precise amount claimed.
2. If the subject-matter of the suit is immovable property, the plaint must contain a description of the property sufficient to identify it.
3. In case the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint must show the ground upon which exemption from such law is claimed.
4. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.
5. If the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

REPLY/ WRITTEN STATEMENT – MEANING

When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleading as are applicable to application or petition.

A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or with leave of the court, in answer to defendant's pleas in defence, is also called a "written statement" (also called Replication or Rejoinder). All the rules relating to defendant's written statement apply, mutatis mutandis to such written statement of the plaintiff also.



FORMS OF DEFENCE

1. Traverse or Denials

Where a defendant totally and categorically denies the allegations of the plaintiff

2. Special Defence

Where the defendant admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own.

3. Objection in point of law or Demurrer

Where the defendant pleads that the plaint allegations do not disclose[^] a cause of action, or that the special damages claimed are too remote.

4. Dilatory Pleas

Where the defendant pleas go to the root of the case.

5. Set off

It has the effect of extinguishing the plaintiff's claims to the extent of the amount claimed by the defendant.

HOW TO DRAFT A WRITTEN STATEMENT

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

1. **DENIALS**: A defendant is said to take the defence of denial when he totally and categorically, denies the allegations contained in the plaint. It is also called 'traverse'. Admissions and denials of the material facts alleged in the plaint should be given in the opening paragraphs of the body of the written statement. It may be emphasized that bare denials are in themselves valid defences to the claim made in the plaint. Rules as to denials

- | |
|---|
| <ul style="list-style-type: none"> • Denials must be specific |
| <ul style="list-style-type: none"> • Denials must not be evasive |

2. **DILATORY PLEAS**: Pleas which merely delay the trial of a suit on merits have been characterized as 'dilatory pleas'. They simply raise formal objections to the proceedings and



do not give any substantial reply to the merits of the case, e.g., the plea that the court-fee paid by the plaintiff is not sufficient. Such pleas should be raised at the earliest opportunity.

3. **OBJECTIONS TO POINT OF LAW**: By such an objection the defendant means to say that even if the allegations of fact (made in the plaint) be supposed to be correct, still the legal inference which the plaintiff claims to draw in his favour from those facts is not permissible.
4. **SPECIAL DEFENCE** (confession and avoidance): Special defence is more appropriately called the plea of confession and avoidance. It is a plea whereby the defendant admits the allegations made in the plaint but seeks to destroy their effect by alleging affirmatively certain facts of his own, showing some justification or excuse of the matter charged against him or some discharge or release from it
5. **SET OFF AND COUNTER-CLAIM**: According to Black's Law Dictionary set off is the defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim. Where the plaintiff sues a defendant for the recovery of money the defendant can defend that suit and he can 'claim a set-off in respect of any claim of his own'.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

DRAFTING OF REPLY/Written STATEMENT - IMPORTANT CONSIDERATIONS

1. One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure .
2. It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC) Dalvir Singh Dhillowal v. Kanwaljit Singh 2002 .
3. However, general allegation in the plaint cannot be said to be admitted because of general denial in written statement. [Union v. A. Pandurang]
4. If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner. [Syed Dastagir v. T.R. Gopalakrishnan Setty]
5. Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint;



6. The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case. [Vinod Kumar v. Surjit Kumar.])
7. After reply, the same is to be signed by the constituted attorney of the opposite party.
8. If the opposite party is an individual, it could be signed by him or his constituted attorney.
9. If the opposite party is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by virtue of Section 22 of the Indian Partnership Act, 1932.
10. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manager or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.] It may be noted that if the plaint or reply is not filed by a duly authorised person, the petition would be liable to be dismissed [Nibro Ltd. v. National Insurance Co. Ltd.] However, at the time of filing of petition, if the pleadings are signed by a person not authorised, the same could be ratified subsequently. [United Bank of India v. Naresh Kumar]
11. The reply/written statement is to be supported by an Affidavit of the opposite party.
12. It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings. General rule is that no pleadings, no evidence. [Mrs. Om Prabha Jain v. Abnash Chand Jain])
13. If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are couched may be, and the same applies to undue influence or coercion. [Afsar Shaikh v. Soleman Bibi.]
14. While pleading against fraud or misrepresentation, party must state the requisite particulars in the pleadings. [K Kanakarathnam v. P Perumal.]
15. In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed. [R Tiwary v. B Prasad])

REJOINDER / REPLICATION

1. Rejoinder or replication means a written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent.
2. Such statements are subsequent pleadings as contemplated in Order VIII Rule 9 of the Civil Procedure Code. Under Rule 9, leave of the court is essential before any party can present a further pleading after the written statement has been filed.



3. The only subsequent pleading that may be filed without the leave of the court is the written statement filed by way of defense to a set-off or a counter-claim.
4. While filing a rejoinder/replication, a party cannot be allowed to fill up gaps or lacuna in his pleadings. Nor again can a party introduce new material facts or different cause of action except in a case where subsequent to filing of the petition/suit, the petitioner/plaintiff discovers new matters and accordingly seeks leave of the Court to submit such further particulars in his pleadings.

REPRESENTATIVE SUIT

Representative suits are the suits in which parties represent

- (a) others; or
- (b) Themselves and also other suits by executors, trustees, etc.

Representative suits are an ***exception to the general principle that all persons interested in a suit shall be parties thereto.***

Examples

- (a) Suit by or against the Karta of a Joint Hindu family
- (b) Suit by members of public in respect of a public charity

ESSENTIALS OF REPRESENTATIVE SUIT

The following essential conditions must be fulfilled in a representative suit:

- (a) The parties must be numerous
- (b) The parties mostly have same interest in the suit
- (c) The suit must be brought or prosecuted with the permission or under the direction of the Court
- (d) Notice must be given to the parties to be represented in the suit.

INTERLOCUTORY APPLICATION

1. Interlocutory means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient.
2. The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarises general powers of a civil court in regard to different types of Interlocutory orders. The detailed procedure has been set out in the Schedule I of the C.P.C which deals with Orders and Rules.
3. Interlocutory orders may take various shapes depending upon the requirement



of the respective parties during the pendency of the suit. Applications for appointment of Commissioner, Temporary Injunctions, Receivers, payment into court, security for cause etc.

ORIGINAL PETITION

1. Suits are filed to lodge money claims in civil courts working under District Courts while petitions are filed in High Courts which are above District Courts seeking some directions against the opposite party; mostly the Government.
2. There is no legal term like original suit or original petition. The suit which is initially filed in the first court for the first time is referred as original suit.
3. Petitions are Writ Petitions, Arbitration Petitions, Miscellaneous Petitions etc. & not the original petition. After judgement in suit or petition, if any aggrieved party challenges it then it is by filing appeal in the higher court which is ordinarily called as Appeal but often in some court it is termed as Letters Patent Appeal (LPA) & as Special Leave Petition (SLP) in Supreme Court.



SPECIMEN OF SUITS

SUIT UNDER XXXVII OF CPC

IN THE COURT OF SENIOR CIVIL JUDGE: NEW DELHI

CIVIL SUIT NO. ----- OF 2013

[UNDER ORDER XXXVII CPC]

IN THE MATTER OF:

AB

PLAINTIFF

VERSUS

1. CD

2. EF

DEFENDANTS

PLAINT UNDER ORDER XXXVII CPC FOR RECOVERY OF AN AMOUNT OF RS.1, 15,000/- (RUPEES ONE LAC FIFTEEN THOUSAND) TOGETHER WITH INTEREST PENDENT LITE AND FUTURE AND COST.

RESPECTFULLY SHOWETH:

1. That the plaintiff above-named is an iron merchant dealing in iron angles, pipes, casting sheets etc. and operating his business from the address mentioned in the title of the plaint.
2. That defendant no. 1 is a partnership concern of which, defendant no. 2 is the partner as had been disclosed to the plaintiff by defendant no. 2 in the course of business dealings that took place between the plaintiff on the one hand and defendants on the other hand. The plaintiff is unaware of the other partners of defendant no. 1 and seeks indulgence of this Hon'ble Court in issuing necessary directions to defendants to disclose the status of defendant no. 1 firm as also the details of the other partners of the said firm so as to facilitate impleadment of such other partners also as party to the present suit.
3. That defendants maintained commercial transaction with the plaintiff above named by purchasing goods i.e. iron/steel items sold/supplied by the plaintiff to the defendant from time to time against invoices raised/issued by the plaintiff. Defendants made part payments towards the invoice value of the goods so supplied/sold by the plaintiff thereby leaving balance outstanding in the accounts as maintained by the plaintiff in the ordinary course of business.
4. That as on 30th June 2012, a sum of Rs. 1,00,000/- was outstanding against defendants in the accounts maintained by the plaintiff and in discharge of the said liability, the defendants had issued cheque bearing No. 128038 dated 25th July 2012 for an amount of Rs. 1,00,000/- drawn on Canara Bank, Branch Office Connaught Circus, New Delhi. The original cheque leaf as issued by the defendants is annexed and marked as ANNEXURE-A.



5. That after issuing the aforesaid cheque, the defendants, by citing reasons of some accounting problems existing in the defendant no. 1 firm, required the plaintiff to defer presentment of the cheque for encashment till November, 2012. Resultantly, the plaintiff presented the cheque for encashment with his bankers in the month of November, 2012. However, the said cheque was returned back unpaid/dishonoured by the bankers of the defendants for the reasons "Exceeds Arrangement". The return memo as issued by the bankers of the defendants has been received by the plaintiff on 27th November 2012. The original return memo is annexed herewith as ANNEXURE-B.
6. That repeated requests and reminders were thereafter sent by the plaintiff to the defendants for payment of the aforesaid outstanding dues, however, the defendants failed to pay the same. As such the plaintiff was constrained to issue a legal notice of demand dated 7th December 2012 calling upon the defendants to pay the aforesaid outstanding dues. However, despite receipt of the aforesaid notice of demand, the defendants failed to make payment of the aforesaid outstanding dues. Office copy of legal notice of demand dated 7th December 2012 along with Postal Receipts is annexed herewith as ANNEXURE-C.
7. That the amount outstanding against defendants is legally recoverable by plaintiff from defendants who are liable to pay the same jointly and severally. Furthermore, since the claim in suit has arisen out of commercial transactions between the parties, the plaintiff is entitled to claim interest on the aforesaid outstanding amounts at the prevalent market rate of interest as per custom/market usage. The rate of interest at the time when transactions took place between the parties was not less than 18% p.a. and as such plaintiff is entitled to claim and defendants are liable to pay interest on the aforesaid outstanding amount at the rate of 18% per annum from the date the amounts remained due and payable by the defendants. Interest calculated at the said rate of 18% p.a. on the outstanding amount of Rs. 1,00,000/- (Rupees one lac) calculates to Rs. 15,000/- (Rupees fifteen thousand) as on the date of filing of the suit and the total adds up to Rs. 1,15,000/- (Rupees one lac fifteen thousand only). Defendants are liable to pay the said amount of Rs. 1,15,000/- to the plaintiff.
8. That the aforesaid claim of the plaintiff is legal, valid and enforceable. Defendants are liable to pay the same to the plaintiff. There is no impediment in plaintiff's entitlement to the relief prayed.
9. That by the present suit, plaintiff seeks to recover claim of money payable by defendants by virtue of the negotiable instrument/cheque which has remained unpaid because of the acts directly attributable to the defendants. Suit claim of the plaintiff even otherwise consists of a debt or a liquidated demand in money payable with interest arising out of written contract.
10. That no relief which does not fall within the ambit of Order XXXVII Rule 2 CPC is claimed in the suit. The suit claim is liable to be tried under the summary procedure prescribed by Order XXXVII CPC.



11. That the defendants are residing/carrying on business within jurisdiction of the Hon'ble Court at the address described in the title of the plaint. Plaintiff is also having his business premises within the jurisdiction of this Hon'ble Court. Cause of action for filing the present suit has also arisen within the jurisdiction of this Hon'ble Court. As such, this Hon'ble Court has got jurisdiction to entertain and try the present suit.
12. That the plaintiff values the suit for the purposes of court fee and jurisdiction at Rs. 1,15,000/- on which *ad valorem* court fee has been paid.

PRAYER

In the aforesaid facts and circumstances, it is, therefore, respectfully prayed that the Hon'ble Court may be pleased to:

- a) Try the plaintiffs suit claim under summary procedure prescribed under Order XXXVII CPC by ordering summons of suit in accordance with provisions of Order XXXVII CPC
- b) Pass a decree for money in the sum of Rs. 1,15,000/- (Rupees One Lac Fifteen Thousand Only) in favour of the plaintiff and against the defendants liable jointly and severally
- c) Allow interest pendente lite and future @ 18% p.a. on the suit amount in favour of the plaintiff and against the defendants liable jointly and severally together with cost of the suit;
- d) Hon'ble Court may also pass such further order(s) considered just, fit, proper and expedient in the facts and circumstances of the case.

THROUGH: PLAINTIFF

ADVOCATE FOR THE PLAINTIFF

NEW DELHI

DATED: April, 2013

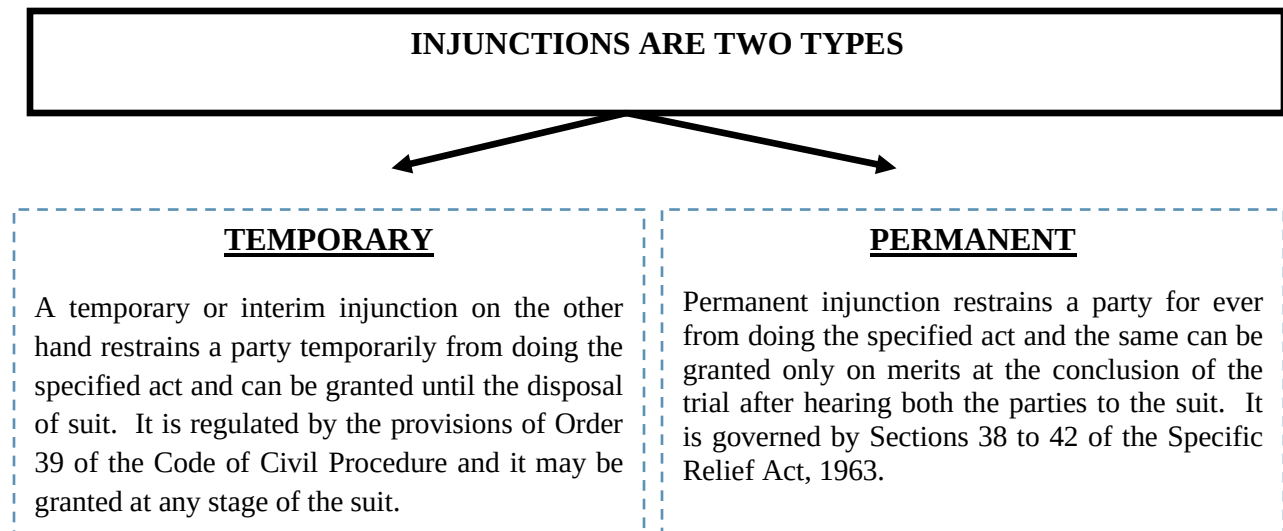
SUIT FOR PERMANENT INJUNCTION

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 is some cases (when it is called a 'mandatory injunction') commanding active restitution of the former state of things.

Injunctions are preventive, prohibitive or restrictive i.e. when they prevent, prohibit or restraint someone from doing something or mandatory, i.e. when they compel, command or order some persons to do something.

It is not the plaintiff alone who can apply for interim injunction. A defendant can also make an application for grant of an injunction against the plaintiff. Injunction may be issued only against a party and not against a stranger or third party. The power to grant temporary injunction is at the discretion of the court. The discretion however should be exercised reasonably, judiciously and on sound legal principles.





Specimen Suit for Temporary Injunction Restraining Waste

In the Court of the Civil Judge at.....

Original Suit No of.....

AB, s/o aged r/o

Plaintiff

Versus

CD, s/o age.....r/o

Defendant

The above-named plaintiff states as follows:

1. The plaintiff is the absolute owner of (describe the property.)
2. The defendant is in possession of the same under a lease from the plaintiff.
3. The defendant has cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale, without the consent of plaintiff.
4. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.



Specimen Suit for Permanent Injunction Restrain Breach of Contract

Ankush leased out his plot no. 111 in village pilakhua, to dinesh for three year from 1st June, 2012 for carrying out only nursery business there from. The plot has several sheesham trees. A lease deed was signed by both the parties and registered as required by law. Dinesh has been doing nursery business but with effect from 1st October, 2014 he started digging earth from said plot for using it in his adjoining brick-kiln. A notice dated 5 October, 2014 served on him by registered AD post asking him to stop digging earth from said plot, was ignored by dinesh the lessee. The plot continues to be damaged in this manner. It causes irreparable damage thus. Ankush intends to institute an injection cum-damages suit in a court of competent jurisdiction praying for restraining dinesh from digging earth from said plot and damages pendent lite. Interests and costs are also to be claimed. Assuming supplementary data, draft a specimen plaint.

In the Court of the Civil Judge at.....

Original Suit No of

AB, s/o aged r/o **Plaintiff**

Versus

CD, s/o aged r/o **Defendant**

The above-named plaintiff states as follows:

1. The plaintiff let plots Nos. 142 and 678 in village ____ to the defendant, by a deed of lease, dated July 6, 2010, for purposes of a nursery for 7 years, and the defendant agreed by the said deed of lease not to use the land for any other purpose.
2. The defendant has, since July 1, 2013 commenced a dig earth from the said plots for the purposes of his adjoining brick-kiln.
3. The removal of earth from the land would make it unfit for cultivation for several years and would even otherwise reduce its quality and value and compensation in money would not afford adequate relief to the plaintiff.
4. The defendant threatens and intends, unless restrained from so doing, to continue to dig earth from the said plots.

The plaintiff claims a perpetual injunction restraining the defendant, his servants, or agents, from digging earth from any portion of the said plots Nos. 142 and 678.

SUIT FOR SPECIFIC PERFORMANCE

Specific performance is an order of a court which requires a party to perform a specific act, usually what is stated in a contract. It is an alternative to awarding damages, and is classed as an equitable remedy commonly used in the form of injunctive relief concerning confidential information or real property. While specific performance can be in the form of any type of forced action, it is usually used to complete a previously established transaction, thus being the most effective remedy in protecting the expectation interest of the innocent party to a contract.

Orders of specific performance are granted when damages are not an adequate remedy, and in some specific cases such as sale of land. Such orders are discretionary, as with all equitable



remedies, so the availability of this remedy will depend on whether it is appropriate in the circumstances of the case.

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Babulal v. Hazari Lal Kishori Lal	The Supreme Court in this has held that no special form of decree in a suit for specific performance is supplied by the Civil Procedure Code. Chapter 11 of the Specific Relief Act, 1963 deals with the various circumstances under which a contract may be enforced specifically and where it cannot be allowed. When a contract is to be specifically enforced, it means simply this that when the parties do not agree to perform the contract mutually, the intervention of the Court is required and the Court will do all such things as the parties would have been bound to do had this been done without the intervention of the Court.

Specimen Suit by a Vendee for Specific Performance of Contract for Sale of Land

In the Court of the Subordinate Judge at.....

Other Class Suit No. of 2016

AB, s/o aged r/o **Plaintiff**

Versus

CD, s/o aged r/o **Defendant**

Suit for specific performance of contract

The above-mentioned plaintiff most respectfully show that

1. That the defendant while owing and occupying the property, described in the Schedule below, had entered into a contract in writing on agreeing therein to sell to the plaintiff the land, described in the Schedule below, at a consideration of Rs. 10 lakh and received from the plaintiff a sum of Rs 2 lakh as earnest money.
2. That it was agreed therein that the defendant would sell the said property to the plaintiff by executing a proper sale deed and register the same on receipt of the balance sum of Rs 8 lakh within six months from the date of the agreement to sell.
3. That the plaintiff has been always willing to pay to the defendant the balance of consideration money and as a matter of fact, the plaintiff offered to the defendant the said balance of consideration by a notice dated served by the plaintiff on the defendant by registered post through his lawyer Shri (Advocate).
4. That in the said notice the defendant was requested for compliance with the terms in the notice within 15 days from the date of receipt of the plaintiff's notice. The defendant received the notice on but did not comply with the request made therein.



5. That the plaintiff is entitled to specific performance of the said contract dated.....
6. That for the purpose of jurisdiction and court-fees, the suit is valued at Rs. ----- and ad valorem court-fees of Rs. ----- are paid.

THE PLAINTIFF, THEREFORE, PRAYS

- a. That the suit be decreed directing the defendant to execute and register the sale deed in question in favour of the plaintiff in respect of the property in the Schedule below, on accepting the contracted purchase money less the amount already paid as an earnest money;
- b. That the defendant be directed to execute and register the sale deed within a time specified by the court, failing which the said deed be executed and registered according to the provisions of O. 21, R. 34 (5) and 6(a) of C.P.C.;
- c. All costs of suit.

Schedule

Verification

APPLICATION TO SUE AS AN INDIGENT-PERSON

In the Court of the Sub-Judge at.....

Misc. Judicial Case No./20.....

Title Suit No./20..... (New)

A.B. **Plaintiff.**

Versus

C.D. **Defendant.**

THE ABOVE-NAMED PLAINTIFF STATES AS FOLLOWS

(Here insert the pleadings)

Then add:

The plaintiff petitioner is an indigent person. He is not possessed of sufficient means to enable him to pay the said court-fees of Rs prescribed by law for the plaint of the above suit.

(Or, where no such fee is prescribed – The plaintiff petitioner is an indigent person. He is not entitled to property worth Rs. 1,000 other than the subject-matter of this suit).

The petitioner has not entered into any agreement with anybody in respect of the subject-matter of the suit. He has not transferred any of his property within two months next before presentation of this application, either fraudulently or in order to be able to apply for permission to sue as an indigent person.

The properties owned and possessed by the petitioner, with estimated value thereof, are specified below.

Format of Plaint



SUIT FOR EJECTMENT AND ARREARS OF RENT**In the Court of Small Cause****Suit No Of**

(Space for Court-fee Stamp)

AB S/o CD Age Resident of *Plaintiff*

Versus

PQ S/o RS Age Resident Of *Defendant**Suit for Ejectment, Arrears of Rent and Mesne Profits* The above-named plaintiff states as follows: -

1. That the plaintiff is the owner of the house no Situated at
2. That under verbal agreement made on 20 the defendant became a monthly tenant to the plaintiff in respect to the house described in paragraph I above at the rent of Rupees Per month and has been in occupation of the said house as such tenant since the above-mentioned date of the agreement.
3. That the defendant has not paid the rent from June 1, 20.. or any part thereof.
4. That the plaintiff duly determined the said tenancy by serving on the defendant, by registered post on October 1,20.. a notice to quit the said house within thirty days of the receipt of the notice and pay the entire arrears of rent from June 1,20... That the said notice was served upon the defendant on October 7, 20.. yet the defendant has not vacated the house, nor has he paid the said arrears of rent or any part thereof. Hence the defendant is liable to Ejectment under section 20 of the U.P. Act No. XIII of 1971.
5. That now a total sum of Rupees is due to the plaintiff as against the defendant, that is Rupees on account of arrears of rent from June 1, 20.. to November 7, 20.. , and Rupees On account of damages for use and occupation from November 8, 20.., to 20.., the date of filing the suit.
6. That the cause of action for the said arose on November 8, 20.., when the period stipulated in the said notice expired.
7. That the defendant resides at within the jurisdiction of the court.
8. That the valuation of the suit for purpose of jurisdiction and payment of court-fee is Rupees, has been paid.

Wherefore the plaintiff claims -

- a. That the decree for Ejectment of the defendant from the house described in paragraph 1 above be passed in favour of the plaintiff.
- b. That the decree of Rupees on account of arrears of rent from June 1, 20.. to November 7, 20.. be passed in favour of the plaintiff.
- c. That a decree for Rupees .. On account of damages for use and occupation at the rate of Rupees .. per month from June 1, 20.. , to November 7, 20.. , the date of suit, be passed in favour of the plaintiff as against the defendant.
- d. That a decree for further damages for use and occupation at the aforesaid rate till the Ejectment of the defendant be passed in favour of the plaintiff as against the defendant on payment of additional court- fee.
- e. That cost of the suit be allowed to the plaintiff.



Place: AB

Date: Plaintiff

Through

Advocate

FORMAT OF WRITTEN STATEMENT SUIT FOR EJECTMENT AND ARREARS OF RENT

In the Court of Small Cause

Suit No of

(Space for Court-fee Stamp)

AB S/o CD Age Resident of Plaintiff

Versus

PQ S/o RS Age Resident of Defendant

The above-named defendant states as follows: -

1. That the defendant admits the facts stated in paragraph 1 of the plaint.
2. That the defendant admits the agreement mentioned in paragraph 2 of the plaint and his occupation of the said house as alleged therein.
3. That the defendant denies that he has not paid the rent from June 1, 20.., as stated in paragraph 3 of the plaint.
4. That the defendant admits service of the notice alleged in paragraph 4 of the plaint, but does not admit that the plaintiff duly determined the defendant's tenancy thereby. That the defendant admits that he continues to be in occupation of the said house but denies that he has not paid any part of the said arrears of rent or that he is liable to Ejectment under the provisions of law alleged in paragraph 4 of the plaint.
5. That the defendant does not admit any one of the several allegations made in paragraph 6 of the plaint
6. That no cause of action even occurred to the plaintiff alleged in paragraph 6 of the plaint.
7. That the defendant admits the jurisdiction of the court as alleged in paragraph 7 of the plaint.
8. That paragraph 8 of the plaint relates to valuation of the suit and payment of court fee. Additional Pleas
9. That the defendant has paid the rent for the months May, June, July, August and September, 20..., to Sri EF, the plaintiff's authorized agent who has been collecting the rent of the said house on behalf of the plaintiff but no rent receipts in respect of the aforesaid months have been issued to the defendant even after repeated demands by the defendant.
10. That the rent for the October, 20.., and that for the subsequent months was tendered to the said agent of the plaintiff and to the plaintiff himself but both have refused to accept it.
11. That in fact only Rupees, are due from the defendant to the plaintiff as arrears of the rent, being the rent for the months mentioned in paragraph 10 above and that the defendant is ready and willing to pay the said amount to the plaintiff.
12. That the notice mentioned in paragraph 4 of the plaintiff is invalid in that it did not purport to give sufficient period of time of the defendant as stipulated in section 30 of the U.P. Act No. XIII of 1972.
13. That there are absolutely no grounds for granting the relief prayed for by the plaintiff and the suit is liable to be dismissed with costs.

Place: AB

Date: Defendant

Through

Advocat



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. A complaint in a criminal case is what a plaint is in a civil case, whether the complaint is made to police or to a court. Explain it?

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

- an oral or a written allegation;
- some person known or unknown has committed an offence;
- it must be made to a magistrate; and
- it must be made with the object that he should take action.

There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed and ending with a prayer that the culprit be suitably dealt with is a complaint. (**Mohd. Yousuf v. Afaq Jahan**). Complaint need not be presented in person. A letter to a magistrate stating facts constituting an offence and requesting to take action is a complaint.

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Subsection (2) of Section 173.

2. Material facts vis-à-vis immaterial facts while drafting a plaint. Explain it.

A material fact is an occurrence, event, or information that is sufficiently significant to influence an individual into acting in a certain way, such as entering into a contract. In format court procedures, a material fact is anything needed to prove one party's case, or tending to establish a point that is crucial to a person's position.

Whereas, immaterial facts are facts not necessary or essential to the right of an action. Immaterial facts are of no importance or relevance. It will be inconsequential or irrelevant in a case. Immaterial facts have no material body or form. The case cannot be decided based on such facts. Immaterial facts are of no substantial consequence or of no material significance.

Plaint is the statement of claim in writing and filed by the plaintiff, in which he sets out his cause of action with all necessary particulars. Plaint is the first process in inferior court in the nature of an original writ, whereby a party seeks remedy from court for the redressal of his grievances.

The fundamental rule of pleadings is contained in provisions of O. 6, R.2 of C.P.C. which states that "Every pleading shall contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be. Material facts which gave the plaintiff his cause of action or the defendant his defence are, briefly speaking, material facts which he must prove or fail. It, therefore, stands to reason that facts which are not required to support the plaintiffs or the defendant's case are not material. Whether a fact is material or not



depends on the facts and circumstances of each case and can be held so or otherwise only in the context of relevant situation. Any fact which is not material should be avoided.

3. A suit for specific performance was instituted in the civil court at Delhi against Positive Energy Ltd. The managing director asked the Company Secretary to file written statement under his own signature as if he had implied authority to do so. This was done, but the plaintiff sought dismissal of the written statement for want of proper legal authority for verifying written statement. In the meantime, the company granted *ex post facto* sanction and ratification of the authority of the Company Secretary to sign pleadings on behalf of the company. Yet, the court dismissed the written statement.

On what legal grounds, should the aggrieved company prefer an appeal impugning civil court's order? Cite case law, if any.

- In the given case **Nitro Ltd. V. National Insurance Co. Ltd. and Raghvir Paper Mills Ltd. V. Indian Securities Ltd.**, it was held that if the Plaint/reply is not filed by a duly authorized person, the petition would be liable to be dismissed.
- But in the given case **United Bank of India V. Naresh Kumar**, it was held that the in case of Signing/filing written statement or pleadings by a person not duly authorized the authority exercised could be ratified subsequently.

In the above case, ex-post facto ratification has been accorded on this ground and on the basis of United Bank of India case appeal should be filed. Other legal/juristic grounds should also be pleaded.

4. Distinguish between "Plaint" and "miscellaneous application" in civil courts.

Plaint' has not been formally defined in Section 2 of Code of Civil Procedure but from Order VI & VII, it is clear that it is a concise statement with affidavit of material facts on which claim is founded. Its language and form are technical and duly regulated. It is also an old law as most of the plaints pertain to enforcement of civil rights whether spelled in statutes or by legal case law.

Miscellaneous Civil Application (MCAs) on the contrary, are formal requests to Court for specified reliefs/orders base on facts and circumstance mentioned therein. Instances are adjournment applications for appearances without Power of Attorney/Vakalatnama, in case of Standing Counsels of Government etc., or for inspection of Vakalatnama record etc.

5. Write notes on the Replication?

ANSWER: Refer chapter 40

6. Write notes on the Art of Pleadings?

ANSWER: Refer chapter 40

2. Write notes on the Written statement

ANSWER: Refer chapter 40

3. Write notes on the Factors / Considerations that a judge looks for in the pleadings of parties in the cause.



ANSWER: Refer chapter 40

4. Distinguish between Wordings in the order of permanent injunction and wordings in the order of temporary injunction:

Answer: Permanent injunction restrains a party for ever from doing specified act and the same can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit. It is governed by sections 38 to 42 of the specific relief Act, 1963.

A temporary or interim injunction on the other hand restrains a party temporarily from doing the specified act and can be granted until the disposal of suit. It is regulated by the provisions of Order 39 of the code of civil procedure and it may be granted at any stage of the suit. Injunctions are preventive, prohibitive or restrictive i.e. when they prevent prohibit or restraint someone from doing something or mandatory i.e. when they compel, command or order some persons to do something.

5. It is incumbent upon the defendant to file his defense in writing, else the court may pronounce judgment against him or make such order as it deems fit” Examine the statement and enumerate important point while drafting the reply or a written statement.

ANSWER: Refer Page 393 chapter 31

6.	Examine and comment on the following statements:
i)	Where the amendment changes the character of the suit. It cannot be allowed.
ii)	Pleadings cannot be construed too technically
iii)	Rejection of plaint will amount to decree.
iv)	Institution of a suit in court of higher grade is only an irregularity
v)	Where the defendant pleads set-off he will be in the position of plaintiff

- i) Under order 6 Rule 17 of the CPC, the Court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
- ii) In the case of a civil litigation the court in India have been always liberal in the matter of interpreting the pleadings and technicalities are not permitted to restrict the scope of the pleadings.
- iii) According to section 2(2) the ‘rejection’ of a plaint will amount to a decree the disposal of a suit or an appeal amount to a decree if there is an adjudication which conclusively determiners the rights of the parties with regard to all or any of the matters in controversy in the suit or appeal.
- iv) According to section 15 to 20 of the C.P.C. regulate the forum for the institution of suits, section 15 requires that every suit shall be instituted in the court of the lowest grade competent to try it. The object of the section is that court of higher grade should not be over crowded with suits, this rule is a rule procedure and not of jurisdiction.



- v) A set off was originally merely a defence to an action and it has been held that the right to plead this defence arises when the action is brought, so that it does not become barred subsequently by the statute of limitations. The right has now become one of attack as well as of defence and the defendant occupies the position of a plaintiff in respect of any balance claimed by him.

7. Write notes on the Interlocutory application?

ANSWER: Refer chapter 40

8. What is meant by 'Pleadings'? What is the objective behind formulating the rules of pleadings? explain the fundamental rules of pleadings

ANSWER: Refer chapter 40

9. While drafting written statement, certain important considerations must be borne in mind. Identify at least ten requirements with reference to law on the subject.

ANSWER: Refer chapter 40

10. What are the different forms of defense that may be adopted by a defendant while replying to opponent's pleadings?

ANSWER: Refer chapter 40

11. Pleading is just a written complaint for preventing deviations from the course which litigation must take as held in ganesh trading vs. motiram.

The object of a pleading which aims at ascertaining precisely the point for contention of the parties to a suit. The rules of pleading and other ancillary rules contained in the code of civil procedure have one main object in view. It is to find out and narrow down the controversy between the parties. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties and to prevent deviations from the course which litigation on particular causes of action must take **Ganesh Trading v. motiram** necessarily, a pleading is accurate only when stripped of verbosity it pinpoints succinctly the plaintiff's grievances giving him the right to sue for the desired relief, or when it brief sets out the defendant's defense. When so done, there would be hardly any scope left to beat about the bush or to take the other party by surprise. Pleadings should be read not by the piecemeal but as a whole and should be liberally construed every venial defect should not be allowed to defeat a pleading.

For a plaintiff's case should not be defeated merely on the ground of some technical defect in his pleadings provided he succeeds on the real issues of the case. It has been held; rigid construction of the law of pleadings was inappropriate and not calculated to serve the cause of justice for which the law of procedure was largely designed.



CHAPTER 41

Drafting of Appeal and Writ Petition

Appeal is an application by which a party requests an Appellate Court to set aside or revise a decision of a subordinate Court.

LAWS WHICH DEALS WITH APPEAL

CIVIL PROCEDURE CODE, 1908

1. APPEALS FROM ORIGINAL DECREES

According to sections 96 to 99 OF **code of civil procedure, 1908** Appeals from original decrees may be preferred from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such Court on points of law as well as on facts. In this case, there is always a right to appeal, until and unless there is a specific prohibition to such a right.

2. SECOND-APPEALS

According to sections 100 to 103 of **code of civil procedure, 1908** Second Appeals lie to the High Court from every decree passed in an appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Under section 100 to the code an appeal may lie from an appellate decree passed ex parte.

3. APPEALS FROM ORDERS

Appeals from Orders would lie only from certain orders on grounds of defects or irregularity of law.

4. APPEALS TO THE SUPREME COURT

Appeals to the Supreme Court, lie Subject to the provisions of the Constitution an appeal from any judgement, decree or final order in a civil proceeding of a High Court, if the High Court certifies

- That the case involves a substantial question of law and
- That in the opinion of the High Court the said question needs to be decided by the Supreme Court.

CONSTITUTION OF INDIA

ARTICLES 132 TO 135 DEAL WITH APPEALS TO THE SUPREME COURT

1. **Appeals in Constitutional cases:** Article 132 of the Constitution provides that an appeal shall lie to the **Supreme Court** from any judgement, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceedings, if the High Court certifies under Article 134A that the case involves a substantial question of law as to interpretation of the Constitution.
2. **Appeals in civil cases:** Article 133 deals with appeals to the Supreme Court from decisions of High Court in civil proceedings. If the High Court certifies
 - That the case involves a substantial question of law and
 - That in the opinion of the High Court the said question needs to be decided by the Supreme Court.
3. **Appeals in criminal cases:** A limited criminal appellate jurisdiction is conferred upon the Supreme Court by Article 134. It is limited in the sense that the Supreme Court has been constituted a Court of criminal appeal in exceptional cases where the demand of justice requires interference by the highest Court of the land.

Modes by which a criminal appeal can be brought before the Supreme Court

- a) Without a certificate of the High Court.
- b) With a certificate of High Court.
- c) Appeal by Special Leave



Appeals from order

According to sections 104 to 106 **the code of civil procedure, 1908** provides that appeals from order from the following grounds of defect or irregularity of law:-

- a) An order as per section 135A
- b) An order as per section 91 or section 92
- c) An order as per section 95 for compensation for obtaining assets, attachment or injunction on insufficient ground.
- d) An order under the code imposing a fine.

SPECIAL POINT

1. In appeals, as a general rule, the parties to an appeal are not entitled to produce additional evidence, whether oral or documentary
2. but the Appellate Court has discretion to allow additional evidence in the following circumstances:

a) When the lower court has refused to admit evidence which ought to have been admitted
b) When the party seeking to produce additional evidence establishes that he could not produce it in its trial Court for no fault of his
c) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement
d) For any other substantial cause

DRAFTING AN APPEAL

S.NO.	PARTICULARS	PROVISIONS
1	Formal part, or memorandum of appeal	The memorandum of appeal should begin with the name of the Court in which it is filed. After the name of the Court, number of the appeal and the year in which it is filed are given. As the number is noted by the officials of the Court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. After the names of the parties, an introductory statement giving the particulars of the decree or order appealed from (viz., the number and date, the court which passed it, and the name of the presiding officer), should be written. Thereafter, the grounds of appeal be given under the heading "Grounds of Appeal". The grounds of appeal are the grounds on which the decree or the order appealed from is objected to or attacked.
2	Material part, grounds of	A. Grounds of objection should be written distinctly and



	appeal	specifically; B. They should be written concisely; C. They must not be framed in a narrative or argumentative form; and D. Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.
3	Relief sought for	It is nowhere expressly provided in the Code that the relief sought in appeal should be stated in the memorandum of appeal. The absence of prayer for relief in appeal does not appear to be fatal and the Court is bound to exercise its powers under Section 107 of the Code and to give to the appellant such relief as it thinks proper. However, it is an established practice to mention in the memorandum of appeal, the relief sought by the appellant.
4	Signature	A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his counsel but if there are several appellants and they have no counsel, it must be signed by all of them. It is not required to be verified.

SPECIMEN FORM OF APPEAL TO THE HIGH COURT

APPEAL TO THE HIGH COURT

IN THE HIGH COURT OF.....AT.....

CIVIL APPELLATE JURISDICTION

REGULAR CIVIL APPEAL NO.....OF.....

IN THE MATTER OF:

_____, a company incorporated under the provisions of the Companies Act and having its Registered office at_____.

...Appellant

Versus

_____, a partnership concern having its place of business at_____.

...Respondent

May it please the Hon'ble Chief Justice of the High Court of____and His Lordship's Companion Justice,



THE APPELLANT-COMPANY MOST RESPECTFULLY SHOWETH

1. That the appellant herein is a company duly registered under the provisions of the Companies Act and the registered office of the appellant is at _____ and the company is engaged in the business of manufacturing.
2. That the respondents who are also doing business of selling goods manufactured by the appellants and other manufacturers approached the appellant for purchasing from the appellant-company the aforesaid manufactured goods. An agreement was reached between the parties which was reduced to writing. The appellant supplied goods worth Rs. 15 lakh over a period of _____ months to the respondents. A statement of account regarding the goods supplied is annexed hereto and marked as **Annexure A-1**.
3. That the respondents have made a total payment of Rs. 6 lakh on different dates. The statement of the said payments made by the respondents is appended and is marked as **Annexure A-2**.
4. That the remaining amount has not been paid by the respondent despite repeated demands and issuance of legal notice by the appellant through advocate.
5. That the appellant filed a suit for recovery of the aforesaid balance amount of Rs. 9 lacs together with interest at the rate of 12% per annum and the cost of the suit. The suit was filed on _____ in the court of the learned District Judge.
6. That upon being summoned by the said court the respondents appeared through counsel and filed their written statement to which the appellant-plaintiff also filed replication (rejoinder).
7. That the parties led evidence. After hearing the counsel for the parties the learned District Judge has by his judgment and decree passed on _____ dismissed the appellant's suit on the ground that the evidence led by the parties does not establish the claim of the appellant-plaintiff. Copies of the judgment and decree of the court below are annexed hereto and are marked as **Annexure A-3 and A-4, respectively**.

Aggrieved by the aforesaid judgment and decree of the court below dismissing the suit of the plaintiff, this appeal is hereby filed on the following, amongst other

GROUND

1. That the judgment and decree under appeal are erroneous both on facts as well as law.
2. That the learned trial court has failed to properly appreciate the evidence, and has fallen into error in not finding that the preponderance of probability was in favor of the plaintiff- appellant.
3. That there was sufficient evidence led by the plaintiff to prove the issues raised in the suit and the defendant-respondent has failed to effectively rebut the plaintiff's evidence, more particularly the documentary evidence.



In the above facts and circumstances the appellant prays that this appeal be allowed, the judgment and decree under appeal be set aside and the decree prayed for by the appellant in his suit before the court below be passed together with up-to-date interest and costs of both courts.

APPELLANT THROUGH

(Counsel's name)

SPECIAL LEAVE PETITION/ APPEAL BY SPECIAL LEAVE ARTICLE 136 OF CONSTITUTION OF INDIA

Article 136 of the Constitution of India, authorizes the **Supreme Court to grant, in its discretion special leave to appeal** from any judgment, decree, sentence or order passed or made by any Court or Tribunal in the territory of India.

Article 136 gives wide powers to the Supreme Court in entertaining and hearing appeals by granting special leave against any kind of judgment or order made by any Court or Tribunal (except a Military Tribunal) in any proceeding and the exercise of this power is left entirely to the discretion of the Court.

This power cannot be curtailed by legislation.

SPECIMEN OF A PETITION FOR SPECIAL LEAVE IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

IN THE MATTER OF:

Special Leave Petition under Article 136 of the Constitution of India
AND

IN THE MATTER OF:

_____, a company registered under the Companies Act through _____,
Chairman/Managing Director, the company having its registered office at _____.

...Petitioner

Versus

(1) _____, S/o _____, R/o _____

(2) Union of India through the Secretary, Ministry of Corporate Affairs, New Delhi.

(3) The Registrar of Companies.

...Respondents

May it please the Hon'ble Chief Justice of India and His Lordship's Companion Judges, of Supreme Court. The petitioner-appellant-(company)

MOST RESPECTFULLY SHOWETH:

(1) That the petitioner is a company duly incorporated under the provisions of the Companies Act, having its registered office at _____ and is challenging by way of this Special



Leave Petition the judgment and order of the High Court of _____ dated _____ in proceeding under Section----- of the Companies Act.

- (2) That the questions of law involved in this matter are as follows:
- (a) Whether the High Court has fallen into error in taking view that _____
 - (b) Whether it would be a good ground for winding up of the petitioner-company that two of its directors are not on speaking terms and there is, thus, a deadlock in the administration of the affairs of the company.
- (3) That respondent No. 1 herein had filed a petition before the Hon'ble High Court of _____ seeking the relief _____ which petition was contested by the petitioner-company inter alia on the grounds that _____.
- (4) That the High Court after hearing the parties through their respective counsel allowed the said petition, holding that sufficient grounds had been made out for winding up of the petitioner- company.
- (5) That the aforesaid findings and the final judgment/order of the High Court are assailed on the following, amongst, other.

GROUND

- A. That the judgment and decree under appeal are erroneous both on facts as well as law'.
- B. That the learned High Court has failed to properly appreciate the evidence, and has Fallen into error in not finding that the preponderance of probability was in favor of the appellant company.
- C. That there was sufficient evidence led by the plaintiff to prove the issues raised in the suit and the defendant-respondent has failed to effectively rebut the plaintiff's evidence, more particularly the documentary evidence.
- D. That the petitioner has not filed any appeal or other proceeding relating to this matter in this Hon'ble Court or any other Court.

RELIEF

The petitioner-company accordingly prays that this Hon'ble Court be pleased to grant Special Leave to Appeal in the matter and to allow the appeal, set aside the impugned judgment/order passed in the High Court and dismiss the petition filed by the respondent (No. _____) in the High Court.

PETITIONER



REFERENCE, REVIEW AND REVISION

REFERENCE

(Section 113 of CPC)

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.

References to the High Court under Order XLVI of the Civil Procedure Code, 1908, and Sections 99 and 100 of the Punjab Tenancy Act, 1817.

Reference under Section 113 and Order XLVI, Civil Procedure Code

A reference to the High Court by a District Judge or Judge of a Court of Small Causes, under the provisions of Section 113 and Order XLVI, Rule I of the Code of Civil Procedure, should be made only when the presiding Judge entertains a reasonable doubt on the point of law or usage having the force of law referred, and not merely on the importunity of pleaders.

Reasonable doubt on a point of law” explained

A subordinate Court cannot be supposed to entertain a reasonable doubt on a point of law if it has been decided clearly in a ruling of the High Court, unless some doubt has been thrown on the correctness of the same by a ruling of the Supreme Court. Nor has an Appellate Court, which has no jurisdiction to hear an appeal, any jurisdiction to make a reference.

MODE OF REFERENCE

In making a reference the presiding Judge should be careful to conform to the requirements of Order XLVI, Rule I, of the Code of Civil Procedure by:

- | |
|--|
| • drawing up a statement of the facts; |
| • stating the point on which doubt is entertained; and |
| • stating his opinion on such point. |

Each of the above statement should be precise and clear, or the High Court find itself compelled to return the reference for amendment under Order XLVI, Rule 5, of the Code of Civil Procedure.

OPTIONAL AND COMPULSORY REFERENCE

It should be noted that references under Section 99 of the Punjab Tenancy Act, 1887, and under Order XLVI, Rule 6, of the Code of Civil Procedure are made at the discretion of the Court, as are also those under Order XLVI, Rule 7, when not required by a party to the suit. There is no such discretion in cases falling under Section 100 of the Punjab Tenancy Act, 1887, or Order XLVI, Rule 7, if required by a party.

References under Order XLVI, Rule 7 It should also be noted that, by the terms of Order XLVI, Rule 7, a reference may be made only when it appears to the District Court that a Court subordinate to it has by reason of erroneously holding a suit to be cognizable by a Court of Small Causes, or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested; unless this condition is fulfilled - that is, unless the Court is itself of opinion that one of these errors has been committed, - it has no power to refer; when that condition is fulfilled, the Court still has a discretion to make or refuse to make a reference



unless it be required to make it by a party. In the latter case, the Court is bound to make a reference.

Character of suit to be described in reference It is essential that the true character of the suit should be described with precision and accuracy in the heading of the reference.

Parties should be heard before making reference A reference by a Civil Court under Section 99 or Section 100 of the Punjab Tenancy Act, 1887, or under Order XLVI, Rule 6 or 7, of the Code of Civil Procedure shall not be made until the parties to the suit have had an opportunity of showing cause against such reference in the Court which proposes to make it.

Date fixed for appearance in High Court The date specified shall be such as to allow a reasonable time for the parties to appear in the High Court, and shall be a date not less than one month in advance of the date of making the reference.

REVIEW **(Section 114 of CPC)**

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 and the Court may make such order thereon as it thinks fit.

Any person may apply for a review of judgement to the court in the following situation:-

1. In case of a decree or order from which an appeal is not allowed.
2. In case of a decree or order from which an appeal is allowed but from which no appeal has been preferred.

CONDITION PRECEDENT:

The conditions to invoke Section 114 have been dealt with in Order XLVII Rule 1 of the CPC. They are:

1. Discovery of new and important matter or evidence:

An application for review on the ground of discovery of new evidence should show that: (i) such evidence was available and of undoubted character; (ii) that the evidence was so material that its absence might cause a miscarriage of justice; and (iii) that it could not with reasonable care and diligence have been brought forward at the time of the decree. The applicant has, however, to satisfy that there was no remissness on his part.

2. Mistake or error apparent on the face of the record:

Whether there is a mistake or error apparent on the face of record in a case depends on individual facts. However, it must be borne in mind, that in order to come to the conclusion that there is a mistake or error apparent on the face of record, it must be one which must be manifest on the face of record.

3. Any other sufficient reason:

The phrase “any other sufficient reason” means a reason at least analogous to those specified in the rule immediately previously, namely, excusable failure to bring to the notice of the court new and important matter or evidence or mistake or error apparent on the face of the record. These words have been interpreted in **Chajju Ram v. Neki**, to mean a reason sufficient on grounds at least analogous to those specified in (1) and (2).



REVISION**(Section 115 of CPC)**

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 when a subordinate Court appears—

1. To have exercised a jurisdiction not vested in it by law, or
2. To have failed to exercise a jurisdiction so vested, or
3. To have acted in the exercise of its jurisdiction illegally or with material irregularity,

A petition for revision can be made to the High Court and High Court may make such order as it thinks fit.

ILLEGALLY OR WITH MATERIAL IRREGULARITY:

The words ‘illegally’ and ‘material irregularity’ in Section 115 do not cover either error of fact or of law.

These words do not refer to the decision arrived at but to the manner in which it is reached. The errors as contemplated relate to material defects of procedure.

Section 115 empowers the High Court to satisfy itself upon **three matters**

(a) that the order of the subordinate court is within its jurisdiction
(b) that the case is one in which the court ought to exercise jurisdiction
(c) that in exercising jurisdiction the court has not acted illegally that is in breach of some provision of law, or with material irregularity.

If the High Court is satisfied upon those **three matters**, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court upon questions of fact or law.

The High Court will not interfere with an incorrect decision of the lower court where there is no question of lack of jurisdiction or material irregularity in procedure.

Where there is a wilful disregard or conscious violation of a rule of law or procedure the case is one of material irregularity calling for interference in revision.

DISTINGUISH BETWEEN THE FOLLOWING:

S.NO.	REVISION	APPEAL
1	Application for revision can be made only to the high court	Appeal can be preferred to any court superior to one from whose decree or order appeal is sought to be preferred. That superior court need not necessarily be a high court.
2	Revision cannot be applied for as a right.	Right of appeal is substantive, given by law.
3	The power of the high court to exercise revisional jurisdiction either of its own motion or on the request of a party is discretionary.	The court to which an appeal has been preferred is bound to consider it according to the procedure prescribed.



4	Revision can be applied for only on grounds of jurisdiction and not on the question of law or fact.	In an appeal the appellate court has power to consider both the question of law and fact.

DIFFERENCE BETWEEN APPEAL AND REVIEW

1.	There are definitive limits to the exercise of the power of review and it cannot be exercised on the ground that the decision was “erroneous on merits. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate Court.
2.	Scope of an application for review is much more restricted than that of an appeal. The Supreme Court in Lily Thomas vs. Union of India, AIR 2000 SC 1650, has held that the power of review can only be exercised for correction of a mistake and not to substitute a view and that the power of review could only be exercised within the limits of the statute dealing with the exercise of such power.
3.	The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained.
4.	Where an appeal has been preferred a review application does not lie. But an appeal may be filed after an application for review.
5.	In such event the hearing of the appeal will have to be stayed. If the review succeeds the appeal becomes infructuous for the decree appealed from is superseded by a new decree. No court can, however, review its order after it has been confirmed on appeal.

REVISION PETITION

In the High Court of.....
Civil Revision No.....of 20.....

IN THE MATTER OF:

ABC

S/o.....R/o.....

Petitioner

Versus

XYZ

S/o.....R/o.....

Respondent

AND

IN THE MATTER OF:



CIVIL REVISION AGAINST THE ORDER DATED.....PASSED BY
THE LEARNED SUB-JUDGE, 1ST CLASS.....IN THE SUIT ENTITLED
ABC - Vs. XYZ (CIVIL SUIT NO.....OF 20.....)

May it please the Hon'ble Chief Justice, High Court of.....and
his companion Justices.

THE PETITIONER MOST RESPECTFULLY SHOWETH

- (a) That the petitioner named above has filed a suit against the respondents for the recovery of possession of a house situated in....., fully described in the plaint. The suit is pending in the court of Sub-Judge 1st Class.....and the next date of hearing is.....
- (b) That on being summoned the respondent appeared before the court below and filed his written statement wherein he denied the petitioner's title set up in the suit property.
- (c) That the trial court framed issues on and directed the petitioner (plaintiff) to produce evidence, upon which the petitioner promptly furnished to the court below a list of witnesses, making a request that the witness be summoned by that Court.
- (d) That on a previous date of hearing that is....., 200..... two witness of the petitioner had appeared and their statements were recorded. However, the learned Presiding Officer of the court below passed an order that the remaining witnesses be produced by the petitioner-plaintiff on his own without seeking the assistance of the court. This order was passed despite a request by the petitioner that at least those witness named in the list who are State employees should be summoned by the court, as they are required to produce and prove some official records.
- (e) That on the next date of hearing the learned trial court by the order impugned in this revision closed the evidence of the petitioner-plaintiff on the ground that the remaining witnesses were not produced by him.
- (f) That the impugned order has caused great prejudice to the petitioner and if the same is allowed to stand the petitioner's suit is bound to fail.
- (g) That the trial court has unjustifiably denied assistance of the court to the petitioner- plaintiff to secure the attendance of his witnesses. The interests of justice demand that he is provided with all legal assistance in this regard.

In the facts and circumstances discussed above the petitioner prays that this Hon'ble Court be pleased to quash and set aside the order under revision and direct the court below to provide assistance of the court for summoning the plain tiff-witnesses.

PETITIONER



APPLICATION FOR REVIEW OF A JUDGMENT

(Under ORDER. 47, RULE. 1 of C.P. Code)

A.B. Plaintiff.

Versus

1. C.D.

2. E.F. Defendants

The above-named defendants most respectfully showeth:

1. That the plaintiff instituted a suit against the petitioner-defendants in this court and obtained a judgment and a decree in his favour on.....
2. That no appeal is allowed against the said judgment/decree by law. (Or, no appeal has been preferred against the said decree/judgment).
3. That the defendants are aggrieved with the said judgment/decree and pray for review of the said judgment/decree on the following, amongst others,

Grounds

- (a) Discovery of new and important matter or evidence.
- (b) Discovery of some mistake or error apparent on the face of the record.
- (c) Any other sufficient reason.

It is, therefore, prayed that Your Honour may be pleased to

- (i) set aside the judgment;
- (ii) Re-hear the suit and pass judgment accordingly.

REFERENCE AND REVISION UNDER CRIMINAL PROCEDURE CODE**REFERENCE**

Section 395 of Code of Criminal Procedure, 1973 (Cr.P.C.) empowers a Court subordinate to the High Court to make a reference to the High Court under sub-section (1) if following conditions exist: -

- | |
|---|
| 1. The case pending before it must involve a question as to validity of any Act, Ordinance or Regulation. A mere plea raised by a party challenging the validity of an Act is not sufficient to make a reference to the High Court unless the Court itself is satisfied that a real and substantial question as to validity of the Act is actually involved for the disposal of the case. |
| 2. Secondly, the Court should be of the opinion that such Act, Ordinance Regulation, as the case may be, is invalid or inoperative but has not been so declared by High Court or by the Supreme Court |



3. While making a reference to the High Court, the Court shall refer to the case setting out its opinion and reasons for making a reference.

The section does not permit a reference with a view to resolve a conflict of authority where different views on a certain point of law have been expressed by some High Court, the reason being that the Court desiring to make a reference is supposed to follow the law laid down by the High Court to which it is subordinate.

It is necessary for the Court making a reference to give its own opinion on the law which is sought to be referred to for clarification because the High Court is not expected to answer hypothetical questions of law however interesting or important they might be.

REVISION

- A. **Sections 397 to 401** of the Code deal with the revisional jurisdiction of the High Court and the Sessions Court.
- B. Revision lies both in pending and decided cases and it can be filed before a High Court or a Court of Session.
- C. Very wide discretionary powers have been conferred on the Sessions Court and the High Court.
- D. The object of the revision is to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions of apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals.
- E. The purpose of revision is to enable the revision court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior criminal court.

The provisions of Section 397 are attracted under the following conditions: -

○ The proceedings must be that of an inferior Criminal Court;
○ The term ‘inferior Court’ includes all Magistrates whether judicial or Executive, exercising original or appellate jurisdiction. They shall be deemed to be inferior to the Sessions Judge for the purposes of Sections 397 and 398. The Court of District Magistrate shall also be an inferior Court to the Sessions Judge for the purpose of this section;
○ Such inferior Court must be situate within the local limits of the jurisdiction of the revisional Court; and
○ The purpose of calling records by the revisional Court should be to enable itself to satisfy as to correctness or legality of any finding, sentence or order recorded or passed or to examine the regularity of any proceedings of such inferior Court.

The revisional jurisdiction of the High Court or a Sessions Judge under Section 397 extends only to the ‘inferior Criminal Courts’ and it does not include a civil or revenue Court acting under **Section 340 of Cr.P.C.** The Sessions Judge is inferior to the High Court and, therefore, the High Court can call for and examine the record of any proceeding before the Sessions Judge.



NO SECOND REVISION:

Sub-section (3) of Section 397 permits only one revision therefore if an application is made to a Sessions Judge and he is of the opinion that it should be referred to the High Court, then a fresh application for revision can be made to the High Court. But the sub-section bars an application for the revision to the High Court if a person has already applied for it to the Sessions Judge or vice versa.

A person can directly move a revision application to the High Court without first approaching the Sessions Judge. But if he moves the Sessions Judge he cannot thereafter approach the High Court for another revision.

The general rule in this regard is that a concurrent jurisdiction is conferred on two Courts, the aggrieved party should ordinarily first approach the inferior Court, i.e., the Sessions Judge in the context of Section 397(3) unless exceptional grounds for taking the matter directly to the higher Court (High Court in this case) are made out.

Under Section 398 Cr PC, the revision Court may make an order for further inquiry. Further inquiry entails supplemental inquiry upon fresh evidence. The power under Section 398, Cr PC is not co-extensive with Section 397, Cr PC but extends far wider as the record can 'otherwise' be examined by the revision Court without recourse to Section 397, CrPC.

SESSIONS JUDGE'S POWERS OF REVISION (SECTION 399 OF CRPC)

1. In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Section 401(1) of the Code.
2. Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, applied to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.
3. Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

Thus, while hearing a case records of which have been called for revision by himself, the Sessions Judge has the same powers as the High Court has under Section 401 of the Code. It would appear from Section 399(3) of the Code that, while a person has the choice to move either the High Court or the Sessions Judge under Section 397 of the Code, if he chooses to go before the Sessions Judge, he cannot thereafter go before the High Court even if the Sessions Judge rejects his revision application.

An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Section 401 deals with the powers of the High Court as a Court of revision. It is a discretionary jurisdiction vested in the High Court which should be exercised sparingly to decide questions as to legality, propriety, regularity or correctness of any finding, sentence or order recorded or



passed by the inferior Criminal Court. The section also empowers the High Court to direct tender of pardon to the accused as contemplated by Section 307.

The High Court can exercise revisional powers under this section either suo motu, that is, on its own initiative or on a petition of any aggrieved party or any other person.

The exercise of revisional power by the High Court is, however, subject to two limitations which are as follows:

- | |
|--|
| <ul style="list-style-type: none"> ○ Where a person or someone on his behalf has made an application for revision before the Sessions Judge under Section 399 (3), no further revision can be entertained by the High Court at the instance of such person; and |
| <ul style="list-style-type: none"> ○ Where an appeal lies but it was not availed of by the person, no revision can be entertained by the High Court at the instance of the party who could have appealed but did not do so. |

The High Court may even direct additional evidence to be taken in case of a revision against discharge of the accused in the interest of justice. But otherwise the jurisdiction of the High Court in a criminal revision is drastically restricted and it cannot embark upon re-appreciation of the evidence.

NO REVISION WHERE RIGHT TO APPEAL EXISTS

Sub-section (4) of section 401 provides that the party having right of appeal cannot apply for revision. The Cr.P.C. provides a remedy, by way of appeal under Chapter XXX and if the party does not file an appeal against an order of the inferior criminal Court, he will not be permitted to prefer a revision against that order. But legal bar does not stand in the way of High Court's exercise of power of revision suo motu. It can itself call for the records of proceedings of any inferior criminal Court and has power to enhance the sentence by exercising its revisional jurisdiction.

REVISION MAY BE TREATED AS APPEAL:

Sub-section (5) of the section 401 vests a discretionary power in the High Court to treat a revision petition as an appeal and deal with it under its appellate jurisdiction under Chapter XXX. But it can do so when an appeal against the order of the inferior Court lies but the petitioner has filed a revision under an erroneous belief that an appeal does not lie and when it is in the interest of justice to do so.

ENHANCEMENT OR REDUCTION OF SENTENCE:

The High Court, under its revisional jurisdiction does not exercise power of enhancing the sentence in every case in which the sentence passed appears to be inadequate. It would interfere when it is convinced that the sentence passed is manifestly and grossly inadequate.

The District Magistrate, a Sessions Judge or the Government pleader may draw the attention of the High Court to a sentence which is inadequate and deserves to be enhanced or the High Court can also suo motu call for the record of a particular case where it is of the opinion that the sentence awarded is grossly inadequate.

There is no limitation on the power of the High Court as regards enhancement of sentence to the extent of maximum prescribed by the Penal Code, except in cases tried by Magistrates. But before doing so, the Court has to be issued a show-cause notice against the enhancement of his sentence.



REDUCTION:

If after hearing the State, i.e., the Government pleader, the High Court comes to a conclusion that the sentence imposed on the accused is too severe and needs to be reduced, it may reduce it exercising its revisional jurisdiction. However, it cannot be reduced below the prescribed statutory limit, if any, provided in the Indian Penal Code or the relevant Act.

FACT FINDING:

The jurisdiction of the High Court in revision of criminal cases is severely restricted and confined only to the questions of law. It cannot embark upon a re-appreciation of evidence.

The High Court does not normally interfere with a concurrent finding of fact.

The High Court in exercise of its revisional power will not go into the question of sufficiency of material before the lower Court for its decision or order. Where the trial has dealt with the matter fully, the High Court will not interfere and disturb the order of the trial Court. While disposing of revision petition the High Courts must ensure that the principles of natural justice are not violated.

WRITS

S.NO.	PARTICULARS	PROVISIONS
1	Meaning	Anyone whose rights are affected is empowered to seek writs from Supreme Court under Article 32 and from High Court under Article 226. However under Article 32 Supreme Court can issue Writs only in the case of violations of Fundamental Rights. <u>Remedies under writ are provided only if</u> (i) There is no remedy available under the ordinary law, or (ii) The remedy available is inadequate.
TYPE OF WRITS		
1	Writ of habeas corpus	➤ The writ of habeas corpus is a remedy available to a person who is confined without legal justification. The words “Habeas Corpus” literally means “to have a body”. ➤ This is an order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for his detention. ➤ This writ has to be obeyed by the detaining authority by production of the person before the Court. Under Articles 32 and 226 of the Constitution, any person may move the Supreme Court and the High Court of competent jurisdiction respectively, for the issue of this writ. ➤ The applicant may be the prisoner himself moving the Court or any other person may move the Court on his behalf to secure his liberty praying for the issue of the writ of habeas corpus. ➤ No person can be punished or deprived of his personal liberty except for violation of any law and in accordance with the due process of



		law. Dis-obedience to the writ of habeas corpus attracts punishment for contempt of Court under the Contempt of Courts Act, 1971.
2	Writ of mandamus	➤ The expression “mandamus” means a command. The writ of mandamus is, thus, a command issued to direct any person, corporation, inferior Court or Government authority requiring him to do a particular thing therein specified which pertains to his or their office and is further in the nature of a public duty. ➤ This writ is used when the inferior tribunal has declined to exercise jurisdiction. Mandamus can be issued against any public authority. The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed. ➤ Mandamus is not issued if the public authority has discretion. Mandamus can be issued by the Supreme Court and all the High Courts to all authorities. However, it does not lie against the President of India or the Governor of a State for the exercise of their duties and powers (Article 360). ➤ It also does not lie 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 or of a Statute. It is a discretionary remedy and the Court may refuse if alternative remedy exists except in case of infringement of Fundamental Rights.
3	Writ of prohibition	➤ The writ of prohibition is issued by the Supreme Court or any High Court to an inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. ➤ It compels courts to act within their jurisdiction when a tribunal acts without or in excess of jurisdiction or in violation of rules or law. ➤ The writ of prohibition 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 prayed for as a matter of right and not a matter of discretion. ➤ The Supreme Court may issue this writ only in case of Fundamental Rights being affected by reason of the jurisdictional defect in the proceedings. ➤ This writ is available during the pendency of the proceedings and before the order is made.
4	Writ of certiorari	It is a writ issued by the Supreme Court and High Court to an inferior court forbidding the later to continue proceedings in excess of its jurisdiction. All Courts can issue the writ of certiorari throughout their territorial jurisdiction when the <u>subordinate judicial authority acts:-</u> (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. 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 i.e. Certiorari is issued after authority has exercised its powers.
5	Writ of quo Warranto	The writ of Quo Warranto is prayed, for an inquiry 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 an usurper. The holder of the office has to show to the Court under what authority he holds the office. This writ is issued when: • The office is of a public and of a substantive nature; • The office is created by a Statute or by the Constitution itself; and • The respondent must have asserted his claim to the office. It can issue even though he has not assumed charge of the office. The fundamental basis of the proceedings of quo Warranto is that the public has an interest to see that no unauthorised person usurps a public office. It is a discretionary remedy which the Court may grant or refuse. When an applicant challenges the validity of an appointment to a public office, it is maintainable whether or not any fundamental or other legal right of such person has been infringed. This writ is intended to safeguard against the usurpation of public offices.

SPECIMEN FORM OF PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

IN THE HON'BLE HIGH COURT AT.....

(Original Civil Jurisdiction)

Writ Petition No.....of....., 20.....

A.....

Petitioner

Versus

1. State of.....
 2. Drug Controller.....
 3. Appellate Authority.....
- Respondents.



Petition under Article 226 of the Constitution for the issue of a writ of certiorari.

To

The Hon'ble the Chief Justice and his companion Judges of the Hon'ble High Court of Judicature.

The above named Petitioner begs to submit as under:

- (1) That the Petitioner is a stockist and dealer in drugs and carries on his business in the name and style of..... at
- (2) That the Petitioner held a drug dealer's licence No.....dated.....and has been carrying on this business for the last six years.
- (3) That on.....the Petitioner received a notice from Respondent No. 2 to show cause why his licence should not be cancelled for selling substandard and spurious drugs. He was also required by the notice to produce his licence before Respondent No. 2.
- (4) That on.....the Petitioner submitted his explanation to the show-cause notice submitting that he did not sell any substandard or spurious drugs and that he sold only drugs in their original containers obtained from reputed drug manufacturers. He expressed his inability to produce the licence as the same had been submitted to the Civil Surgeon for renewal.
- (5) That without giving proper consideration to the pleas raised by the Petitioner, Respondent No. 2 passed an order dated.....cancelling the Petitioner's licence.
- (6) That, thereupon, the petitioner preferred an appeal against the order of Respondent No. 2 to Respondent No. 3.
- (7) That by order dated.....Respondent No. 3 dismissed the appeal.
- (8) That the Petitioner has no other remedy but to approach this Hon'ble Court.
- (9) That the orders of Respondents No. 2 and No. 3 are void and illegal for the following amongst other—

REASONS

Because the orders of respondents Nos. 2 and 3 are vitiated as they have acted in violation of the principles of natural justice.

Because both respondents Nos. 2 and 3 have placed great reliance on the report of the Central Drugs Laboratory dated.....which report was never disclosed to the Petitioner and which the Petitioner was not given any opportunity to meet.

Because the authorities have been influenced by the failure of the Petitioner to produce the licence but have themselves failed to consider the Petitioner's explanation that the licence had



been submitted to the Civil Surgeon for renewal.

Because respondents Nos. 2 and 3 have not applied their minds to the facts and circumstances of the case.

Because the impugned orders violate the fundamental right of the Petitioner to carry on his trade and business guaranteed by Article 19(1) (g) of the Constitution. It is, therefore, most respectfully prayed that a writ, direction or order in the nature of certiorari be issued quashing the order of Respondent No. 2 dated.....and the order of Respondent No. 3 dated.....

.....
(Petitioner)

Place:

Date:





PREVIOUS YEAR QUESTIONS AND ANSWERS

- Write short notes on the Writ as an extra-ordinary constitutional remedy?

Writs are issued by High Courts as extraordinary remedies in cases where there is either no remedy available under the ordinary law or the remedy available is inadequate. Article 226 of the Constitution lays down: “Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrantum and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III (Fundamental Rights) and for any other purpose”.

It has been held in the case of **Ramdas Motor Transport Company Limited v. T. A Reddy**, that 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 shareholder has very effective remedies for prevention and mismanagement. Consequently High Court should not entertain a petition under the said Article.

Supreme Court also has the power to issue writs Under Article 32 in case of infringement of fundamental rights. Therefore, writ is an extra ordinary constitutional remedy for enforcement of Fundamental Rights conferred on the citizens of India and others under the Constitution of India and Article 32 of the Constitution confers on the Supreme Court of India power to issue directions or orders or writs for the enforcement of any of the said rights.

- **ABC Ltd. employed Joy as its President and provided him rent free accommodation as part of conditions of employment. The agreement contained a clause stipulating employee's right to retain the accommodation upon termination of service for a particular period. Joy's service were terminated within Six months of appointment. He refused to surrender the accommodation to the company. This accommodation owned by ABC Consultants (P) Ltd. which was a sister concern of ABC Ltd. The accommodation owner had given permission to Joy to occupy it as an employee of ABC Ltd. On Joy's refusal to handover the accommodation upon termination of employment, ABC Ltd. filed a complaint against Joy under section 630 of the Companies Act, 1956 and also under IPC sections. The Judicial Magistrate of First Class (JMFC) discharged Joy of the charges leveled against him. But on appeal, the High Court quashed the JMC's order.**

On what grounds should Joy prefer an appeal to the Supreme Court against the impugned order of the High Court? Cite relevant case law, if any.

Joy may prefer an appeal to the Supreme Court on the following grounds:

1. That the High Court has misconstrued the nature of the allegation made in the complaint and it has wrongly held that the said complaint and the material on record *prima facie* disclose that Joy (the Appellant) is wrongfully withholding the property of the complainant company and thus liable under Section 452 of the Companies Act, 2013.
2. That the dispute between the parties is of a civil nature.
3. That the Employer Co. was not the lessee of the flat and except for the permission granted by ABC consultants (P) Ltd. to it and Joy (the Appellant), it has no right, title or interest in that flat.

In the above case are similar to **Jagdish Chandra Nijhawan v. S. K. Saraf**. In this case the Supreme Court upheld the contention of the Appellant and observed that the High Court did not appreciate the



material aspects of the case properly. The Apex Court set aside the order passed by the High Court and restored the discharge order passed by the Judicial Magistrate.

- **Explain the difference between the writ of prohibition and writ of certiorari.**

ANSWER: Refer Chapter 41

- **Explain the following:**

a) **Habeas corpus**

b) **Mandamus**

ANSWER: Refer Chapter 41

- **Examine and comment on the following:**

Special leave petitions under Article 134A and under Article 136 of the constitution of India are similar in formats and same in essence.

ANSWER: Refer Chapter 41

- **A high court allows a writ petition (c) under Article 226 of the Constitution of India. Issuing a writ of mandamus directing SEBI to enlist shares of XYZ (Pvt). Ltd. Along with those of AFC Corporation, a government company.**

ANSWER: Refer Chapter 41

- **Write short notes on Revision under the code of Civil Procedure, 1908.**

ANSWER: Refer Chapter 41

- **Distinguish between the Revision and review applications in a High Court.**

ANSWER: Refer Chapter 41

- **Distinguish between Special Civil application and special criminal application**

Answer: Special Civil Application and Special Criminal Application

Special Civil Application (SCA) is another name for Writ Petition, i.e. petition for issuing prerogative writs of mandamus etc. for enforcement of fundamental rights or for any other purpose under Article 226 of the constitution of India (only for High Courts.) in fact SCA is a technically couched and framed civil application for enforcement of fundamental rights, but not well defined statutory legal rights. SCA is a popular term for Writ Petitions in Bombay High Court and other Southern State High Courts. In Delhi the term Writ Petition (WP) (Civil) is used.

Special Criminal Application, on the other hand is Criminal Application (Cr.A0 for relief/order to be obtained from the court in criminal matters. A popular example is special criminal application for grant of bail/anticipatory bail in case of refusal by lower criminal court. The special criminal application is primarily directed for enforcement of fundamental rights under article 14 and 21 of the constitution which is criminal in nature punishment and fines are involved.)



- Several types of appeal have been provided in the ordinary civil law as well as constitutional framework. Elucidate in respect of civil jurisdiction only.

ANSWER: Refer Chapter 41

- State the grounds on which a review of the order passed by the court can be sought.

ANSWER: Refer Chapter 41

- What are the important matters which should be kept in view while drafting a memorandum of appeal for filling before an appellate authority/superior court, etc?

ANSWER: Refer Chapter 41

- Write notes on the Amendment of the pleadings with reference to the general rule no pleadings no evidence?

ANSWER: Refer Chapter 41

- A suit for specific performance was instituted in the civil court at Delhi against positive energy ltd. The managing director asked the company secretary to file written statement under his own signature as if he had implied authority to do so. This was done, but the plaintiff sought dismissal of the written statement for want of proper legal authority for verifying written statement in the meantime the company granted ex post facto sanction and ratification of the authority of the company secretary to sign pleadings on behalf of the company. Yet, the court dismissed the written statement. On what legal grounds should the aggrieved company prefer an appeal impugning civil courts order? cite case law, if any.

In the given case **nitro ltd. V. National Insurance co.** Ltd. It was held that if the plaint/reply is not filed by a duly authorized person, the petition would be liable to be dismissed.

But in the given case united bank of **India V. Naresh Kumar**, it was held that the in case signing/filling written statement or pleadings by a person not duly authorized the authority exercised could be ratified subsequently.

In the above case, ex-post facto ratification has been accorded on this ground and on the basis of united bank of India case appeal should be filed. Other legal/juristic grounds should also be pleaded.

- What are the important matters which should be kept in view while drafting a memorandum of appeal for filling before an appellate authority/superior court, etc?

An appeal may be divided into three parts: (1) formal part, known as the memorandum of appeal, (2) material part, grounds of appeal and (3) relief sought for,

While drafting the memorandum of appeal, following points should be kept in view:

The memorandum of appeal should begin with the name of the court in which it is filed after the name of the courts, number of the appeal and the year in which it is filed are given. As the number is noted by the officials of the court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should be indicated against the names of the parties as to what character each party had in the lower court. i.e. whether he was a plaintiff or a defendant. Or an applicant or an opposite party.



CHAPTER-42

COURT CRAFT AND ART OF ADVOCACY

Art of advocacy is **means to convince the judge**. The aim of advocacy is to make judge prefer your version of the truth.

Company Secretaries act as an authorized representative before various Tribunals/quasi-judicial bodies. It is necessary for them to learn art of advocacy or court craft for effective delivery of results to their clients when they act as an authorized representative before any tribunal or quasi-judicial body.



Technical and legal knowledge about the area in which Company Secretaries are acting is essential. **Better their knowledge, the better their advocacy skills and the greater their impact.**

Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures. It is a valuable and lifelong skill worth mastering.

IMPORTANT PRINCIPLES OF ADVOCACY

- (1) Act in the best interest of the client;
- (2) Act in accordance with the client's wishes and instructions;
- (3) Keep the client properly informed;
- (4) Carry out instructions with diligence and competence;
- (5) Maintain client confidentiality.
- (6) Act impartially and offer frank, independent advice;



IMPORATANT ADVOCACY TIPS

S.NO.	PARTICULARS	PROVISIONS
1	Clarity	The judge's time is limited, so make the most of it.
2	Credibility	The judge needs to believe that what you are saying is true and that you are on the right side.
3	Eye contact	While pleading, maintain eye contact with your judge.
4	Psychology	Understand judge's psychology as your job is to make the judge prefer your version of the truth. Be likeable. At least be more likeable than your opponent. Learn to listen. Entertain your judge



5	Humour	Humour will often bail you out of a tough spot
6	Voice modulation	Voice modulation is equally important. Modulating your voice allows you to emphasize the points you want to emphasize. Be very careful about raising your voice. Use your anger strategically. But use is rarely. Always be in control of it

SOME IMPORTANT PREPARATORY POINTS

Some important preparatory points which a company secretary should bear in mind

With regards to advocacy

Company Secretaries should be able to

- Identify the client's goals
- Identify and analyse factual material;
- Identify the legal context in which the factual issue arises
- State in summary from the strengths and weaknesses of the case from each party's perspective
- Develop a presentation strategy
- Outline the facts in simple narrative form
- Structure legal framework of the case

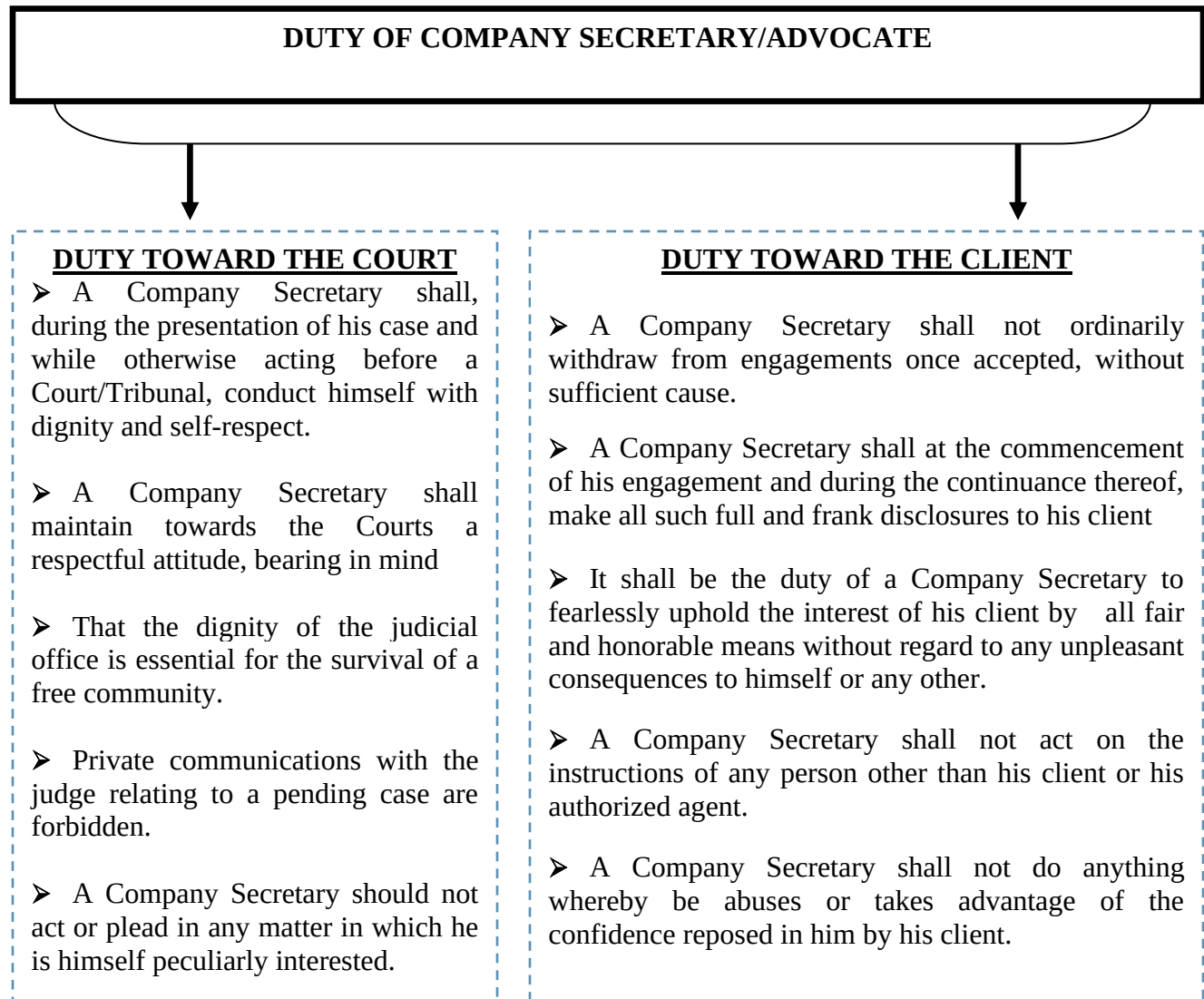
While contacting with client

- Take minute facts from the client
- Lend your complete ears to all that client has to say
- Put questions to the client while taking facts so that correct/relevant facts can be known
- Convey to the client about exact legal position in context of relief sought by the client;
- Give correct picture of judicial view to the problem posed by the client.

While presenting your case

- Start your address with humble note
- State brief facts
- State relevant facts, provisions of law and relevant binding decisions
- Complete all points slowly but firmly
- Permit the opponent counsel uninterruptedly. However, if facts are being completely twisted, interrupt depending upon the relevant circumstances
- Take instructions from client in advance with respect to alternative reliefs.



DUTY OF COMPANY SECRETARY/ADVOCATE**ARGUMENTS ON PRELIMINARY SUBMISSIONS.**

Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings. Additionally the provisions of law or legal objections relevant and applicable to the issues involved in the matter should also be mentioned so as to demonstrate that the relief being claimed by the opponent is not eligible to be granted and/or that the relief being claimed by the party being represented by a lawyer/authorized representative should ordinarily be allowed as per those provisions of law.

FOR EG. If a claim being opposed by a lawyer/authorized representative is evidently barred by limitation, such an objection should be taken in the preliminary submissions/objections. Such



type of submissions/objections should be duly supported by law on the point or by relevant case law/judgments.

ARGUMENTS ON MERITS

- 1) Such arguments as relate to the facts pleaded by the parties are termed as arguments on merits. While addressing arguments on merits, a lawyer/authorized representative should carefully point out the pleadings of the parties and the relevant evidence in support thereof, lead by the parties, both oral as well as documentary.
- 2) A lawyer/ authorized representative should ensure that all or any contradiction in the pleadings of the opponent and the evidence in support of such pleadings are duly pointed out while submitting his/her arguments.
- 3) Thus, where an agreement/contract of service is pleaded and there is no evidence either oral or documentary on record in support of such an agreement/contract, it should be specifically pointed out that the opponent has failed to prove/establish that such an agreement/contract actually exists or that the same had actually been executed at all.

ETIQUETTES

- 1) Etiquette is **the fine art of behaving in front of others**. It is a set of practices and forms which are followed in a wide variety of situations.
- 2) Many people consider it to be a branch of decorum, or general social behavior. Each society has its own distinct etiquette, and various cultures within a society also have their own rules and social norms.
- 3) Being a corporate professional, a company secretary must practice some basic etiquette as that would be necessary for his professional success in the emerging business scenario.
- 4) These include handshake etiquettes, communication etiquettes, dressing etiquettes and dining etiquettes etc.

KINDS OF ETIQUETTES

S.NO.	PARTICULARS	PROVISIONS
1	HANDSHAKE ETIQUETTE 	➤ Always rise when introducing or being introduced to someone. ➤ Shake hands with your right hand. ➤ Shake hands firmly (but not with a bone crushing or fish-limp grip), and with only one squeeze. ➤ Hold it for a few seconds (only as long as it takes to greet the person), and pump up and down only once or twice. ➤ Make eye contact while shaking hands
2		➤ Always speak politely. Listen to others attentively. A good listener is always dear to every client. ➤ While speaking over telephones, always greet the other person while starting and ending the call. ➤ Speak only when the other person has finished talking instead of interrupting in between.



	COMMUNICATION ETIQUETTES 	➤ Show interest in what gather people are doing and make others feel good. ➤ Stand about an arm's length away while talking to others. ➤ Question another person in a friendly, not prying, manner. ➤ Make eye contact when talking to others. ➤ Be polite. Avoid foul language, unkind statements, and gossip. ➤ Keep your conversations short and to the point. ➤ Maintain your sobriety and politeness even if the client speaks something offensive or rude and avoid replying back in harsh tone/words.
3	DRESSING ETIQUETTE Corporate Clothing 	<u>DRESSING ETIQUETTE</u> ➤ Always wear neat and nicely pressed formal clothes. Choose corporate shades while you are picking up clothes for your office wear. ➤ Ties for men should compliment. ➤ Women should avoid wearing exposing dresses and opt for little but natural make-ups. Heels should be of appropriate or modest height. ➤ Men need to keep their hair (including facial hair) neatly trimmed and set. ➤ Always polish your shoes. ➤ Keep your nails clean.
4	INVITATION ETIQUETTE 	➤ If you cancel after initially accepting an invitation, phone your regrets as soon as possible. Send a note of regret following the phone conversation. ➤ Don't ask for permission to bring a guest unless the invitation states. ➤ Arrive at the event promptly, but not too early. ➤ Mingle and converse with the other guests. ➤ Don't overstay your welcome. ➤ Extend your thanks as you leave.
5	DINING ETIQUETTES 	➤ Always be courteous while official dinners. Offer the seat to your guest first. If you are the guest, be punctual and thank the host for the dinner. ➤ Wait until you receive your host's signal. ➤ Initiate conversations while waiting for the food. ➤ Never begin eating any course until everyone has been served or the host/hostess has encouraged you to do so. ➤ Chew quietly; don't speak with your mouth full. ➤ Avoid pointing the knife or fork towards the other person while eating and speaking. ➤ Allow your guest to select the menu and wine.



ICSI - GUIDELINES FOR PROFESSIONAL DRESS OF COMPANY SECRETARIES

The Council of the Institute of Company Secretaries of India to enhance the visibility and brand building of the profession and ensuring uniformity, has prescribed the following guidelines for professional dress for members while appearing before judicial/quasi-judicial bodies and tribunals

S.NO.	PARTICULARS	PROVISIONS
1	Professional dress for Male members	Navy Blue suit and white shirt with a tie (preferably of the ICSI) or navy blue buttoned-up coat over a pant or a navy blue safari suit.
2	Professional dress for female members	Saree or any other dress of a sober colour with a Navy Blue jacket.
3	Members in employment	Members in employment may wear the dress/uniform as specified by the employer for all employees or if allowed the aforesaid professional dress.
4	Practising Company Secretaries	Practising Company Secretaries appearing before any tribunal or quasi-judicial body should adhere to dress code if any prescribed for appearing before such tribunal or quasi judicial body or if allowed the aforesaid professional dress.



PREVIOUS YEAR QUESTIONS AND ANSWERS



1. In the present litigation corporate scenario, what are the expectations from a company secretary with regard to drafting and Conveyancing?

- The Company Secretary is an expert professional well versed with company affairs and administration. Now law is an integral part of corporate administration-both as per statutes as well as general rules of practice. So the company Secretary must have some basic proficiency in law relating to company administration.
- Besides a company Secretary acts as an authorized representative before various Tribunals/quasi judicial bodies. It is necessary for him to learn art of advocacy or court craft for effective delivery of results to his clients when he acts as an authorized representative before any tribunal/quasi judicial body.
- For winning a case, **art of advocacy is important**. Advocacy/court is learned while entering the Practicising side of the profession. Apart from the legal side of the profession, advocacy is often useful and sometimes vital, in client interviewing, in negotiation and in meetings, client seminars and public lectures. It is a valuable and lifelong skill worth mastering.
- Technical and legal knowledge about the area in which Company Secretaries are acting is essential. Better their knowledge, the better their advocacy skills and the greater their impact. Good advocacy or negotiating skills will not compensate for lack of appropriate knowledge. **ANSWER:** Refer page 416

2. Write notes on the Communication etiquettes

ANSWER: Refer chapter 42

3. Write notes on the Court Craft

ANSWER: Refer chapter 42

4. Practicing of good professional etiquettes is necessary for professional success in the emerging business scenario discuss.

ANSWER: Refer chapter 42

5. In presenting a case before the tribunal/quasi/judicial body a company secretary owes duty to the court, to the client and to the opponent. Describe these duties of the company secretary.

ANSWER: Refer chapter 42

6. What is meant by 'Etiquette'? What are the invitation etiquette to be observed by a company secretary?

ANSWER: Refer chapter 42

7. What are the advocacy tips to be borne in mind by a practicing company secretary while appearing before a tribunal?

ANSWER: Refer chapter 42



8. A Company Secretary representing his company in court proceedings is not an advocate even though he is a law graduate performing advocacy functions “Comment, highlighting conceptual distinction between company secretary and advocate as professionals.

Answer: under section 2(i) (a) of the advocates Act, 1961, advocates has been defined to mean any advocate entered in the roll under the provisions of the advocates act.

- 1) As per section 29 of the advocates act provides that there shall be only one class of person entitled to practice the profession of law. Namely advocates.
- 2) As per section 32 of the advocates act provides that any court, authority or person may permit any person, not enrolled as an advocate to appear before it or him in any particulars case.
- 3) As per section 33 of the advocates act provides that no person shall on or after the appointed day, be practice in any court or before any authority or person unless he is enrolled as an advocate.

9. What are the advocacy tips to be borne in mind by a practicing company secretary while appearing before a tribunal?

ANSWER: Refer chapter 42

10. Highlight important professional etiquettes necessary for success in career.

ANSWER: Refer chapter 42

11. ABC Ltd. has decided to acquire XYZ Pvt. By purchase of its entire shares, as a practicing company secretary you have been asked by ABC ltd. For legal opinion on the acquisition. Explain the process involved in drafting the legal opinion.

Drafting a legal opinion can and should always be split into three processes. The mental attitude, the thinking process and the writing process.

LEGAL OPINION

As a practicing company secretary, following issues are come across while framing legal opinion;

1. As the negotiations for acquisition continue, both companies will conduct extensive due diligence in an effort to identify issues that must be resolved for a successful merger.
2. If significant issues can be resolved and both companies are convinced that a merger will be beneficial, then a formal merger and acquisition agreement will be formulated.
3. The basic outline for the M & A agreement is rooted in the letter of intent. However, due diligence will uncover several additional issues not covered in the letter of intent. Consequently, the M & A agreement can be very lengthy based on the issues exposed through due diligence.
4. Both companies need to agree on the integration process.
5. Once all issues have been included and addressed to the satisfaction of companies, the merger and acquisition is executed by signing the M & A agreement.
6. The buyer and the seller along with their respective legal teams meet and exchange documents.
7. Once the agreement has been finalized a formal announcement is made concerning the merger between the two companies

Sd-/

PCS



12. Writing process is an essential part of a legal opinion even if composed on a laptop.

A legal opinion is a professional's written response to client's instructions to advice in writing. It is not merely an advice as it needs to be supplemented with the basic reasoning behind it. Composing of legal opinion essentially involves three processes which are the mental attitude, the thinking process and the actual writing of the opinion. Writing being one of the most important processes as it act as a medium to transfer the thinking process into the form of legal opinion.

Today most of the legal opinions are drafted in electronic form i.e. they are composed using laptop. Desktop etc. and the mere fact that composing of legal opinion in laptop without use of pen and paper for writing does not dilute the importance of writing.



CHAPTER-43

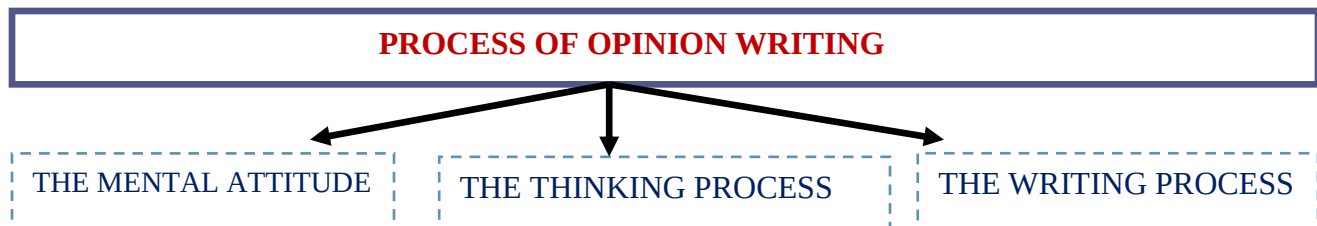
OPINION WRITING

OPINION WRITING

An opinion is a professional's written response to client's instructions to advice in writing. It follows that it must contain advice. Professionals do not advise someone simply by telling them what to do, but supplement it with the basic reasoning behind it. Advising is inextricably bound up with and is part of the mental attitude with which professionals approach opinion writing, with the thinking process that precedes the actual writing of the opinion, and with the writing process itself.

NEED FOR A LEGAL OPINION

1. Interpretation of statutes or documents
2. Advise a transaction structure
3. Opinion for guidance of decision makers in commerce, industry or government
4. Opinion to Lenders on enforceability of Finance Documents
5. Opinion for Investors for compliance by Target Companies
6. Opinion on Foreign Direct Investment



1. The Mental Attitude

The mental attitude required to write a good opinion, or give good advice, is that of a practitioner as opposed to an academic. The approach required is a practical approach not an academic approach. The practical approach is something to be developed and acquired, and defining it does not necessarily help.

2. The Thinking Process

It involves the following stages:

- | |
|--|
| a) Read and digest your instructions: - Find out exactly what your instructions are, what is required of you, what the case is about, what are the basic facts and what your client actually wants to know. |
| b) Answer the primary question:- You must have a clear idea of what your client wants to know if you are to address your mind the right issues and give proper advice. |
| c) Digest & organise the facts: - The first thing to do is to digest and organise the facts. There will be facts in any case which are relevant and pertinent to the case and facts which are not. |



d) Construct a legal framework: - Once the facts are at your fingertips, a legal framework needs to be constructed into which these facts can be logically slotted.
e) Look at the case as a whole: - What should also be borne in mind throughout the planning stage is the opponent's case. A legal opinion will be useless if it considers the client's case in isolation.
f) Consider your advice: - What your client needs is good practical advice, so you should also consider the practical steps that you advise your client to take.

3. The Writing Process

Simply knowing your opinion, knowing the answer, does not mean that writing process is a mere formality. You have to know how to express yourself in an opinion, how to transfer the thinking process on the paper.

The legal opinion should be written following a structure. **It should be entitled opinion or advice** and contain the title of the case in the heading. The first paragraphs should serve as an introduction to the legal opinion, laying out the salient facts and what you have been asked to advise about.

At this point, many legal opinions will set out the main conclusions and advice and the overall opinion.

The subsequent paragraphs should set out your reasons for reaching the legal opinion which you do in the opening paragraphs.

CASE FOR OPINION WRITING

1. <u>Lawfulness of an action:</u> Opinion letters are given when one wants to know if an action is lawful.
2. <u>Legal consequences:</u> Sometimes a party entering into a transaction obtains legal opinion to ascertain if the action will lead to desired legal consequences.
3. <u>Regulatory requirements:</u> Sometimes legal opinion has to be sought because it is mandated by law to get the opinion of outside legal expert.
4. <u>Compliance:</u> A legal opinion can be sought for assessing the requirements of the regulatory regime so that the querist can meet the compliance requirement.
5. <u>Protective shield:</u> Clients sometimes desire the protection of an expert's legal opinion to be used as evidence of lack of mens rea in certain proceedings.
6. <u>To satisfy contractual requirements:</u> Sometimes a clause in commercial contracts require the opinion of an expert.



TYPES OF LEGAL OPINION

1. **Advices on Transaction:** Due diligence is the principal reason for opinion letters in business transactions. An opinion letter may be one component of a party's due diligence, but it is not normally a substitute for due diligence performed by the opinion recipient and its counsel.
2. **Advices on Law:** Sometimes the client would want to know how the law will apply to a given situation. Without in-depth knowledge of law and legal research one cannot give an opinion to the satisfaction of the client. The proper way is to start with the cases and work through to reach a deduction as to the principle of law that covers the situation. Quite often however one forms a value judgment as to what the conclusion ought to be from first principles and moral feelings and then searches for the authorities to support this conclusion. This is top down reasoning should be avoided.
3. **Opinions on Facts:** The third type of opinion is one which is predominantly related to facts. One is given a series of statements and documents and asked whether on that material there are reasonable prospects of prosecuting or defending the claim. The matter may be a simple personal injury case in which the law is well settled.
4. **Advices on Evidence:** A special type of opinion is a brief to advice on evidence. When advising on fact or law one should not be too positive. In relation to advices on quantum of damages one can never be sure so it is advisable to not give a precise figure but a range. Where the law is in a state of flux or doubtful the legal expert should always draw attention to this explaining why one cannot be more positive.

QUALITY OF WRITING

1. The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English.
2. Every word of the legal opinion should be chosen because it communicates precisely the advice which the writer intends to convey.
3. It is important to write in plain English wherever possible.
4. The use of plain English simply involves saying what needs to be said in the clearest way possible and avoiding unnecessary verbosity. There are times where technical terms will have to be used if they carry the precise meaning of the advice being delivered.
5. A legal opinion will often contain a complicated set of facts which will have to be sorted into specific legal issues and defined in legal terms.
6. Clarity of expression is therefore vital. Clarity of expression can only be achieved through thorough planning and thought.



FORM AND ELEMENTS OF THE OPINION LETTER

Coverage in Opinions

There is no form for a legal opinion prescribed by law or rule. Opinion letters, however, have developed a certain uniformity because of their repeated use. In general, a legal opinion will cover the following:

- 1. Introductory Matters:** such as the date, the identity of the opinion recipient, the role of the opinion giver giving the opinion, and the purpose for which the opinion is given.
- 2. References:** a general or specific recitation of the documents and other factual and legal matters reviewed by the opinion giver, including in some instances a statement of reliance on various factual assumptions.
- 3. Legal Conclusions and Qualification:** the legal conclusions expressed in the opinion, and any qualifications to the legal conclusions.
- 4. Peculiar Matter:** matters peculiar to the particular opinion, such as matters relative to opinions of local counsel in other jurisdictions and specific limitations on the use of the opinion.
- 5. Signature:** the signature of the opinion giver.

THINGS TO BE KEPT IN MIND WHILE PREPARING FOR OPINION LETTER

Differences between opinion givers and opinion recipients generally arise over

1. The time and expense required to render an opinion on a matter that is peripheral to the primary concerns of the opinion recipient,
2. The appropriate scope of a particular opinion,
3. Whether the opinion will cover matters that are essentially factual in nature,
4. Whether the opinion will cover matters about which there is some recognized legal uncertainty, and
5. Requests for what historically were referred to as “comfort opinions” but are more properly referred to as “negative assurances.

STANDARDS APPLICABLE TO PREPARATION OF AN OPINION

Generally: A lawyer is expected to be well informed and to exercise such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake

Customary Practice: An attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are



commonly known by well-informed attorneys, *and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.*

Fraudulent or Misleading Opinions

An opinion giver may be liable for an opinion that constitutes fraudulent misrepresentation. A lawyer owes a duty to non-clients to refrain from fraudulent misrepresentation. It is generally understood that, regardless of compliance with other standards, and even if an opinion is technically correct, a lawyer should not render an opinion that the lawyer recognizes would be misleading to the opinion recipient.

Ethical Issues Relating to the Provision of Opinions to Non-clients

A lawyer delivering an opinion letter to a non-client should also consider ethical principles. For example, rendering an opinion to a non-client may conflict with the opinion giver's ethical obligations to maintain the confidences of its client. He should decline to give legal opinion in such cases.



THANKS FOR READING

जो सपने देखने की
हिम्मत रखते हैं
वो पूरी दुनिया जीत
सकते हैं



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- SATYAM SCAM
- FLIPKART AND MYNTRA
- FACEBOOK AND WHATS APP

- SAHARA SCAM
- JET AIRWAYS AND ETIHAD
- DAICHI SANKYO AND RANBAXY
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COMPANY LAW QUIZ
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SEMINAR ON HOW TO FILL E-FORMS IN CLASS

PRACTICAL EXPOSURE

SEMINAR ON INCORPORATION OF COMPANIES
SEMINAR ON XBRL FILING
SEMINAR ON PRIVATE PLACEMENT
MOCK AGM
MOCK BOARD MEETING
HOW TO DRAFT NOTICES, RESOLUTIONS AND MEETING ETC.

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IN EVERY ATTEMPT



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2	CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY (NEW SYLLABUS)	Pen drive/google drive
3	SECRETARIAL AUDIT AND DUE DILIGENCE (NEW SYLLABUS)	Pen drive/google drive
4	CORPORATE FINANCE AND STRATEGIC MANAGEMENT (NEW SYLLABUS)	Pen drive/google drive
5	INTELLECTUAL PROPERTY RIGHTS (NEW SYLLABUS)	Pen drive/google drive
6	DRAFTING, APPEARANCE AND PLEADINGS (NEW SYLLABUS)	Pen drive/google drive
7.		
1	SETTING UP OF BUSINESS AND ITS CLOSURE NEW COURSE	Pen drive/google drive
2	COMPANY LAW (OLD AND NEW COURSE)	Pen drive/google drive
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