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PRESS RELEASE

Chief of Bureau

14 December 2023

ICSI signs MoU with IMA® to enhance professional skills and competencies of its members

The ICSI signed a Memorandum of Understanding (MoU) with IMA® (Institute of Management Accountants) at the 2nd Regional Conference of Corporate CS of ICSI-SIRC, hosted by Bengaluru Chapter in Bengaluru, to foster collaborative alliances for the benefit of the members of both organizations.

Aimed at advancing the highest standards of ethics and professional conduct in members of both organizations, the MoU will promote excellence in financial management, corporate reporting, and governance.

Sharing his views, CS Manish Gupta, President The ICSI, emphatically stated that "Understanding the rising needs and expectations of the stakeholders, it is utmost important to raise the bar and continuously upgrade the professional knowledge & skills. The association with IMA will provide a collaborative platform for sharing best practices, enhancing knowledge & skills, and will open the doors to addressing various challenges faced by professionals working in the area of finance, governance and strategy".

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LESSON-1

Sources of Law

INTRODUCTION

- Various jurists have described the nature and meaning of law, but there is no unanimity of opinion.
- Lack of unanimity exists because different jurists view law at different times and from different perspectives.
- Perspectives include nature, source, function, and purpose of law based on the needs of a particular period.
- It is not possible to give a precise and permanent meaning to law.
- Definitions by different jurists highlight different facets of law and help build a complete picture of the concept.

MEANING OF LAW

- The term "law" refers to specific and concrete laws laid down by a particular legal system (e.g., Indian laws follow the Indian legal system).
- Law consists of rules and regulations made by governmental bodies.
- The purpose of laws is to regulate human activities and define what is permissible and not permissible.
- In a broader sense, law refers to the whole legal system applied to maintain peace and order in society.
- Under Article 13(3) of the Indian Constitution:
 - "Law" includes Ordinance, order, bye-law, rule, regulation, notification, custom or usage having force of law in India.
 - "Laws in force" includes laws made before the Constitution's commencement that have not been repealed.
- Different jurists define law differently:
 - Ulpian: Law is "the art or science of what is equitable and good."
 - Cicero: Law is "the highest reason implanted in nature."
 - Justinian's Digest: Law is "the standard of what is just and unjust."
- Meaning of law differs from person to person, but its purpose is to regulate human conduct and maintain peaceful relations.

SIGNIFICANCE OF LAW

- Law has developed over centuries into a combination of statutes, judicial decisions, customs, and conventions.
- Studying sources of law provides insight into its characteristics.
- Law is not static; it changes as society changes.

- Existing law must align with the customs, needs, and aspirations of the people.
- Modern science and technology have transformed human ambitions, leading to changes in law.
- Law has undergone conceptual and structural transformation, shifting from abstract justice to social justice.
- Law provides order and security for the future.
- Law is expected to provide socio-economic justice and correct existing imbalances.
- It aims to achieve socio-economic goals in the Constitution.
- Law serves as an instrument of social change and social justice.

RELEVANCE OF LAW TO CIVIL SOCIETY

- Law performs numerous duties to assist civil society.
- These duties need clear differentiation in practice and theory.
- Failure to differentiate can lead to restriction, distortion, or suppression of civil society.
- Civil society requires an enabling legal environment for proper functioning.
- Law can promote, defend, support, and empower civil society.
- In some sectors, law has a negative image because it may obstruct, restrict, or suppress freedoms.

JURISPRUDENCE & LEGAL THEORY

Meaning and Nature of Jurisprudence

- The word jurisprudence comes from *juris* (law) and *prudence* (knowledge).
- Jurisprudence is the study or science of law.
- It does not study specific statutes but law in general, including concepts, principles, and underlying philosophies.
- According to B.E. King, jurisprudence involves disquisitions about law rather than exposition of law.
- Substantive laws define rights, duties, and obligations; procedural laws specify how they are enforced.
- Jurisprudence analyses the nature of rights, duties, and obligations, and how and why they arise in society.
- It draws insights from other disciplines to improve the use of law.

Evolution and Scope

- Different jurists have defined jurisprudence in different ways.
- Meaning has changed over time because the discipline has flexible boundaries.
- This flexibility has caused scholarly controversy.
- In England, Bentham and Austin's analytical work led to jurisprudence being seen mainly as analysis of formal structure and legal concepts.

- As dissatisfaction with their conception grew, broader meanings of jurisprudence emerged.
- A clear boundary of what jurisprudence includes remains elusive.
- One of jurisprudence's main tasks is to clarify the nature of law.
- Law has two aspects: an abstract body of rules and a social machinery for maintaining order.
- Different schools focus on one aspect over the other.

Schools of Jurisprudence

• Analytical jurisprudence:

- Concentrates on abstract theory of law.
- Attempts to discover objective elements of pure science.
- Avoids reliance on individual ethical or sociological views.

• Sociological jurisprudence:

- Criticizes the limitations of pure legal science.
- Argues law must address social problems.
- Understanding law requires examining what it does.

• Teleological school:

- Believes social facts alone are insufficient.
- Law is a product of human reason and tied to purpose.
- Seeks to identify the supreme ends that law should follow.

Definitions by Various Scholars

• Salmond:

- Jurisprudence is the science of law in its widest sense, including all obligatory rules of human action.
- Divided jurisprudence into three streams:
 - Civil jurisprudence
 - International jurisprudence
 - Natural jurisprudence
- In a narrower sense: study of the science of civil law.
- Civil jurisprudence further divided into:
 - Systematic jurisprudence (legal exposition)
 - Historical jurisprudence (legal history)
 - Critical jurisprudence (science of legislation)
- In the narrowest sense: the science of first principles of civil law.

• Jeremy Bentham:

- Used jurisprudence in two senses:

- As “law” (case laws, precedents, legal commentary).
- As “theory” (philosophical principles about laws and legal systems).
- Distinguished between:
 - Expository jurisprudence: what the law *is*.
 - Censorial jurisprudence: what the law *ought to be*.
- Expository jurisprudence has:
 - Authoritative mode (given by the state).
 - Unauthoritative mode (given by other authorities).

• Prof. Julius Stone:

- Defined jurisprudence as the lawyer’s extraversion.
- Examines legal precepts, ideals, and techniques in light of knowledge from other disciplines.

• Prof. G.W. Paton:

- Jurisprudence aims to explain the relationship between law, its concepts, and society.
- Not concerned with universal rules accepted by all nations.
- Studies nature and development of law and legal institutions and their relation to society.
- Legal systems arose for dispute settlement and maintaining order.
- Now also used to bring planned social changes in an orderly fashion.
- Each system develops methods, technical terms, concepts, and institutions.
- Social pressures differ across communities; jurisprudence studies methods of solving these problems.

LEGAL THEORY

Legal theory is a branch within jurisprudence.

- It develops and analyses the foundations of law.
- Two main theories:
 - Normative legal theory: what the law *ought to be*.
 - Positive legal theory: explains what the law *is*, why it is that way, and how it affects the world.
- Other theories include sociological, economic, historical, and critical legal theory.

Jeremy Bentham

Bentham’s Concept of Law

- Pioneer of analytical jurisprudence in Britain.
- Defined law as an assemblage of signs expressing the sovereign’s will regarding conduct of persons subject to his power.
- His concept of law is imperative.

Bentham's View on Human Nature and Function of Law

- Believed humans are governed by two sovereigns: pain and pleasure.
- "Pleasure" includes altruistic conduct and principle of benevolence.
- "Interest" means anything that promotes pleasure.
- Laws should aim at maximum happiness of each individual, resulting in happiness of all.
- Laws are justified because they ensure the happiness of the community.
- Sovereign power should be used to secure the common good, not selfish desires.

Bentham's Eight Aspects of a Law

1. Source
 - Source is the will of the sovereign.
 - Sovereign may conceive, adopt past laws, or authorize future laws by subordinate authorities.
 - Sovereign = person or body whose will the whole community obeys.
2. Subjects
 - Subjects may be persons or things.
 - Can be active or passive subjects (agents initiating or receiving an act).
3. Objects
 - The goals of a law.
4. Extent
 - Direct extent: territory where the act terminates.
 - Indirect extent: relation of actor to a thing.
5. Aspects
 - Every law has a *directive* and *sanctional* part.
 - Four aspects of sovereign will: command, prohibition, non-prohibition, non-command.
 - All laws fall within these four aspects.
6. Force
 - Motivation to obey law comes from its force.
7. Remedial Appendage
 - Subsidiary laws addressed to judges.
 - Used to cure evil (compensation), stop evil, or prevent future evil.
8. Expression
 - Law is an expression of the sovereign's will.
 - Issue arises in discovering true will from the expression.

Completeness of Law (According to Bentham)

- A complete law must have integrality and unity.
- Integrality includes:
 - *Complete expression*: legislative will fully expressed.
 - *Connection*: all parts well coordinated.
 - *Design*: law covers all situations it intends to cover; if not, it is incomplete.
- Unity depends on unity of the species of the act that is the object of the law.

Criticism of Bentham's Theory

1. Imperative theory restricts laws to command or permission; ignores laws conferring powers (e.g., contract-making, creating titles).
2. Did not treat custom fairly; considered customs incomplete.
3. Did not accept judge-made laws; believed they should disappear through complete legislation.
4. Pleasure–pain criterion is subjective; theory does not explain how subjective measures become objective.
5. Increase in happiness for one group may reduce happiness for another; not always leading to overall happiness.

John Austin

General Information

- John Austin was a noted English legal theorist and the first occupant of the chair of Jurisprudence at the University of London.
- Austin is known for the Command Theory of Law.
- He was a positivist, concerned with what the law *was* and not with its justness or fairness.

Kinds of Law According to Austin

- Austin differentiated between 'Law properly so called' and 'laws improperly so called'.
- Laws properly so called are general commands, but not all of these are given by men for men.
- A species of laws properly so called are given by political superiors to political inferiors.

Austin's Definition of Law

- Law is the command of the sovereign backed by a sanction.
- Law is a command imposing a duty, and failure to fulfil that duty results in sanctions (punishment).

Three Main Features of Law

1. It is a command.
2. It is given by a sovereign authority.
3. It has a sanction behind it.

Austin's Conception of Command, Sovereign, and Sanction

Command

- An expression of the wish or desire of an intelligent person directing another to do or forbear from doing an act, with violation followed by evil consequences.
- Requires two parties: the commander (political superior) and the commanded (political inferior).

Sovereign

- Politically and legally superior.
- Independent.

- Receives habitual obedience from the people.
- Does not habitually obey any other authority.
- Source of all laws.

Sanction

- The evil consequence that follows violation of a command.
- Magnitude of sanction is not relevant; absence of sanction means the expression is not a law in Austin's sense.
- Sanction should not be confused with reward; reward confers a positive right, while sanction is a negative consequence.

Criticism of Austin's Command Theory of Law

1. Welfare states pass social legislations that confer rights and benefits, not commands; such laws are not covered under the command theory.
2. According to Austin, the sovereign does not obey anyone, but modern states have powers limited by national and international laws (e.g., Government of India cannot violate the Constitution).
3. Austin does not provide for judge-made laws; he claimed judges act under tacit command of the sovereign, but in reality, judges make positive laws too.
4. Since a sovereign is a pre-requisite for law, Austin did not recognize international law as law because it is not backed by any sovereign.

John William Salmond

General Information

- John William Salmond was a law professor in New Zealand and later served as a judge of the Supreme Court of New Zealand.
- He made seminal contributions in jurisprudence, law of torts and contracts law.

Purpose of Law According to Salmond

- The purpose of law was the deliverance of justice to the people.
- He differed from Bentham and Austin, who analysed law as it stood without its purpose.
- He also required the presence of the state for implementation of laws like Bentham and Austin.

Distinction Between "a law" and "the law"

- "A law" refers to the concrete, while "the law" refers to the abstract.
- Concrete term is not co-extensive with the abstract in application.
- Abstract usage: civil law, criminal law, law and order, law and justice, courts of law.
- Concrete usage: specific laws like the Bharatiya Nyaya Sanhita or the Right to Information Act.
- Law does not consist of the total number of laws in force.

Definition of Law by Salmond

- Law is the body of principles recognized and applied by the state in the administration of justice.
- Law consists of rules recognized and acted on in courts of justice.
- “Law” here is used in its abstract sense.
- The constituent elements of law are rules of law or legal principles.

Administration of Justice

- Some form of compulsion is required to maintain justice.
- There are conflicts between interests of individuals and those of society.
- Men cannot be left to do what they believe is right in their own eyes.
- Regulative or coercive systems uphold and enforce right and justice through external constraint.
- One such system is the administration of justice by the state.
- Administration of justice: maintenance of right within a political community by means of physical force of the state.
- Another system is social control through opinion of society—censure, ridicule, contempt enforce morality.

Laws and Administration of Justice

- Administration of justice is the primary task of the state.
- Laws are made to achieve that objective.
- Administration of justice is antecedent to laws.
- Laws are secondary, accidental, and unessential.
- Law consists of pre-established and authoritative rules applied by judges in administration of justice.
- Administration of justice is possible without laws, though not desirable.
- Courts with unfettered discretion can deliver justice if guided by equity and good conscience.

Development of a Legal System

- Development consists of progressive substitution of rigid pre-established principles for individual judgment.
- Principles grow spontaneously within courts.
- The body of rules in a developed legal system is a product of administration of justice, not a condition precedent.
- Through precedent, custom and statute, a fixed body of principles is collected.
- Courts increasingly follow these principles; justice becomes justice according to law.
- Courts of justice thus become courts of law.

Criticism of Salmond

1. Justice is not always the end of law; some laws may be “unjust.”
2. Law serves many ends that change over time; justice is not the sole purpose.

- Salmond limits jurisprudence to first principles of civil law of a national legal system, but justice is universal; analysis should not be constrained by national boundaries.

Roscoe Pound

General Information

- Roscoe Pound was a distinguished American legal scholar and a leading jurist of the 20th century.
- A major proponent of sociological jurisprudence, emphasizing consideration of social facts in making, interpreting, and applying laws.

Theory of Social Engineering

- Compared a lawyer's task to that of an engineer.
- Aim: build a social structure achieving **maximum satisfaction of wants with minimum friction and waste**.
- Such a society is an **efficient society**.
- Requires balancing competing interests.
- Interests: claims, wants or desires men assert de facto, which law must address.

Requirements for a Successful Legal Order

- Recognition of certain interests – individual, public, social.
- Definition of limits within which such interests are recognized and given effect.
- Securing those interests within defined limits.

Five Tasks for Determining Scope and Subject Matter of Legal System

- Preparation of an inventory of interests and their classification.
- Selection of interests to be legally recognized.
- Demarcation of limits for securing selected interests.
- Consideration of means by which laws may secure the interests.
- Evolution of principles of valuation of interests.

Classification of Interests

1. Individual Interests

- Interest of personality: physical integrity, freedom of will, honour and reputation, privacy, freedom of conscience.
- Interest in domestic relations: relationships of parents, children, husbands, wives.
- Interest of substance: property, freedom of association, freedom of industry and contract, continuity of employment, inheritance, testamentary succession.

2. Public Interests

- Interests of the state as a juristic person: integrity, freedom of action, honour of the state's personality, property held for corporate purposes.
- Interests of the state as guardian of social interests.

3. Social Interests

- (i) General security: general safety, peace and order, general health, security of acquisition and transaction.
- (ii) Security of social institutions: domestic, religious, political, economic institutions.
- (iii) General morals: laws on prostitution, gambling, bigamy, drunkenness.
- (iv) Conservation of social resources: natural and human resources; clashes with individual property interests.
- (v) General progress: economic, political, cultural.
- (vi) Individual life: self-assertion, opportunity, conditions of life; society is interested because individuals are its building blocks.

Balancing of Interests

- Competing interests should be weighed on the same plane.
- Cannot balance individual interest against social interest directly.
- Interests must be transferred to the same place, preferably the social plane, for meaningful comparison.

Criticism of Roscoe Pound

1. Pound said interests pre-exist laws, but many modern interests are created by laws.
2. No criteria for evaluating interests; the ideal, not the interest itself, determines importance.
3. Balancing of interests is most effectively done by judges; thus theory gives more importance to judiciary over legislature.
4. Distinction between public and social interests is doubtful; even individual vs. social is of minor significance.
5. Recognition of new interests is a matter of policy; list of interests is of limited assistance in resolving disputes.

PROF. H.L.A. HART

Meanings of Positivism Listed by Hart

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

Relation to Natural Law

- Positivism is most commonly understood as the separation between law as it is and law as it ought to be.
- Natural law theory claims that a proposition is “law” not merely because it satisfies formal requirements, but must have an additional minimum moral content.
- An immoral rule cannot be “law” even if it satisfies all formal requirements.

Hans Kelsen

- Hans Kelsen was an Austrian philosopher and jurist known for his ‘Pure Theory of Law’.
- He believed contemporary theories of law were impure because they drew from religion, morality, and other fields.
- Like Austin, Kelsen was a positivist, focusing on what the law is, excluding moral, ethical, or ideal elements from law.
- He discarded the idea of justice as an essential element of law, stating that unjust laws may still remain laws.
- Kelsen described law as a “normative science”, different from natural sciences based on cause and effect.
- Natural laws (like gravitation) can be described and discovered, while the science of law deals with what law ought to be.
- Like Austin, he considered sanction essential but preferred calling it a “norm”.
- According to Kelsen, “law is a primary norm which stipulates sanction.”

Norms and Legal Order

- A norm (sanction) is a rule forbidding or prescribing certain behaviour.
- Legal order is a hierarchy of norms with sanctions; jurisprudence is the study of these norms forming legal order.
- Moral norms and legal norms both contain “ought” propositions, but violating moral norms has no penal consequences.
- The “ought” in a legal norm refers to the sanction applied for violation of law.

Hierarchy of Norms and Grundnorm

- We attach legal-normative meaning to actions depending on whether a legal norm assigns such meaning.
- Each legal norm derives its validity from a higher norm above it.
- This chain of authorization ends at the highest norm, called Grundnorm.
- Kelsen’s theory is based on a pyramidal hierarchy of norms, each deriving validity from the basic norm.
- The Grundnorm does not derive validity from any other norm; its validity must be presupposed.
- It is the result of social, economic, political, and other conditions and is assumed to be valid by itself.

Unity of Legal Order

- The legal order has unity because all norms can be traced back to a final source—the Grundnorm.
- Grundnorm is the ultimate rule governing establishment, annulment, validity, and invalidity of norms.
- Example: A statute in India is valid because it is passed by Parliament and receives the President's assent.
- Parliament and President derive authority from the Constitution.
- The Constitution's validity cannot be traced further; hence it is the Grundnorm in Kelsen's theory.

Types of Norms

- Grundnorms: Basic norms; highest and not derived from any other norm.
- Superior Norms: Laws governing subordinate laws; below Grundnorm but above subordinate norms.
- Subordinate Norms: Derived to assist superior norms; derive justification from superior norms.

Grund Norm (fundamental law/ supreme law/law of land). Example: Constitution of India

Superior Law (justified and controlled by grund norm). Example: Indian Penal Code, 1860, The Code of Criminal Procedure, 1908, etc.

Subordinate Norm (derives justification and are controlled by superior norms). Example: Regulations under SEBI Act, 1992 and Rules under the Companies Act, 2013, etc.

Criticism of Kelsen's Pure Theory

1. It is difficult to trace the grundnorm in every legal system, and there is no rule or yardstick to measure the effectiveness of the grundnorm. Kelsen only maintained that the grundnorm imparts validity as long as the 'total legal order' remains effective, later revised to 'by and large' effective, without providing any measure of "total" or "by and large".
2. The Pure Theory does not give the timeframe for which effectiveness must hold for validity to be satisfied. Validity must be determined at a given point of time and depends on what judges are prepared to accept at that moment as imparting law-quality.
3. Kelsen's theory ceases to be 'pure' when one attempts to analyse the grundnorm, because that analysis requires drawing from sociology, history, or morality, which Kelsen wanted to exclude.
4. International law does not fit well within Kelsen's Pure Theory. He supported a monist view and claimed that the grundnorm of the international system postulated the primacy of international law, but actual practice shows the opposite—most countries give primacy to municipal law over international law.

SCHOOLS OF LAW

Natural School of Law

Meaning

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

Divisions of Natural School

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

1. ANCIENT THEORY

Two groups of philosophers

- a) Roman philosophers
- b) Greek philosophers

Roman Philosophers

- Ulpine: Law is "the art or science of what is equitable and good."
- Cicero: Law is "the highest reason implanted in nature."
- Justinian's Digest: Law is "the standard of what is just and unjust."
- In all Roman definitions, justice is the main and guiding element of law.

Greek Philosophers

- a) Heraclitus – Identified destiny, reason and order as three main features of natural law, all interconnected and interrelated.
- b) Socrates – Viewed that like natural moral law, there is also 'human insight' which helps a man distinguish between good and bad.
- c) Plato – His theory was characterized by two main aspects: wisdom and reason.
- d) Aristotle – Defined natural law as a 'reason unaffected by desires', inherent nature of man, human insight, shaping human will, actions, justice and morality.

2. MEDIEVAL THEORY

- Based on the theological idea of God.

- Law of nature is the law of God, and the law of God is the true Dharma, connecting law with God.
- 'Law' is a part of 'Dharma'.

Major Exponent

Thomas Aquinas – Categorized law into:

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

3. RENAISSANCE THEORY

- Marked by rationalism.
- Reason is the foundation.
- Two distinct features:
 - More secular, political, and founded on human reasons.
 - Advocates natural rights of a man and the state.

Major Proponents

1. Hugo Grotius – Built theory on social contract; duty of sovereign is to safeguard citizens; sovereign is bound by natural law.
2. Immanuel Kant – Man is guided by his own conscience; natural law is based on reason and right reason.

4. MODERN THEORY

- Rejects older theories and conceptions.
- Revival of Natural law.
- Revival was a reaction against positive and historical approaches but in a modified manner.
- Major propounders: Stammler, Rawl, Fuller.
- Stammler: Law of nature means the just law with harmonious purposes in society.

Analytical School of Law

- Major exponent: John Austin, English jurist.
- Considers law in its present form and not what it should be.
- Also known as the positivist school of law.
- According to Austin: "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject."
- Law is the command of the sovereign.
- Law obliges a certain conduct or imposes a duty and is backed by a sanction.
- Command, duty and sanction are the three elements of law.

Hans Kelsen's Pure Theory

- Law is a normative science.

- Legal norms are 'Ought' norms, distinct from 'Is' norms of natural sciences.
- Law prescribes rules, not describes occurrences.
- Science of law is the knowledge of hierarchy of normative relations.
- All norms derive power from the Grundnorm.

Hierarchy of Norms

- Grundnorm: Fundamental law of the land; superior law; all other laws must adhere to it.
- Superior Norm: Laws governing subordinate laws; inferior to Grundnorm but superior to subordinate norms.
- Subordinate Norm: Derived to assist the superior norm; validity is derived from the superior norm.

Historical School of Law

- Law originates from historical and evolutionary forces.
- Law develops from customs, conventions, social habits, and traditions.

Von Savigny's Theory

- Law is the result of unconscious and organic growth; law is found, not made.
- Law is not universal; varies with people and age like language.
- Custom precedes legislation and is superior to it.
- Law must conform to popular consciousness.
- Law's source is in the Volkgeist (common consciousness of the people).
- Legislation is the last stage of law making; jurists more important than legislators.

Sir Henry Maine

- "Law" is associated with notions of order and force.

Philosophical / Ethical School

- Law and ethical values are co-related.
- Law must have ethical value to command respect.
- Law is a means to harmonize individual will with the general will.

Hugo Grotius

- Rules of conduct emerge from right reason and receive public support.

Hegel

- Purpose of law is to reconcile conflicting egos in society.
- Law secures individual liberty and achieves human perfection.

Sociological School of Law

- Focuses on mutual effect of law and society.
- Treats law as a social phenomenon.

- Synthesizes philosophy, psychology, history, and social sciences with law.

Duguit

- Law is “essentially and exclusively a social fact.”

Ihering

- Law is the guarantee of the conditions of life of society assured by state coercion.
- Three essentials:
 1. Law is one of many means of social control.
 2. Law must serve a social purpose.
 3. Law is coercive in character.

Roscoe Pound

- Law is an instrument of social engineering.
- Conflicting interests constantly seek recognition.
- Law is a social institution to satisfy social wants by ordering human conduct.

Realist School of Law

- Defines law in terms of judicial process.

Holmes

- Law is the statement of circumstances where public force is applied through courts.

Cardozo

- Law is a rule or principle justifying a prediction that courts will enforce it.

General Features of Law

- Law pre-supposes a State.
- State makes, authorizes, recognizes, or sanctions rules called law.
- Laws must have sanctions to be effective.
- Laws serve a purpose—social or personal (even for a despot).
- Separate rules and principles are known as laws.
- Laws may be:
 - Mandatory: require affirmative action (e.g., payment of taxes).
 - Prohibitive: require negative conduct (e.g., prohibition of concealed weapons).
 - Permissive: allow certain conduct without requiring or forbidding it.

Laws are made effective:

By requiring
damages
to be paid for an
injury due to
disobedience

By requiring one, in
some instances, to
complete an
obligation he has
failed to perform

By preventing
disobedience

By administering
some form of
punishment

SOURCES OF INDIAN LAW

Meaning of “Sources of Law”

- The expression “sources of law” has been used to convey different meanings.
- There are as many interpretations of the expression as there are schools and theories about law.
- The general meaning of the word “source” is origin.

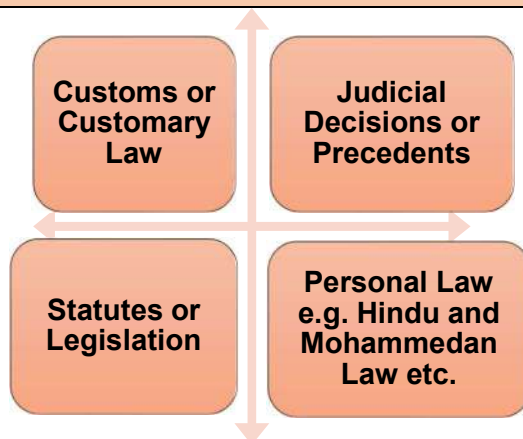
Views on Origin of Law

- Austin: Law originates from the sovereign.
- Savigny: Origin of law is in Volkgeist (general consciousness of the people).
- Sociologists: Law originates from numerous heterogeneous factors.
- Theologians: Law originates from God.
- Vedas and Quran: Primary sources of Hindu and Mohammedan law; believed to be revealed by God.
- Regardless of differences, law has emanated from almost similar sources in most societies.

Two Categories of Sources of Indian Law

- Primary sources of Indian Law
- Secondary sources of Indian Laws

PRIMARY SOURCES OF INDIAN LAW



1. Customs or Customary Law

- As per Collins Dictionary: A custom is an activity, way of behaving, or event which is usual or traditional in a particular society or circumstances.
- Custom is the most ancient of all sources of law.
- Held the most important place in the past, though its importance now diminishes with the growth of legislation and precedent.
- In primitive society, people's lives were regulated by customs which developed spontaneously.

- A particular way of doing things was found more convenient, and repeated practice led it to assume the form of custom.
- Customs played an important role in shaping ancient Hindu Law.
- Most laws in Smritis and commentaries originated from customs.
- Smritis strongly recommended that customs should be followed and recognised.
- Customs acted as a re-orienting force in Indian Law.

Examples

Constitution of India

Article 13 of the Constitution of India defines the term “Law”. The definition is as under: “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

Hindu Marriage Act, 1955

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

According to:

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

CLASSIFICATION OF CUSTOMS

Customs may be divided into two classes:

1. Customs without sanction
2. Customs having sanction

1. Customs without sanction

- Non-obligatory customs.
- Observed due to pressure of public opinion.
- Also called “positive morality”.

2. Customs having sanction

- Enforced by the State.
- Concern of law.
- Divided into:
 - (i) Legal Customs
 - (ii) Conventional Customs

(i) Legal Customs

- Operate as binding rule of law.
- Recognised and enforced by courts.
- Part of law of the land.
- Types:

(a) Local Customs

- Prevail in a definite locality.

- May also apply to sects or communities wherever they go.
- Sub-types:
 - Geographical Local Customs
 - Personal Local Customs

(b) General Customs

- Prevail throughout the country.
- Constitute source of law of the land.
- Example: Common Law in England.

(ii) Conventional Customs (Usages)

- Binding due to agreement between parties.
- Not binding by independent legal authority.
- Conditions for recognition by courts:
 1. Convention must be clearly established and known to contracting parties.
 2. No fixed period required for recognition.
 3. Cannot alter general law of the land.
 4. Must be reasonable.
- Can also be general or local.
 - Local conventional customs limited to place, market, trade, or transaction.

Requisites Of A Valid Custom

A custom is valid at law if it satisfies the following conditions:

1. Immemorial (Antiquity)

- Must be ancient.
- Blackstone: Used so long that memory of man runs not to the contrary.
- English Law: Legal memory traced to 1189 (Richard I).
- India: Only proof of ancient usage is required.

2. Certainty

- Custom must be definite and not vague or ambiguous.

3. Reasonableness

- Must be useful and convenient to society.
- Unreasonable if opposed to justice, equity, and good conscience.

4. Compulsory Observance

- Must be continuously observed from time immemorial.
- Must be regarded as obligatory by those affected.

5. Conformity with Law and Public Morality

- Must not oppose morality or public policy.
- Must not conflict with statute law.

6. Unanimity of Opinion

- Must be general or universal.
- Practice left to individual choice is not custom.

7. Peaceable Enjoyment

- Must have been enjoyed without dispute in courts or otherwise.

8. Consistency

- Must not conflict with other established customs.

2. Judicial Decision or Precedents

Definition:

- In general, a precedent is a set pattern guiding future conduct.
- In law, it is the guidance or authority of past court decisions for future cases.
- Only decisions that lay down a new rule or principle are called judicial precedents.

Importance:

- Judicial precedents are an important source of law, especially in England and countries influenced by English jurisprudence.
- They ensure certainty, fairness, and equity in law.
- The principle of following precedents is called stare decisis.
- Reason: Judicial decisions are presumed correct, creating confidence among litigants.

Precedent in Indian Courts

High Courts

1. Binding Nature:
 - Decisions bind all subordinate courts within its jurisdiction.
 - Decisions of one High Court have persuasive value only in another High Court's jurisdiction.
 - If conflict arises with a local High Court's decision, local High Court's decision prevails.
2. Benches in High Courts:
 - Single Judge Bench: Smallest bench.
 - Division Bench: 2 judges.
 - Full Bench: 3 or more judges.
 - A smaller bench must follow the decision of a larger bench.
 - A Division Bench decision binds a Single Judge of the same High Court.
 - In case of conflict between co-equal benches, the later decision is generally followed.
 - If disagreement exists, refer to Full Bench.
3. Pre-1950 Privy Council Decisions:
 - Binding on High Courts unless overruled by Supreme Court.

Supreme Court

1. Binding Nature:
 - Supreme Court is the highest court.
 - Decisions are binding on all courts and tribunals in India (Article 141).
 - Only the ratio decidendi (reason for the decision) is binding.

- Obiter dicta are binding only if on a point raised and argued.

2. Self-binding:

- Supreme Court is not bound by its own decisions.
- In practice, it follows its own decisions unless there are extraordinary reasons.
- It can depart from earlier decisions if they are erroneous or detrimental to public welfare.

3. Foreign Decisions:

- English and Privy Council decisions have persuasive value only.
- Supreme Court is not bound by them.

Key Principle of Indian Precedent

- Lower courts must follow decisions of higher courts.
- Higher courts (including Supreme Court) are not strictly bound by their own past decisions.

Kinds of Precedents

Precedents may be classified as:

Declaratory and Original Precedents

Persuasive Precedents

Absolutely Authoritative Precedents

Conditionally Authoritative Precedents

i. Declaratory and Original Precedents

- According to Salmond:
 - Declaratory precedent: merely the application of an already existing rule of law.
 - Original precedent: creates and applies a new rule of law.
- In declaratory precedent, the rule is applied because it is already a law.
- In original precedent, it is law for the future because it is now applied.
- In advanced countries:
 - Declaratory precedents are more numerous.
 - Original precedents are fewer but very important; they develop the law of the country.
- Both declaratory and original precedents have the same legal authority.

- Example: “Vishaka Guidelines” in Vishaka and others v. State of Rajasthan (1997) regarding prevention of sexual harassment at workplace. Precedent for many cases from 1997–2013.

ii. Persuasive Precedents

- Judges are not obliged to follow but may take into consideration and attach weight as deemed fit.
- Not a legal source of law; regarded as a historical source of law.
- Examples:
 - Decisions of one High Court in India are persuasive in other High Courts.
 - Rulings of English and American Courts are persuasive.
 - Obiter dicta have only persuasive value.
- Example: Decision of one High Court may not bind another, but principles may guide it.

iii. Absolutely Authoritative Precedents

- Judges must follow whether they approve or not; binding force is absolute.
- Judge’s discretion is excluded; decision has a legal claim to implicit obedience, even if considered wrong.
- Unlike persuasive precedents, it is a legal source of law.
- In India:
 - Courts are bound by superior courts’ decisions.
 - Subordinate courts follow High Court decisions.
 - Single judge of High Court is bound by bench of two or more judges.
 - All courts are bound by Supreme Court decisions.
- In England:
 - House of Lords’ decisions bind all inferior courts and itself.
 - Court of Appeal decisions bind itself.
- Example: Decisions of higher courts are authoritatively binding on lower courts.

Question: An absolutely authoritative precedent is one which judges are not obliged to follow.

Options: (a) True (b) False

iv. Conditionally Authoritative Precedents

- Ordinarily binding on the court, but liable to be disregarded in certain circumstances.
- Court can disregard if the decision is wrong or contrary to law and reason.
- Example:
 - Single judge decision of High Court is absolutely authoritative for subordinate judiciary.
 - Conditionally authoritative when cited before a Division Bench of the same High Court.

Doctrine of Stare Decisis

- Meaning: “adhere to the decision and do not unsettle things which are established.”
- Origin: Latin term meaning “to abide by things decided.”

- Purpose: To bring certainty and uniformity in the law.
- Under this doctrine:
 - A principle of law settled by a series of decisions is binding on courts.
 - Courts should follow it in similar cases.
- Simple principle: Like cases should be decided alike.
- Basis: Public policy.
- Limitation:
 - Doctrine should not be applied rigidly at the cost of justice.
 - It obligates courts to follow historical cases (precedents) while ruling in similar cases.

Ratio Decidendi

- Definition: The underlying principle of a judicial decision which is authoritative.
- Constitutes the proposition of law necessary for the decision.
- Binding effect:
 - Concrete decision is binding between parties to it.
 - Abstract ratio decidendi has the force of law as regards the world at large.
- Prof. Goodhart: Ratio decidendi is decision based on material facts of the case.
- Application:
 - Principles deduced by abstraction of material facts (eliminating immaterial elements) form ratio decidendi.
 - Applicable not only to that case but also to other similar cases.
- Binding effect: Ratio decidendi is binding; obiter dictum is not.
- Separation of ratio decidendi and obiter dictum is difficult and left to judge.

Obiter Dicta

- Meaning: Latin for “said by the way.”
- Definition: Judicial statements not strictly necessary for the decision of the issue raised.
- Effect: Have persuasive value only; judges are not bound to follow them.
- Role: Sometimes help in reforming the law.
- Characteristics:
 - Can be deliberate expressions of opinion on a point argued before the court.
 - Often difficult to determine whether an expression is ratio or casual opinion.
- Flexibility: Other judges can give decision contrary to obiter dicta.

3. Statutes or Legislation

- Definition: Legislation is the declaration or promulgation of legal rules by an authority duly empowered by the Constitution.
- Also called:
 - Jus scriptum (written law) as opposed to jus non-scriptum (unwritten law).

- Salmond calls it “enacted law.”
- Statute or statutory law: Created by legislation, e.g., Acts of Parliament or State Legislature.

Types of legislation:

1. Supreme Legislation

- Proceeds from sovereign power in the State or derives power directly from the Constitution.
- Cannot be repealed, annulled, or controlled by any other legislative authority.

2. Subordinate (Delegated) Legislation

- Made by authority other than sovereign power.
- Dependent on superior authority for validity.
- Examples:
 - Parliament of India → supreme legislation.
 - Judiciary → rules for regulation of own procedure.
 - Executive → may make rules (executive/delegated legislation).
 - Municipal bodies → regulations/bye-laws under delegation.
 - Autonomous bodies (e.g., universities) → bye-laws recognized by courts.
- Limitations on executive rule-making:
 - Rules must be placed on table of both Houses of Parliament.
 - Courts can review validity if rules exceed delegated power.
- Summary:
 - Acts of Parliament, Ordinances, laws made by President/Governors → supreme legislation.
 - Legislation by corporations, municipalities, etc. under authority of supreme legislation → subordinate legislation.

4. Personal Laws

- Definition: Courts apply personal law of parties where issues are not covered by statutory law or custom.

Hindu Personal Law:

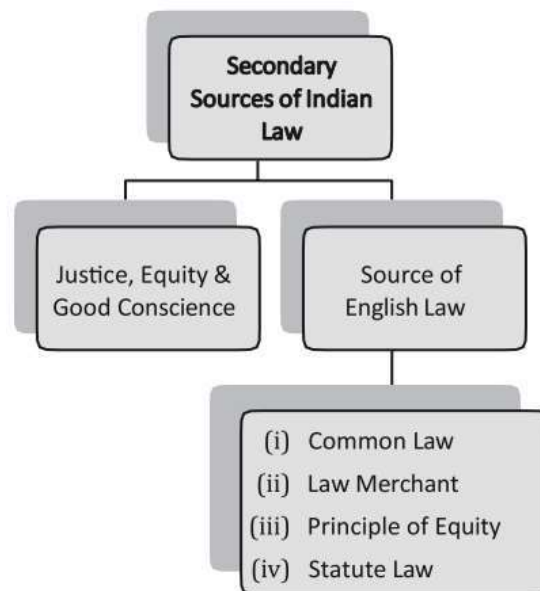
- Sources:
 1. Shruti → includes four Vedas.
 2. Smritis → recollections handed down by Rishis, commentaries by ancient authors.
 - Three main Smritis: Codes of Manu, Yajnavalkya, Narada.
- Governed by personal law modified by statute and custom in matters of:

- Inheritance, succession, marriage, adoption, coparcenary, partition of joint family property, sons' obligations to pay father's debts, guardianship, maintenance, religious/charitable endowments
- Example: Hindu Succession Act, 1956 governs succession matters.

Mohammedan Personal Law:

- Sources:
 1. Holy Quran
 2. Hadis → actions, precepts, sayings of Prophet Mohammed preserved by tradition.
 3. Ijmas → concurrence of opinion of companions and disciples of Prophet.
 4. Kiyas → reasoning by analogy from Quran, Hadis, Ijmas.
 5. Digests/Commentaries → e.g., Hedaya (12th century), Fatawa Alamgiri (compiled by Aurangzeb).
- Governed by personal law modified by statute and custom in matters of:
 - Inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship, pre-emption.

SECONDARY SOURCES OF INDIAN LAW



(i) Justice, Equity and Good Conscience

- Concept introduced by Impey's Regulations of 1781.
- In personal law disputes, courts apply personal law of the defendant if the point is not covered by statute or custom.
- In the absence of statutory law, custom, or personal law, Indian courts apply justice, equity and good conscience.
 - May include rules of English law insofar as applicable to Indian society and circumstances.

- Ancient Hindu Law had its own versions of this doctrine.
- Modern version originated with British administration of justice in India.
 - Charters of High Courts directed that when law was silent, cases should be decided according to justice, equity and good conscience.
- Generally interpreted as rules of English law on analogous matters, modified for Indian conditions.
- Supreme Court: In absence of Hindu Law rules, courts can decide cases on these principles unless repugnant to Hindu Law doctrines (1951) 1 SCR 1135.

(ii) Sources of English Law

- Indian law is an adaptation of English law.
- Chief sources of English law:
 1. Common Law
 2. Law Merchant
 3. Principle of Equity
 4. Statute Law

1. Common Law

- Principles evolved by judges in decisions on cases.
- Built over many years to form a complete statement of law in particular areas.
- Primary sources: immemorial customs, judicial decisions, textbooks on jurisprudence.
- Common Law is unwritten law of England, common to the whole realm.

2. Law Merchant

- Important source of Mercantile Law.
- Refers to customs and usages binding on traders.
- For a custom to have binding force: must be ancient, general, and command universal compliance.
- Otherwise, custom must be proved by the party claiming it.

3. Principle of Equity

- Body of rules, source neither custom nor written law, based on imperative dictates of conscience.
- Developed in Courts of Chancery.
- Common Law procedure was technical and dilatory; remedies limited by writs.
- King considered fountain head of justice; petitions dissatisfied with Common Law could go to King-in-Council, referred to Chancellor.
- Chancellor decided cases according to commonsense, natural justice, and good conscience.
- Law administered by Chancellor known as Equity; courts known as Equity Courts.
- Maxims of Equity Courts:
 - “He who seeks equity must do equity”
 - “He who comes to equity must come with clean hands”

- Equity Courts had separate existence until Judicature Act, 1873; afterwards, High Courts empowered to grant Common Law and Equity remedies.
- Important principles/remedies:
 - Right of beneficiary to trust property
 - Remedy of specific performance of contracts
 - Equity of redemption in case of mortgages

4. Statute Law

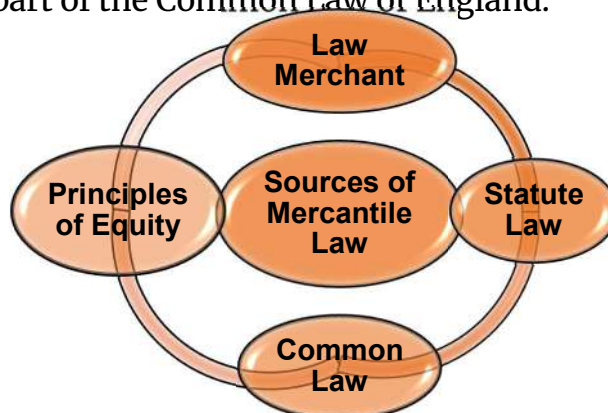
- Derived from legislation or enactment of Parliament or subordinate/delegated bodies.
- Important source of law today.
- Written/statute law overrides unwritten law (Common Law and Equity).
- Important enactments in Mercantile Law:
 - English Partnership Act, 1890
 - English Sale of Goods Act, 1893
 - Bankruptcy Act, 1914
 - Carriers Act, 1830
 - English Companies Act, 1948

MERCANTILE OR COMMERCIAL LAW



Branches of Law – Mercantile Law

- Mercantile Law is related to the commercial activities of the people of society.
- It is the branch of law applicable to or concerned with trade and commerce in connection with various mercantile or business transactions.
- Mercantile Law is a wide term and embraces all legal principles concerning business transactions.
- The most important feature of a business transaction is the existence of a valid agreement, express or implied, between the parties concerned.
- Mercantile Law, also called Law Merchant or Lex Mercatoria, is the part of law which grew from the customs and usages of merchants or traders in England.
- Eventually, it became a part of the Common Law of England.



Mercantile Law in India

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

Sources of Indian Mercantile Law



1. English Mercantile Law

- Indian Mercantile Law is mainly an adaptation of English Mercantile Law.
- Certain modifications have been incorporated to provide for local customs and usages of trade and to suit Indian conditions.
- In the absence of provisions in Indian Law, recourse is to be had to English Mercantile Law.

2. Acts enacted by Indian Legislature or Statute Law

- Important Acts include:
 - a) The Indian Contract Act, 1872
 - b) The Sale of Goods Act, 1930
 - c) The Indian Partnership Act, 1932
 - d) The Negotiable Instruments Act, 1881
 - e) The Arbitration and Conciliation Act, 1996
 - f) The Insurance Act, 1938

3. Judicial Decisions

- Judges interpret and explain statutes.
- When law is silent, judges decide cases according to principles of justice, equity and good conscience.
- Identical cases should have identical decisions to ensure justice and certainty.
- The English legal system developed the system of judicial precedent:

- Legal principles extracted from decisions are applied in subsequent indistinguishable cases.
- Such decisions are called precedents and are an important source of law.
- Prior to independence, the Privy Council of Great Britain was the final Court of Appeal and its decisions were binding on Indian courts.
- After independence, the Supreme Court of India is the final Court of Appeal.
- Decisions of English Courts (Privy Council, House of Lords) are still referred to as precedents for interpreting Indian statutes.

4. Customs and Trade Usages

- Although most Indian Law has been codified, customs and usages still play a role.
- Many statutes provide that their provisions are subject to any special custom or usages of trade.
- **Examples:**
 - Section 1, Indian Contract Act, 1872: Custom or usage of trade not inconsistent with the Act is recognized.
 - Section 1, Negotiable Instruments Act, 1881: Local usages relating to instruments in any oriental language are recognized.
- Law relating to Hundis and Kachhi/Pakki Adat Systems of Agency is based on custom and usage of trade as recognized by courts.

LESSON-2

Constitution Of India

REGULATORY FRAMEWORK

- The Constitution of India

The Preamble to the Constitution states:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

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

EQUALITY of status and of opportunity; and to promote among them all

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

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

BROAD FRAMEWORK OF THE CONSTITUTION

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

PREAMBLE

- The Preamble to the Constitution sets out the aims and aspirations of the people of India.
- It is a part of the Constitution.
- The Preamble declares India to be a Sovereign, Socialist, Secular, and Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity.

- It declares that the Constitution has been given by the people to themselves, affirming the republican character of the polity and the sovereignty of the people.
- The polity assured to the people is described as a Sovereign, Socialist, Secular, and Democratic Republic.
- The expression “Sovereign” signifies that the Republic is externally and internally sovereign.
- Sovereignty in the strict sense implies independence within and outside the borders of the country.
- Legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.
- The democratic character of the polity is illustrated by:
 - provisions conferring on adult citizens the right to vote,
 - provisions for elected representatives,
 - responsibility of the executive to the legislature.
- The Constitution aims to secure to its people “justice – social, economic and political”.
- The Directive Principles of State Policy in Part IV are designed for achievement of the socialistic goal in the Preamble.
- The expression “Democratic Republic” signifies that the government is of the people, by the people and for the people.

STRUCTURE

- Constitution of India is basically federal but with certain unitary features.
- In *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, the majority of Supreme Court judges held that federal features form the basic structure of the Constitution.
- There is controversy on whether the Constitution is federal or unitary with federal features.
- To determine this, it is necessary to look at the contents of the Constitution.
- **Essential features of a federal polity include:**
 - (a) dual Government,
 - (b) distribution of powers,
 - (c) supremacy of the Constitution,
 - (d) independence of Judiciary,
 - (e) written Constitution,
 - (f) rigid procedure for amendment of the Constitution.
- **The political system introduced by the Constitution possesses all essentials of a federal polity:**
 - (a) Governments at Union and State levels.
 - (b) Powers distributed among them via Seventh Schedule.
 - (c) Both Union and States must follow Constitutional provisions in law-making.
 - (d) Judiciary is independent; Supreme Court decides disputes between Union and States or between States.
 - (e) Constitution is supreme; amendment only by Article 368 procedure.
- The Constitution is basically federal.

- But it does not establish two co-ordinate independent Governments; instead, they co-operate and collaborate to achieve the ideals in the Preamble.

Judicial View

- The question of whether the Constitution is federal or unitary with federal features has arisen in various cases before the Supreme Court and High Courts.
- Most observations were made in specific contexts and must be understood accordingly.
- The question rests largely on value judgement and individual philosophy.

Peculiar Features of Indian Federalism

- Indian Constitution differs from other federal systems in several aspects:

(1) Mode of Formation

- A federal Union like the USA is formed by an agreement between sovereign States surrendering part of their sovereignty.
- Another mode, like Canada, involves provinces of a unitary State being transformed into a federal Union.
- India had a centralised unitary Constitution until the Government of India Act, 1935, which set up a federal system similar to Canada by creating autonomous units and combining them through a single Act.

(2) Position of the States in the Federation

- In federal systems, safeguards protect States' rights because they were previously sovereign.
- In India, States were not previously sovereign, so rights were mainly exercised by the Union (e.g. residuary powers).

(3) Citizenship

- American framers created dual citizenship, dual officials, and dual courts.
- India has single citizenship and no division of public services or judiciary.

(4) Residuary Power

- Residuary power is vested in the Union.
- Thus, the Constitution is neither purely federal nor purely unitary.
- It is a combination of both, based on the principle that national interest should be paramount, while establishing supremacy of law.

FUNDAMENTAL RIGHTS

- The Constitution seeks to secure liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and fraternity assuring dignity and unity.
- Fundamental rights are envisaged in Part III.

Concept of Fundamental Rights

- 17th-century political philosophers believed man by birth had universal and inalienable rights.
- Thinkers include Rousseau, Locke, Montesquieu and Blackstone.

- The Declaration of American Independence (1776) stated that all men are created equal and endowed with inalienable rights including life, liberty and pursuit of happiness.
- These rights are considered essential, basic, natural and inalienable.
- State must recognise these rights to preserve liberty, develop personality, and promote cultural, social and democratic life.
- These rights should be entrenched so they are not interfered with by oppressive or transient legislative majorities.
- Written Constitutions, especially after World War I, began guaranteeing rights and forbidding state organs from interference.

Difference in Approach (England vs USA)

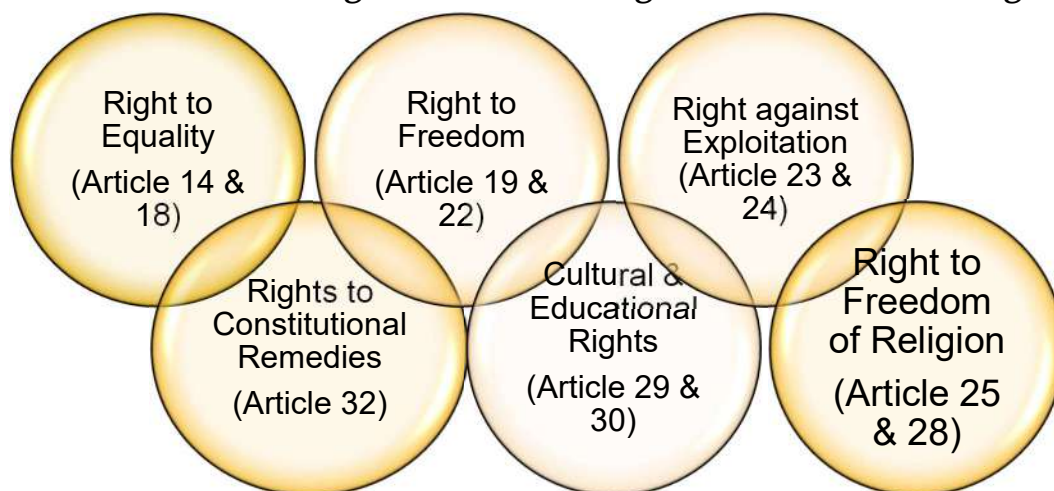
- English sought to protect rights from executive abuse.
- American framers feared tyranny from both executive and legislature.
- England accepted Parliamentary supremacy.
- USA asserted that there must be a law superior to the legislature to prevent autocracy.

Fundamental Rights in India – Historical Movement

- Simon Commission and Joint Parliamentary Committee rejected fundamental rights declarations, calling them useless without means of enforcement.
- Nehru Committee recommended including Fundamental Rights in the Constitution.
- Government of India Act, 1935 did not include such rights.
- Public enthusiasm ensured the Cabinet Mission's Statement of May 16, 1946 included a recommendation that the Constitution-making body adopt rights.
- When the Constituent Assembly began work in December 1947, Pt. Jawaharlal Nehru moved the Objectives Resolution for protection of certain rights.

Inclusion of Fundamental Rights in Part III of the Constitution

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



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

- Apart from this, Articles 12 and 13 deal with the definition of 'State' and 'Law' respectively.
- Articles 33 to 35 deal with the general provisions relating to Fundamental Rights.
- No fundamental right in India is absolute, and reasonable restrictions can be imposed in the interest of the State by valid legislation.
- In such case, the Court normally would respect the legislative policy behind the same. (*People's Union for Civil Liberties v. Union of India, (2004) 2 SCC 476*).
- From the point of view of the persons to whom the rights are available, the Fundamental Rights may be classified as follows:
 - (a) Articles 15, 16, 19 and 30 are guaranteed only to citizens.
 - (b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India – citizen or foreigner.
 - (c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.
- For convenience as well as for their better understanding, it is proper to take each of these separately.
- But some related terms are necessary to be understood first.

Definition of State

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

The State Includes:



the Government & Parliament of India;



the Government Legislature of each of the States; and



all local or other authorities:

i. within the territory of India; or

ii. under the control of the Government of India

Case Laws

- *Local authorities* include Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards.
- *Other authorities* under Article 12 include any constitutional or statutory authority with powers conferred by law, even if not performing governmental functions (Electricity Board, Rajasthan v. Mohanlal).
- Electricity authorities are "State" and their actions can be reviewed under Article 226 (Angur Bala Parui).
- Universities are authorities under Article 12 (University of Madras v. Shanta Bai).
- The President is "State" when issuing orders under Article 359 (Harobhai v. State of Gujarat).

- Authorities under the control of the Government of India, even if outside India, fall under Article 12.
- Income-tax department is included within State (Bidi Supply Co.).
- Corporations functioning as Government *instrumentalities or agencies* are “State” (Sukhdev Singh; R.D. Shetty).
- Bodies with deep State control or State funding like ICAR, CSIR, ONGC, IDBI, Electricity Boards etc. qualify as State.
- Bodies not substantially financed by Government do not; e.g., Cooperatives, NCERT, Stock Exchanges (NCERT and Cochin Stock Exchange cases).
- Ajay Hasia tests to determine State instrumentality include:
 1. Entire share capital owned by Government.
 2. Almost entire expenditure met by State funds.
 3. State-conferred monopoly.
 4. Deep and pervasive State control.
 5. Public importance of functions.
 6. Transfer of a government department to a corporation.
- Pradeep Kumar Biswas: CSIR held to be “State” due to deep financial, functional and administrative control.
- Zee Telefilms: BCCI is *not* State because Government control is only regulatory, not pervasive.
- Judiciary is not “State” when performing judicial functions, but when performing non-judicial tasks like rule-making, it can be treated as “State” (A.R. Antulay).

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

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

JUSTIFIABILITY OF FUNDAMENTAL RIGHTS

- Article 13 gives teeth to the fundamental rights.
- It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.
- **Existing Laws:**
 - Article 13(1) relates to laws already existing in force, i.e., laws which were in force before the commencement of the Constitution (pre-constitutional laws).
 - A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded.
 - It declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.
- **Future Laws:**
 - Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution.

- After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III.
- If such a law is made, it shall be void to the extent to which it curtails any such right.
- In *State of Punjab v. Dalbir Singh*, AIR 2012 SC 1040, the Supreme Court held that Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights conferred by Part III of the Constitution.
- In the event of such a law being made, the same shall be void to the extent of contravention.
- The word 'law' according to the definition given in Article 13 itself includes—
 - "... any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."
- It is clear that like the definition of State in Article 12, the definition of 'law' in Article 13 is not exhaustive.
 - It does not speak of laws made by Parliament or State Legislatures which form the largest part of the body of laws.
- Because of this nature of the definition, the issue came up before the Supreme Court as to whether a Constitutional Amendment by which a fundamental right included in Part III is taken away or abridged is also a law within the meaning of Article 13.
- The Court twice rejected the view that it includes a Constitutional Amendment.
- But in the famous *Golaknath case* (AIR 1967 SC 1643), by a majority of 6 to 5, the Court took the view that it includes such an amendment.
- Therefore, even a Constitutional Amendment would be void to the extent it takes away or abridges any of the Fundamental Rights.
- By the Constitution (Twenty-Fourth Amendment) Act, 1971, a new clause was added to Article 13 which provides that—
 - "Nothing in this Article shall apply to any amendment of this Constitution made under Article 368."
- Article 13 came up for judicial review in a number of cases.
- The Courts have evolved doctrines like doctrine of eclipse, severability, prospective overruling, acquiescence etc. for interpreting the provisions of Article 13.

Example

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

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

Case Law

- In *CBI vs. R. R. Kishore* (Supreme Court, decided on 11.09.2023), the issue was whether the declaration in *Subramanian Swamy vs. Director, CBI* (2014) 8 SCC 682, holding Section 6A of the Delhi Special Police Establishment Act, 1942 unconstitutional, could apply retrospectively under Article 20 of the Constitution.

- The Supreme Court held that once a law is declared unconstitutional for being violative of Part III of the Constitution, it becomes void ab initio, stillborn, unenforceable, and non est, in view of Article 13(2) and its judicial interpretation.
- Therefore, the declaration in *Subramanian Swamy* will have retrospective operation.
- Section 6A of the DSPE Act is held to be not in force from the date of its insertion, i.e., 11.09.2003.

Doctrine of Severability

- Under Article 13, it is not the entire law which is affected by provisions in Part III.
- A law becomes invalid only to the extent to which it is inconsistent with Fundamental Rights.
- Only the inconsistent part of the law will be declared invalid; the rest of the law will stand.
- Courts have clarified that the invalid part shall be severed and declared invalid only if it is actually severable.
- After separating the invalid part, the valid part must be capable of giving effect to the legislature's intent; otherwise, the entire law shall be declared invalid.
- This is known as the rule of severability.
- The doctrine is applied in cases where the invalid part can be separated from the valid part.
- Article 13 states that any law inconsistent with Fundamental Rights is void "to the extent of inconsistency".
- It is not necessary to strike down the whole Act if only part is invalid and can survive independently.
- In *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, the Supreme Court ruled that if an Act is partly invalid and the valid portion is severable, the valid portion will be maintained if sufficient to carry out the purpose of the Act.

Doctrine of Eclipse

- An existing law inconsistent with a Fundamental Right becomes inoperative from the commencement of the Constitution, but it is not dead altogether.
- A pre-Constitution law remains eclipsed or dormant to the extent of its inconsistency but becomes active again if the prohibition is removed by constitutional amendment.
- This is known as the doctrine of eclipse.
- First evolved in *Bhikaji Narain Dhakras v. State of M.P.*, AIR 1955 SC 781.
- The C.P. and Berar Motor Vehicles Amendment Act, 1947 was valid when enacted.
- After commencement of the Constitution, it became inconsistent with Article 19(1)(g) under Article 13(1).
- The Constitution (First Amendment) Act, 1951 permitted creation of State monopoly and removed the inconsistency.
- The Court held that Article 13(1) did not obliterate the entire operation of the law or remove it from the statute.
- For pre-Constitution laws, the doctrine of eclipse applies.

- The judgement stated that the impugned law became “eclipsed” by the Fundamental Right, and the amendment “removed the shadow” and made the Act effective again.
- There has been dispute regarding whether the doctrine applies to both pre- and post-Constitution laws or only to pre-Constitution laws.
- There is no unambiguous pronouncement conclusively deciding this.

Waiver

- The doctrine of waiver is based on the premise that a person is his own best judge and may waive rights conferred by the State.
- The person must have knowledge of the rights and waiver must be voluntary.
- In *Basheshar Nath v. C.I.T.*, AIR 1959 SC 149, the majority held against the waiver of Fundamental Rights.
- Citizens cannot waive Fundamental Rights.
- Any person aggrieved by discriminatory exercise of power can complain against it.

Single Person Law

- A law may be constitutional even if it relates to a single individual, if due to peculiar circumstances that individual forms a class by himself.
- In *Charanjit Lal Chowdhary v. Union of India*, AIR 1951 SC 41, the petitioner challenged the Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950.
- The Central Government took over management due to mismanagement causing closure and affecting public interest.
- Shareholders lost their rights to appoint directors or wind up the company.
- Petitioner argued violation of Article 14.
- Supreme Court dismissed the petition and upheld the legislation.
- The Court held that special circumstances may justify treating a single entity as a class by itself.
- Later cases clarified this is not an absolute rule and depends on facts of each case.
- For a valid classification, there must be a rational nexus between the classification and the object sought to be achieved.
- Example: District-wise distribution of medical seats based on population was held void (*Minor P. Rajendran v. State of Madras*, AIR 1968 SC 1012).

Right of Equality

Articles 14–18

- Article 14 states that the State shall not deny equality before the law or equal protection of the laws.
- “Equality before law” (English origin) means absence of special privilege and equal subjection of all persons to ordinary law.
- “Equal protection of laws” (American origin) means equal enjoyment of rights without favouritism.
- Article 14 applies to all persons, including corporations.

- Right to equality is a basic feature of the Constitution (Indra Sawhney v. Union of India, AIR 2000 SC 498).
- Mathematical equality is not intended; equals must be treated equally, unequals unequally.
- Equality is comparative; discrimination arises only when persons similarly situated are treated differently.
- Glanrock Estate (P.) Ltd. v. State of T.N. (2010) 10 SCC 96 emphasised this.
- In Raj Bala v. State of Haryana AIR 2016 SC 33, the Court held that arbitrariness is not a ground for invalidation under Article 14.

Legislative Classification

- Equal protection does not mean identical treatment through identical laws.
- Doctrine of classification distinguishes similarly situated persons from others.
- Supreme Court has upheld that Article 14 does not forbid reasonable classification.
- State of Bihar v. Bihar State Plus-2 Lecturers Associations (2008) 7 SCC 231 held that Article 14 prohibits discrimination, not classification.
- Classification must be legal, valid, reasonable.

Test of Valid Classification

- Classical test laid down in State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75:
 1. Classification must be based on intelligible differentia distinguishing grouped persons from others.
 2. Differentia must have rational nexus with the object of the statute.
- Reaffirmed in Confederation of Ex-Servicemen Assns. v. Union of India (2006) 8 SCC 399.
- Classification may be based on geographical, occupational, or other grounds.
- There must be a nexus to the purpose of the Act.
- Classification based on educational qualification is permissible.
- Impermissible classification violates Article 14.

Scope of Article 14

1. Supreme Court summarised rules of permissible classification in Ram Kishan Dalmiya v. Justice Tendulkar, AIR 1958 SC 538:
 - Article 14 forbids class legislation, not classification.
Example: Law granting financial aid to girl children below 14 is valid if based on reasonable classification.
 - Classification must satisfy intelligible differentia and rational nexus tests.
 - Classification may be based on geography, objects, occupation, etc.
 - Mathematical precision not required; non-identical treatment permissible.
 - A single person may be treated as a class in special circumstances.
 - Article 14 applies to substantive and procedural law.
 - Presumption of constitutionality of enactments exists; burden is on challenger.

Further Important Decisions

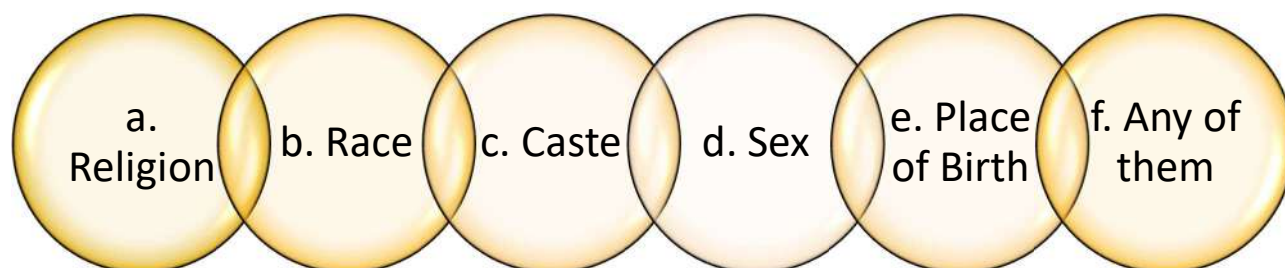
- R.K. Garg v. Union of India, AIR 1976 SC 1559 upheld Special Bearer Bonds Act, 1981 addressing black money despite challenge under Article 14.
- Article 14 applies to procedure and executive action.

- In *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, the Court held Article 14 strikes at arbitrariness and ensures fairness.
- The principle of reasonableness pervades Article 14.
- *Ramana Dayaram Shetty, Kasturi Lal, and Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487 reaffirm that arbitrary State action violates Article 14.
- Oral interview system upheld, but allocation of more than 15% marks for interview was struck down as arbitrary.
- Higher qualification as basis for classification for employees is permissible (*U.P. State Sugar Corpn. Ltd. v. Sant Raj Singh* (2006) 9 SCC 82).

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

Article 15(1)

prohibits the State from discriminating against any citizen on grounds only of:



Article 15(2)

- Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to:
 - (a) access to shops, public restaurants, hotels and places of public entertainment; or
 - (b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and Article 15(4) – Exceptions

- Article 15(3) allows the State to make special provision for women and children.
- Under this provision, courts have upheld laws or executive orders discriminating in favour of women (*Union of India v. Prabhakaran*, (1997) 2 SCC 633).
- Article 15(4) permits the State to make special provision for the advancement of:
 - (a) socially and educationally backward classes of citizens;
 - (b) Scheduled Castes;
 - (c) Scheduled Tribes.

Article 15(5)

- Inserted by the Constitution (Ninety-third Amendment) Act, 2005.
- Permits the State to make special provision for the advancement of socially and educationally backward classes or SC/ST.
- Such special provisions may relate to admission to educational institutions, including private institutions, whether aided or unaided by the State.
- Minority educational institutions under Article 30(1) are excluded.

Article 15(6)

- Inserted by the Constitution (One Hundred and Third Amendment) Act, 2019.
- Provides that nothing in Article 15 or Article 19(1)(g) or Article 29(2) shall prevent the State from making:
 - (a) any special provision for the advancement of economically weaker sections (EWS) of citizens other than those mentioned in clauses (4) and (5);
 - (b) any special provision for advancement of such EWS regarding admission to educational institutions, including private institutions, aided or unaided, except minority institutions under Article 30(1).
- Such reservation shall be in addition to existing reservations and subject to a maximum of ten percent of total seats in each category.
- Explanation: “Economically weaker sections” shall be such as notified by the State from time to time based on family income and other indicators of economic disadvantage.

Example

- Parliament made a law for advancement of EWS citizens.
- Such a law can be made because the Constitution (One Hundred and Third Amendment) Act, 2019 empowers Parliament to make such laws.

Article 16 – Equality of Opportunity in Public Employment**Basic Provisions**

- Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- Article 16(2) prohibits discrimination based on religion, race, caste, sex, descent, place of birth, or residence.

Exceptions under Article 16**1. Article 16(3)**

- Parliament may make a law requiring residence within a State or Union Territory as an essential qualification for certain classes of employment or appointment under the State, UT, or any local or other authority.

2. Article 16(4)

- Provision may be made for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in State services.

3. Article 16(4A)

- The State may provide for reservation in promotion, with consequential seniority, for SCs and STs not adequately represented in services.

4. Article 16(4B)

- The State may consider unfilled reserved vacancies of a year as a separate class to be filled in succeeding years.
- Such vacancies shall not be merged with current-year vacancies for determining the 50% ceiling on reservation.

5. Article 16(5)

- A law shall not be invalid if it requires that office-bearers or governing body members of a religious or denominational institution belong to a particular religion or denomination.

6. Article 16(6)

- The State may make reservation for economically weaker sections (EWS) other than those mentioned in clause (4).
- Such reservation is in addition to existing reservations and limited to 10% of posts in each category.

Judicial Interpretation

- In *Secretary, State of Karnataka v. Umadevi* (2006) 4 SCC 1, the Supreme Court held:
 - Adherence to equality in public employment is a basic feature of the Constitution.
 - The rule of law being core to the Constitution prevents Courts from upholding violations of Article 14.
 - Equality of opportunity is fundamental, and affirmative action ensures unequals are not treated as equals.
 - Public employment must conform to the constitutional scheme.

Rights Relating to Freedom

Articles 19–22 guarantee certain fundamental freedoms.

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



- These freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen.
- At the same time, none of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of Article 19.
- The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:
 - (a) The restriction can be imposed by law and not by a purely executive order issued under a statute;
 - (b) The restriction must be reasonable;

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

Example

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

The contention is correct because it is the fundamental right of a citizen to form co-operative societies.

Reasonableness:

- It is very important to note that the restrictions should be reasonable. If this word 'reasonable' is not there, the Government can impose any restrictions and they cannot be challenged. This word alone gives the right to an aggrieved person to challenge any restriction of the freedoms granted under this Article.
- Reasonableness of the restriction is an ingredient common to all the clauses of Article 19. Reasonableness is an objective test to be applied by the judiciary. Legislative judgment may be taken into account by the Court, but is not conclusive. It is subject to the supervision of Courts.
- The following factors are usually considered to assess the reasonableness of a law:
 - (i) The objective of the restriction;
 - (ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;
 - (iii) How far the restriction is proportion to the evil in question;
 - (iv) Duration of the restriction;
 - (v) The conditions prevailing at the time when the law was framed.
- The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Procedural and Substantiveness:

- In determining the reasonableness of a law, the Court will not only see the surrounding circumstances, but all contemporaneous legislation passed as part of a single scheme.
- It is the reasonableness of the restriction and not of the law that has to be found out, and if the legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the court can take judicial notice of such Acts forming part of the same legislative plan (Lord Krishna Sagar Mills v. Union of India, AIR 1959 SC 316).
- The phrase 'reasonable restrictions' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature.
- In determining the reasonableness of a statute, the Court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom.
- The reasonableness of a restriction has to be determined in an objective manner and from the point of view of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations.
- The Court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction.

- The word 'restriction' also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction only.
- Though the test of reasonableness laid down in clauses (2) to (6) of Article 19 might in great part coincide with that for judging 'due process' under the American Constitution, it must not be assumed that these are identical.
- It has been held that the restrictions imposed in carrying out the Directive Principles of State Policy is a point in favour of the reasonableness of the restrictions.

Scope and Limitations on the Freedoms

(a) Right to freedom of speech and expression

- It need not be mentioned as to how important the freedom of speech and expression is in a democracy.
- A democratic Government attaches a great importance to this freedom because without freedom of speech and expression the appeal to reason which is the basis of democracy cannot be made.
- The right to speech and expression includes right to make a good or bad speech and even the right of not to speak.
- One may express oneself even by signs.
- The Courts have held that this right includes the freedom of press and right to publish one's opinion, right to circulation and propagation of one's ideas, freedom of peaceful demonstration, dramatic performance and cinematography.
- It may also include any other mode of expression of one's ideas.
- The Supreme Court in *Cricket Association of Bengal v. Secretary, Ministry of Information & Broadcasting*, AIR 1995 SC 1236, has held that this freedom includes the right to communicate through any media – print, electronic and audio visual.
- The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.
- This freedom includes the freedom of press as it partakes of the same basic nature and characteristic (*Maneka Gandhi v. Union of India*, AIR 1978 SC 597).
- However no special privilege is attached to the press as such, distinct from ordinary citizens.
- In *Romesh Thapar v. State of Punjab*, AIR 1950 SC 124, it was observed that "freedom of speech and of the press lay at the foundation of all democratic organisations".
- Imposition of pre-censorship on publication under clause (2), is violative of freedom of speech and expression.
- The right to freedom of speech is infringed not only by a direct ban on the circulation of a publication but also by an action of the Government which would adversely affect the circulation of the paper.
- The only restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other (*Sakal Papers v. Union of India*, AIR 1962 SC 305).

- Regarding commercial advertisements it was held in *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce.
- Later it has been held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a) and such speech can also be subjected to reasonable restrictions only under Article 19(2) (*Tata Press Ltd. v. MTNL*, AIR 1995 SC 2438).
- The right to know, receive and impart information has been recognized within the right under Article 19(1)(a) (*S.P. Gupta v. President of India*, AIR 1982 SC 14).
- A citizen has the fundamental right to use the best means of imparting and receiving information and to have access to telecasting (*Secretary, Ministry of I&B v. Cricket Association of Bengal*, 1995).
- The right to reply, i.e., the right to get published one's reply in the same news media, has also been recognised under Article 19(1)(a).
- A Government circular compelling every pupil to sing the National Anthem despite genuine religious objection violates Article 19(1)(a) (*Bijoe Emmanuel v. State of Kerala*, 1986).
- The right to remain silent has been impliedly recognised.
- The Supreme Court in *Union of India v. Naveen Jindal* (2004) held that right to fly the National Flag with respect and dignity is a fundamental right under Article 19(1)(a).
- Dramatic performance is also a form of speech and expression. In *K.A. Abbas v. Union of India*, AIR 1971 SC 481, the Court held that censorship of films including pre-censorship is justified under Article 19(1)(a) and (2) but must be reasonable.
- The right to exhibit films on Doordarshan subject to conditions has also been recognized (*Odyssey Communications v. Lokvidayan Sangathan*, 1988).
- Clause (2) of Article 19 specifies the limits up to which the freedom of speech and expression may be restricted.
- It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the permitted heads.



- Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by executive action. [*Express Newspapers Pvt. Ltd. v. Union of India*, (1986) 1 SCC 133].

- In *Sanjay Narayan, Editor-in-Chief, Hindustan v. Hon'ble High Court of Allahabad*, JT 2011 (10) SC 74, the Court initially expressed the view that the unbridled power of the media can become dangerous if check and balance is not inherent in it.
- The role of the media is to provide to the readers and the public in general information and views tested and found as true and correct.
- This power must be carefully regulated and must reconcile with a person's fundamental right to privacy.
- However, this right is restricted by Article 19(2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality.
- This right is also restricted by the Contempt of Courts Act and laws relating to defamation

Case Law

- The Supreme Court initially held that a Corporation is not a citizen under Article 19 and therefore cannot invoke this Article.
- In *TELCO v. State of Bihar*, AIR 1965 SC 40, the Court held that a company is a distinct and separate legal entity from its shareholders and refused to lift the corporate veil for determining the constitutionality of legislation based on its impact on shareholders' fundamental rights.
- A significant modification came in *R.C. Cooper v. Union of India*, AIR 1970 SC 564 (Bank Nationalisation case), where the Supreme Court ruled that the test is qualitative, not formal, in determining whether shareholders' rights are impaired.
- If State action impairs the rights of both the company and its shareholders, the Court can grant relief.
- In *Bennett Coleman & Co.*, AIR 1973 SC 106, it was held that shareholders' rights are equally affected when the rights of the company are affected.

(b) Freedom of Assembly – Article 19(1)(b)

- Citizens have the right to assemble peacefully and without arms.
- Calling an assembly and putting one's views before it is connected with the right to speech and expression and is of equal democratic importance.
- The assembly must be peaceful and without arms.
- The State may impose reasonable restrictions in the interests of:
 1. the sovereignty and integrity of India,
 2. public order.
- Freedom of assembly is an essential element of democratic government.
- Chief Justice Waite (U.S.) stated that a republican government implies citizens' right to meet peaceably for consultation on public affairs.
- Public meetings aim at educating the public and forming opinion on religious, social, economic and political matters.
- The right of assembly has a close affinity to free speech under Article 19(1)(a).

(c) Freedom of Association – Article 19(1)(c)

- Includes freedom to hold meetings and take out processions without arms.
- Guarantees the right to form associations or unions for people with similar views.
- Subject to reasonable restrictions in the interests of:

1. the sovereignty and integrity of India,
 2. public order,
 3. morality.
- Question arises whether the right to form an association includes the right *not* to form one.
 - In *Tikaramji v. U.P.*, AIR 1956 SC 676, the Supreme Court observed that even if such right exists, it is not necessarily a fundamental right.
 - Andhra Pradesh High Court held that the right implies a right not to be a member of an association; compulsory membership of teachers was struck down (*Sitharamachary v. Sr. Dy. Inspector of Schools*, AIR 1958 AP 78).
 - Supported by *O.K. Ghosh v. Joseph*, AIR 1963 SC 812.
 - The right does not include a fundamental right to form associations for achieving a specific object or running a particular institution.

(d) Freedom of Movement – Article 19(1)(d)

- Citizens have the right to move freely throughout India.
- Does not extend to travel abroad.
- The State may impose reasonable restrictions:
 1. in the interests of the general public,
 2. for protection of the interests of any Scheduled Tribe.
- Laws authorising externment or internment must fall within permissible limits under Article 19(5).
- Restrictions must be reasonable and in public interest or for protection of Scheduled Tribes.

(e) Freedom of Residence – Article 19(1)(e)

- Citizens have the right to reside and settle in any part of India.
- Overlaps with the freedom of movement under Article 19(1)(d).
- Intended to remove internal barriers and allow free travel and settlement within India.
- Subject to reasonable restrictions in the interests of the general public or Scheduled Tribes.
- Citizens may face additional reasonable restrictions (*Ebrahim v. State of Bombay*, 1954 SCR 933).
- Certain areas may be banned for specific persons such as prostitutes (*State of U.P. v. Kaushaliya*, AIR 1964 SC 416).

(f) Right to acquire, hold and dispose of property

- Deleted by the 44th Amendment, 1978.

(g) Freedom of Trade, Occupation, Profession – Article 19(1)(g)

- Citizens have the right to practise any profession or carry on any occupation, trade or business.
- Case law emphasises social control and policy; no rigid interpretative rules established.
- Terms interpreted as:

- Trade: includes buying, selling, barter, commerce, skilled work (widest meaning) – *Safdarjung Hospital v. K.S. Sethi*, AIR 1970 SC 1407.
- Business: more comprehensive than trade; depends on circumstances of each case.
- Profession: occupation requiring intellectual skill, often with manual skill.
- Subject to reasonable restrictions under Article 19(6):
 - (i) restrictions in the interests of the general public;
 - (ii) professional/technical qualifications for practising any profession;
 - (iii) State monopoly in trade, industry or service (complete or partial).
- Reasonableness depends on the nature of the trade and prevailing conditions.
- Restrictions can include total prohibition if reasonable.
- A balance must be struck between freedom and social control; restrictions must not be excessive.

Monopoly

- *Chintaman Rao v. State of M.P.*, AIR 1951 SC 118: prohibition of bidi manufacture during agricultural season held unreasonable.
- After the First Amendment (1951), State may create monopoly.
- *Assn. of Registration Plates v. Union of India* (2004) SCC 476: State can create monopoly but benefits must accrue to the State, not to private parties.

Protection in respect of Conviction for Offences (Articles 20–22)

Article 20 – Three Guarantees

(i) Protection against Ex-Post Facto Laws – Article 20(1)

- No person can be convicted for an act not an offence when committed.
- Penalty cannot be increased retrospectively.
- *Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 SC 394: prohibition applies to substantive law, not procedural law.
- Law reducing criminal liability is not barred (*Rattan Lal v. State of Punjab*, 1964 SCR 676).

(ii) Protection against Double Jeopardy – Article 20(2)

- No person can be prosecuted *and* punished for the same offence more than once.
- If prosecuted but not punished, prosecution may be repeated.

(iii) Protection against Self-Incrimination – Article 20(3)

- Accused cannot be compelled to be a witness against himself.
- Protection applies only when:
 1. person is accused,
 2. compulsion exists,
 3. compulsion results in evidence against himself.
- Covers accused, suspects, and even witnesses fearing self-implication (*Selvi v. State of Karnataka*, AIR 2010 SC 1974).

Article 21 – Protection of Life and Personal Liberty

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

- Right to life includes all that makes life meaningful.
- Includes the right of a couple to adopt a son (Philips Alfred Malvin v. Y.J. Gonsalvis, AIR 1999 Ker 187).
- Includes right to live without noise pollution (Noise Pollution (V), In re, 2005 5 SCC 733).

Earlier Narrow Interpretation

- A.K. Gopalan v. State of Madras, AIR 1950 SC 27: personal liberty restricted to bodily liberty; procedure established by law interpreted narrowly.

Expansion of Scope

- State of Maharashtra v. Prabhakar Sanzgiri, AIR 1966 SC 424: Gopalan not final word.
- Kharak Singh v. State of U.P., AIR 1963 SC 1295:
 - Domiciliary visits violate personal liberty;
 - Surveillance allowed; no fundamental right to privacy yet recognised.

Recognition of Right to Privacy (Evolution)

- Gobind v. State of M.P., AIR 1975 SC 1378: privacy recognised case-by-case; subject to public interest.
- Satwant Singh Sawhney v. A.P.O., AIR 1967 SC 1836: right to travel abroad included in personal liberty; passport denial without law violates Article 21.
- Maneka Gandhi v. Union of India, AIR 1978 SC 597:
 - Personal liberty includes right to go abroad;
 - Procedure must be fair, just, reasonable;
 - Articles 14, 19, 21 are interconnected.

Fair Procedure Requirement

- Law must be valid, and procedure must be just, fair and reasonable (Bank Nationalisation Case, 1970; Maneka Gandhi, 1978).
- Bachan Singh v. State of Punjab, AIR 1980 SC 898: reaffirmed fair, just, reasonable procedure.
- Personal liberty now includes rights such as bail, no routine handcuffing, speedy trial, free legal aid.

Right to Privacy – Final Recognition

- Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161:
 - Right to privacy held a fundamental right.
 - Applies across rights including equality, dignity (Art. 14), free speech (Art. 19), and life/liberty (Art. 21).

Case Law

Swapnil Tripathi v. Supreme Court of India (2018), AIR 2018 SC 4806

- Petitioners sought a declaration that Supreme Court proceedings of *constitutional importance affecting the public at large* should be live-streamed for easy public access.
- The three-judge bench held that live-streaming of court proceedings is important for proper administration of justice, given its impact on the public.
- Live-streaming was recognised as an extension of the principle of *open justice* and *open courts*.
- The Court stated that live-streaming is crucial for dissemination of knowledge about judicial proceedings and ensures full access to justice.

- It emphasised that access to justice is incomplete unless the litigant can see, hear, and understand the proceedings first-hand.
- Live-streaming was held to be a facet of a responsive and accountable judiciary.

PHR Invent Educational Society v. UCO Bank (2024) 4 SCR 541 : 2024 INSC 297

- The Supreme Court reiterated that the High Court will not entertain a petition under Article 226 when an *effective alternative remedy* is available
- However, certain exceptions were recognised where a writ petition may still be entertained:
 - (i) when the statutory authority has not acted in accordance with the provisions of the enactment;
 - (ii) when it has acted in defiance of fundamental principles of judicial procedure;
 - (iii) when it has invoked provisions that have been repealed;
 - (iv) when the order is passed in total violation of natural justice.
- It was further clarified that when the statute itself provides a grievance-redress mechanism, Article 226 jurisdiction should ordinarily not be invoked.

Article 21A: Right to Education

1. Article 21A was introduced by the Constitution (Eighty-sixth Amendment) Act, 2002.
2. It provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
3. In *Environmental and Consumers Protect Foundation v. Delhi Administration*, 2012 (4) SCALE 243, the Court held that, to ensure compliance of Article 21A, it is imperative that schools must have qualified teachers and basic infrastructure.
4. In *State of Tamil Nadu v. K. Shyam Sunder*, AIR 2011 SC 3470, the Court held that the right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without discrimination on grounds of economic, social, or cultural background.
5. In *Fahima Shareen RK v. State of Kerala and Others* (2019), the Kerala High Court upheld the 'Right to Internet Access' as a fundamental right.
6. The Court declared that access to Internet becomes part of the right to education as well as the right to privacy under Article 21.

Protection against Arrest and Detention

- Though Article 21 does not impose a limitation on the legislature regarding deprivation of life or personal liberty, any legislative Act must conform to procedural safeguards under Article 22, failing which it becomes unconstitutional.
- Article 22 does not apply uniformly to all persons and makes distinctions between:
 - (a) alien enemies,
 - (b) persons arrested or detained under preventive detention law, and
 - (c) other persons.
- Alien enemies receive no protection under Article 22.
- Persons in category (c) are given the following rights (which are not provided to persons detained under preventive detention law):
 - (i) A person arrested cannot be detained unless informed, as soon as may be, of the grounds of arrest.

- (ii) Such person has the right to consult and be defended by a legal practitioner of his choice.
- (iii) A person arrested must be produced before the nearest magistrate within twenty-four hours of arrest, excluding travel time, and cannot be detained beyond twenty-four hours without magistrate's authority.

Preventive Detention

- Preventive detention means detention of a person without trial.
- Its object is not to punish for past acts but to prevent future acts likely to be committed.
- No offence is proved nor charge formulated, yet the person is detained because he is likely to commit an act prohibited by law.
- Parliament may make preventive detention laws for reasons connected with defence, foreign affairs, or the security of India.
- Parliament and State Legislatures may make such laws for reasons connected with security of the State, maintenance of public order, or maintenance of supplies and services essential to the community.

Safeguards against Preventive Detention (Article 22, amended by 44th Constitution Amendment Act, 1978*)

- (a) A person cannot be detained for longer than three months unless:
 - i. An Advisory Board of persons who are or have been, or are qualified to be, High Court judges reports before expiry of three months that sufficient cause exists for detention; or
 - ii. Parliament prescribes by law the maximum period of detention and procedure to be followed by the Advisory Board.
- (b) The authority ordering detention must:
 - I. communicate, as soon as may be, the grounds of detention, and
 - II. afford the earliest opportunity of making a representation against the order.
- Grounds must be supplied but facts considered against public interest need not be disclosed.
- *Changes made by the 44th Amendment are not yet notified.

Right Against Exploitation (Articles 23–24)

Articles 23 and 24 provide rights against exploitation for citizens and non-citizens.

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

- Article 23 imposes a complete ban on traffic in human beings, begar, and other similar forms of forced labour.
- Contravention is made punishable by law.
- Traditional systems of beggary become unconstitutional; any person compelled to labour without consent or without payment can complain under Article 23.
- 'Traffic' means dealing in human beings like goods—selling, letting, or disposing of them.
- 'Begar' means involuntary work without payment.

- The State may impose compulsory service for public purposes (e.g., conscription), but cannot discriminate on grounds of religion, race, caste, or class.

(b) Prohibition of employment of children

- Article 24 prohibits employment of children below fourteen years in any factory or mine.
- Important legislations include:
 - Employment of Children Act, 1938
 - Factories Act, 1948
 - Mines Act, 1952
 - Apprentices Act, 1961
 - Child Labour (Prohibition and Regulation) Act, 1986
- Supreme Court has issued guidelines on child labour in *M.C. Mehta v. State of T.N.*, AIR 1993 SC 699.

Right to Constitutional Remedies (Article 32)

- Article 32 guarantees enforcement of Fundamental Rights; it is remedial, not substantive.
- Articles 33–35 are supplementary and do not create rights.
- Article 32 makes it a fundamental right for any person whose fundamental right is violated to approach the Supreme Court directly.
- One need not exhaust alternative remedies; the Supreme Court is empowered to issue writs—habeas corpus, mandamus, prohibition, quo warranto, certiorari.
- Parliament may assign the power to issue such directions to other courts without affecting Supreme Court's powers.
- Example: For violation of the right to freedom of speech, Article 32 provides the remedy to approach the Supreme Court.
- Gajendragadkar, J. described Article 32 as the “cornerstone of the democratic edifice.”
- The Supreme Court acts as “protector and guarantor of fundamental rights” and as the “sentinel on the qui vive” (*State of Madras v. V.G. Row*).
- Article 32 applies even where the violation is by private individuals (Arts. 17, 23, 24).
- In *Peoples' Union for Democratic Rights v. Union of India*, the Court affirmed applicability against private parties.
- The Court's jurisdiction under Article 32 is wide enough to reach injustice in any form.
- In *Romila Thapar v. Union of India* (2018), the Court reiterated Article 32's power to enforce fundamental rights.
- In *Nithya Anand Raghavan v. State of NCT of Delhi* (2017), the Court held habeas corpus cannot be used merely to enforce directions of foreign courts.
- In *Assam Sanmilita Mahasangha v. Union of India* (2015), Article 32 was described as the “heart and soul” of the Constitution.
- In *Centre for PIL v. Union of India*, the Court explained requirements for issuing a writ of quo warranto.
- Article 32 may be suspended only under Article 359 during Emergency.
- In *Kesavananda Bharati*, certain words in Article 31C were declared void.

Supplementary Provisions (Articles 33–35)

- Article 33 allows Parliament to restrict or abrogate fundamental rights for armed forces, paramilitary, and police forces.
- Article 34 provides for indemnity for acts done during operation of martial law.
- Article 35 says that only Parliament can make laws where the Constitution expressly empowers Parliament to restrict fundamental rights.

Amendability of Fundamental Rights

- Since 1951, questions have been raised about the scope of the amending process in Article 368 of the Constitution and whether the Fundamental Rights are amendable.
- The issue arose whether the word “Law” in Article 13(2) includes constitutional amendments or whether amendments to Fundamental Rights in Part III are permissible under Article 368.
- In **Shankari Prasad v. Union of India**, AIR 1951 SC 458, the First Amendment was challenged and the Supreme Court held that the power to amend the Constitution, including Fundamental Rights, was contained in Article 368 and that “Law” in Article 13(2) did not include constitutional amendments, as they are exercises of constituent, not legislative power.
- This view was approved in **Sajjan Singh v. State of Rajasthan**, AIR 1965 SC 845.
- Thus, until **I.C. Golak Nath v. State of Punjab**, AIR 1967 SC 1643, the Supreme Court consistently held that no part of the Constitution was unamendable and Parliament could amend any provision, including Fundamental Rights and Article 368 itself, by following Article 368.
- In **Golak Nath**, the majority overruled the earlier decisions and held that Fundamental Rights are outside the amending process if the amendment takes away or abridges those rights, on the ground that the power to amend the Constitution is legislative power under Article 245 and hence an amendment is “law” under Article 13(2).
- To nullify **Golak Nath**, Parliament enacted the **24th Constitutional Amendment (1971)**, amending Articles 13 and 368 to assert Parliament’s power to amend Fundamental Rights.
- The validity of the 24th Amendment was challenged, and the Supreme Court upheld it, holding that Parliament can amend any part of the Constitution including Fundamental Rights, but adding that Parliament cannot alter the **basic structure** or framework of the Constitution.
- In **Indira Gandhi v. Raj Narain**, AIR 1975 SC 2299, where the 39th Amendment sought to remove judicial review over election disputes involving the Prime Minister, the Supreme Court held that democracy is an essential feature of the basic structure, and exclusion of judicial review damaged the basic structure.
- To neutralise the limitation imposed by the basic structure doctrine, the **42nd Amendment (1976)** inserted clauses (4) and (5) in Article 368—clause (4) barring all

constitutional amendments from judicial review, and clause (5) declaring that Parliament's amending power is unlimited.

- In **Minerva Mills v. Union of India (1980) 3 SCC 625**, the Supreme Court unanimously held clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment unconstitutional as they transgressed the limits of the amending power and damaged the basic structure.
- In **Waman Rao v. Union of India (1981) 2 SCC 362**, the Court held that post-24 April 1973 amendments adding laws to the Ninth Schedule are open to challenge on the ground of damaging the basic structure.
- In **Bhim Singhji v. Union of India (1981) 1 SCC 166**, similar principles were followed.
- In **L. Chandra Kumar v. Union of India (1997) 3 SCC 261**, the Supreme Court held that judicial review is an integral and essential feature of the Constitution, forming part of the inviolable basic structure.
- In **I.R. Coelho v. State of Tamil Nadu (2007) 2 SCC 1**, a nine-judge Bench held that all amendments to the Constitution after 24-4-1973 inserting laws into the Ninth Schedule must be tested on the touchstone of basic structure as reflected in Articles 21, 14, 19 and their underlying principles.
- The Court held that laws inserted into the Ninth Schedule do not become part of the Constitution; they derive validity only from inclusion, and such inclusion is subject to basic structure review.
- If a law already upheld earlier is inserted into the Ninth Schedule, it cannot be reopened, but if a law earlier held unconstitutional is inserted after 24-4-1973, its validity can still be questioned under the basic structure doctrine.
- In **Glanrock Estate (P) Ltd. v. State of Tamil Nadu (2010) 10 SCC 96**, the Court upheld the validity of the **34th Constitutional Amendment (1974)** inserting the Gudalur Janmam Estates (Abolition) Act, 1969 into the Ninth Schedule.
- It was alleged that the 1969 Act violated equality under Article 14 because unlike the 1961 Land Reforms Act, it vested all forest lands in the State. It was also argued that inserting the Act into the Ninth Schedule despite Section 3 being struck down in **Balmadies (1972) 2 SCC 133** violated judicial review, rule of law, and separation of powers.
- The Court held that no facet of Article 14 was abrogated by the 34th Amendment and that the 1969 Act received immunity from Article 31(2) with retrospective effect.
- The Court held that only those breaches of equality that destroy the basic structure will not be protected by Article 31-B; not every breach of Article 14 defeats the protection.
- The Court held that even assuming Article 14 was violated, the 34th Amendment still validated the 1969 Act and did not destroy basic features such as judicial review or separation of powers.
- The Court reiterated that the basic structure doctrine is the touchstone for judging validity of constitutional amendments and that core values such as secularism and egalitarian equality fall outside the amending power.
- In **GVK Industries v. ITO (2011) 4 SCC 36**, the Court held that although Parliament can amend some features under Article 368, the essential features—the basic structure—are

beyond Parliament's power; only the people, through a Constituent Assembly, can alter the basic structure.

Directive Principles of State Policy (Part IV: Articles 36–51)

- Fundamental Rights and Directive Principles were originally proposed as two categories of rights— enforceable and non-enforceable.
- Enforceable ones became Part III; non-enforceable ones became Part IV (Directive Principles).
- Article 37 states that Directive Principles are not enforceable by courts but are fundamental in governance and must guide the State in making laws.
- They differ from Fundamental Rights because:
 - (i) They are not enforceable and create no justiciable rights.
 - (ii) They require legislation; until law is made, existing law cannot be challenged for contravening a Directive Principle.
 - (iii) They do not confer or remove legislative power.
 - (iv) Courts cannot void laws for violating Directive Principles.
 - (v) Courts cannot compel the Government to implement them or make laws.
 - (vi) Implementation is subject to constitutional limitations.
- Conflict between Fundamental Rights and Directive Principles initially resolved in favour of Fundamental Rights.
- In *State of Madras v. Champakram Dorairajan* (1951), Supreme Court held Directive Principles must conform to Fundamental Rights.
- Laws made to enforce Directive Principles cannot violate Fundamental Rights.
- Directive Principles reflect the goal of economic democracy essential for political and constitutional stability.

Important Directive Principles

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

- The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).
- The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).

(b) Certain principles of policy to be followed by the State

The State, particularly, must direct its policy towards securing:

- that the citizens, men and women equally, have the right to an adequate means of livelihood;
- that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

- equal pay for equal work for both men and women;
- that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter a vocation unsuited to their age or strength;
- that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

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

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

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

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

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

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

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

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

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

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

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

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

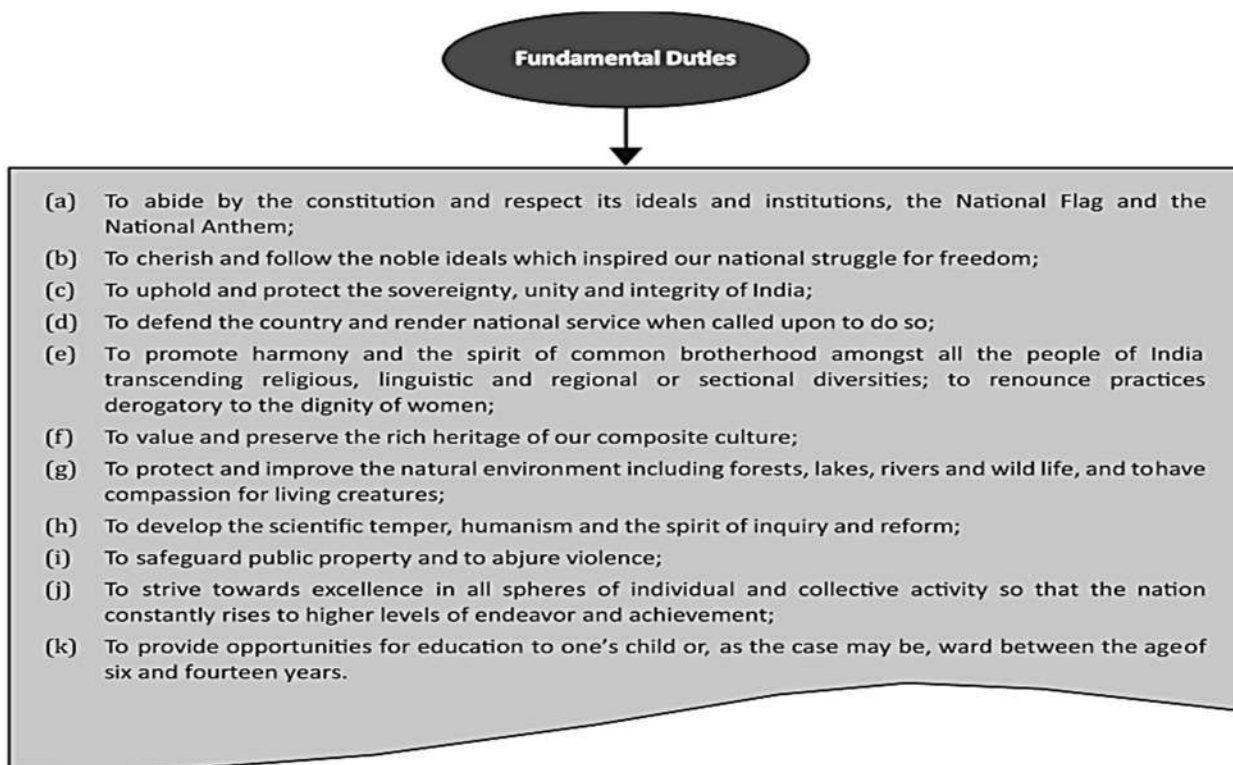
(l) Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).

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

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

FUNDAMENTAL DUTIES

- Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Fortysecond Amendment) Act, 1976.
- The objective in introducing these duties is not laid down in the Bill except that since the duties of the citizens are not specified in the Constitution, so it was thought necessary to introduce them.



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

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

ORDINANCE MAKING POWERS

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



- (i) Administrative power, i.e., the execution of the laws and the administration of the departments of Government.
- (ii) Military power, i.e., the command of the armed forces and the conduct of war.
- (iii) Legislative power, i.e., the summoning; prorogation, etc. of the legislature.
- (iv) Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

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

Ordinance-making power

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

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

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

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

- (i) the Ordinance-making power will be available to the President only when both the Houses of Parliament have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session because law cannot be made by that House in session alone. Both the Houses must be in session when Parliament makes the law. The President's Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.
- (ii) this power is to be exercised by the President on the advice of his Council of Ministers.
- (iii) the President must be satisfied about the need for the Ordinance and he cannot be compelled
- (iv) the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.
- (v) the period of six weeks will be counted from the latter date if the Houses reassemble on different dates.

Example

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

2. Of the Governor

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

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

Ordinance making power

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

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

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

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

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

Example

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

If at any time, except when both Houses of Parliament are in session, the President is satisfied that

circumstances exist which render it necessary for him to take immediate action, he may promulgate such

Ordinances as the circumstances appear to him to require.

LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

- The Indian Constitution is essentially federal.
- Dicey, in the “Law of Constitution”, has said: “Federation means the distribution of the force of the State among a number of co-ordinate bodies, each originating in and controlled by the Constitution”.
- The field of Government is divided between the Federal and State Governments which are not subordinate to one another but are co-ordinate and independent within the sphere allotted to them.
- The existence of co-ordinate authorities independent of each other is the gist of the federal principle.
- A federal constitution establishes a dual polity as it comprises two levels of Government.
- At one level, there exists a Central Government having jurisdiction over the whole country and reaching down to the person and property of every individual therein.
- At the other level, there exists the State Government each of which exercises jurisdiction in one of the States into which the country is divided under the Constitution.
- A citizen of the federal country thus becomes subject to the decrees of two Governments – the central and the regional.
- The Union of India is now composed of 29 States and both the Union and the States derive their authority from the Constitution which divides all powers – legislative, executive and financial – between them.
- The result is that the States are not delegates of the Union and though there are agencies and devices for Union control over the States in many matters, the States are autonomous within their own spheres as allotted to them by the Constitution.

- Both the Union and States are equally subject to the limitations imposed by the Constitution, say, for example, the exercise of legislative powers being limited by Fundamental Rights.
- However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.
- The two levels of Government divide and share the totality of governmental functions and powers between themselves.
- A federal constitution thus envisages a division of governmental functions and powers between the centre and the regions by the sanction of the Constitution.
- Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States.
- Analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of:
 - (a) territory with respect to which the laws are to be made, and
 - (b) subject matter on which laws are to be made.

2. Territorial Distribution

- The Union Legislature, i.e., Parliament, has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States.
- Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that State.
- For example, a law passed by the legislature of the Punjab State cannot be made applicable to the State of Uttar Pradesh or any other State.
- However, this simple generalisation of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

- From the territorial point of view, Parliament, being the supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India.
- A law made by Parliament is not invalid merely because it has an extra-territorial operation.
- As explained by Kania C.J. in *A.H. Wadia v. Income-tax Commissioner*, A.I.R. 1949 F.C. 18, 25: “In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned”.
- A Union Territory is administered directly by the Central Executive.
- Article 239(1) provides that save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.

- Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law.
- Article 246(4) provides that Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List.
- With regard to Union Territories, there is no distribution of legislative powers.
- Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject.
- These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

- A State Legislature may make laws only for the State concerned.
- It can also make laws which may extend beyond the territory of that State.
- But such law can be valid only on the basis of “territorial nexus”.
- That is, if there is sufficient nexus or connection between the State and the subject matter of the law which falls beyond the territory of the State, the law will be valid.
- The sufficiency of the nexus is to be seen on the basis of the test laid down by the Supreme Court in *State of Bombay v. R.M.D.C.*, A.I.R. 1957 S.C. 699, according to which two conditions must be fulfilled:
 - a. the connection must be real and not illusory; and
 - b. the liability sought to be imposed by that law must be pertinent to that connection.
- If both the conditions are fulfilled by a law simultaneously then only it is valid otherwise not.
- To illustrate: in the case cited above a newspaper named “Sporting Star” was published and printed at Bangalore in Mysore (now Karnataka) State.
- It contained crossword puzzles and engaged in prize competitions.
- It had wide circulation in the State of Bombay (now Maharashtra) and most of its activities such as standing invitations, filling up of forms and payment of money took place within that State.
- The State of Bombay imposed a tax on the newspaper.
- The publishers challenged the validity of the law on the ground that it was invalid insofar as it covered a subject matter falling beyond the territory of that State because the paper was published in another State.
- The Supreme Court, applying the doctrine of territorial nexus, held that the nexus was sufficient between the law and its subject-matter to justify the imposition of the tax.
- Thus, State laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax matters.

3. Distribution of Subject Matter of Legislation

- In distributing the subjects on which legislation can be made, different constitutions have adopted different patterns.
- In the U.S.A., there is only one short list of subjects.
- Either by express terms or by necessary implication some of them are exclusively assigned to the Central Government and the others are concurrent.
- The residuary subjects are left for the States.

- A similar pattern exists in Australia with modifications.
- In Canada, there are three lists:
 - subjects exclusively for the Centre,
 - subjects exclusively for the States,
 - subjects on which both can make laws.
- Residuary subjects fall within the central jurisdiction in Canada.
- The Government of India Act, 1935 followed the Canadian pattern with modifications regarding residuary subjects.
- The Constitution of India substantially follows the pattern of the Government of India Act, 1935 but leaves residuary subjects to the Union.
- The Constitution draws three long lists of legislative subjects in the Seventh Schedule:
 - List I: Union List
 - List II: State List
 - List III: Concurrent List
- The number of entries is 97 in the Union List, 66 in the State List, and 47 in the Concurrent List.
- Subjects of national interest or importance requiring uniformity have been included in the Union List.
- Subjects of local or regional interest requiring local control have been included in the State List.
- Subjects which are ordinarily of local interest but need uniformity over more than one State have been placed in the Concurrent List.
- Examples of Union List subjects include defence, atomic energy, foreign affairs, railways, currency, foreign loans, RBI, foreign trade, banking, inter-State trade, and higher education standards.
- Examples of State List subjects include public order, police, prisons, local government, public health, markets, fairs, betting and gambling.
- Examples of Concurrent List subjects include criminal law, marriage and divorce, transfer of property, contracts, economic and social planning, monopolies, social security, price control, electricity, and acquisition and requisition of property.
- Notable points regarding the lists include:
 - (i) Tax entries are separate and grouped at the end of the Lists.
 - (ii) Tax subjects exist only in the Union List and State List, not in the Concurrent List.
 - (iii) Each List contains an entry relating to “fees” excluding court fees.
 - (iv) Each of Lists I and II contains an entry relating to offences against laws with respect to matters in that List.
- The next question concerns who will legislate on which subject.
- The Constitution makes clear arrangements for how powers shall be exercised by Parliament and the State Legislatures on these subjects.
- This arrangement is mainly contained in Article 246 and also in Articles 247 to 254.

4. Arrangement for the Operation of Legislative Powers of the Centre and the States

1. Union List (List I) – Exclusive Power of Parliament

- With respect to subjects enumerated in the Union List, Parliament has the exclusive power to make laws.

- The State Legislature has no power to legislate on any Union List subject, irrespective of whether Parliament has made a law or not.
- This power is notwithstanding the powers of the States to make laws on matters in the State List or the Concurrent List.
- If due to any error or interpretation the same subject appears to fall within the Union List as well as State List, it shall be read only in List I, establishing the superiority of the Union List over the other two lists.

2. State List (List II) – Exclusive Power of State Legislatures

- With respect to subjects enumerated in the State List, the State Legislature has exclusive authority to make laws.
- Parliament cannot legislate on any of these subjects whether or not the State chooses to make a law.

3. Concurrent List (List III) – Power of Both Parliament and State Legislatures

- Both Parliament and State Legislatures can make laws on subjects included in the Concurrent List.
- Both laws remain valid so long as they are not repugnant to each other.
- In case of repugnancy between a Parliamentary law and a State law, the former prevails, and the State law is valid only to the extent it is not repugnant.
- Exception:
 - If a State makes a law on a Concurrent List subject where a Parliamentary law already exists, the State law can prevail within that State if it has been reserved for the consideration of the President and has received his assent.
 - However, Parliament may at any time enact a new law to override, amend, or repeal such State law.

4. Residuary Powers

- With respect to matters not included in any of the three lists, Parliament has the exclusive power to legislate.
- This is referred to as the residuary legislative power of Parliament.
- The Supreme Court has held that the power to impose wealth tax on the total wealth of a person, including agricultural land, falls under Parliament's residuary jurisdiction (Union of India v. H.S. Dhillon, AIR 1972 SC 1061).

5. Power of Parliament to Legislate on State List Subjects

Despite the State List being exclusive to State Legislatures, the Constitution provides five exceptions where Parliament may legislate even on State List matters:

(a) In the National Interest (Article 249)

1. Parliament can legislate on a State List matter if the Council of States (Rajya Sabha) passes a resolution by a two-thirds majority of members present and voting declaring it necessary in the national interest.
2. Parliament's authority continues so long as the resolution remains in force, which is for a maximum of one year at a time.
3. The resolution may be renewed for any number of years through fresh resolutions.

4. A Parliamentary law made under Article 249 ceases to have effect six months after the resolution expires, except for things done or omitted before expiry.

(b) During a Proclamation of Emergency (Article 250)

1. While a Proclamation of Emergency is in operation, Parliament gains power to legislate on all matters in the State List for the whole or any part of India.
2. Such laws cease to have effect six months after the Emergency ends.
3. Under Article 352:
 - The President may declare emergency if satisfied that the security of India is threatened by war, external aggression, or armed rebellion.
 - The decision of the Union Cabinet must be communicated in writing.
 - Parliamentary approval by both Houses within 30 days is required; otherwise, the proclamation ceases.
 - Special provisions apply if Lok Sabha is dissolved during this period.
4. A proclamation approved by Parliament remains in force for six months and may be extended for additional six-month periods by further resolutions.
5. Prior to the 44th Constitutional Amendment, proclamations could continue indefinitely until revoked by the President.
6. Article 353 grants Parliament power to impose duties and confer powers on the Union or its authorities even regarding non-Union subjects during emergency.

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

1. If the Governor reports or the President is otherwise satisfied that State Government cannot be carried on per the Constitution, the President may issue a proclamation (President's Rule).
2. By the proclamation:
 - The President may assume functions of the State Government and powers of the Governor or other authorities.
 - The powers of the State Legislature may vest in Parliament.
3. Parliament gains power to legislate on all State List matters for that State.
4. Suspension or dissolution of the State Legislature is not mandatory, though common in practice.
5. The President cannot assume powers of the High Court or suspend provisions relating to it.
6. The President's satisfaction is subjective, but judicial review is permissible.
7. The Supreme Court in *S.R. Bommai v. Union of India* (1994) held:
 - Presidential proclamation is conditional and must be based on relevant material.
 - Courts may strike down proclamations if mala fide or based on irrelevant grounds.
 - If struck down, the Court may restore the dismissed government and revive the dissolved Legislative Assembly.
8. A proclamation is valid only for six months if approved by both Houses; it may be extended but not beyond three consecutive years.
9. Article 357(2), inserted by the 42nd Amendment, provides that laws made by Parliament during President's Rule continue until altered, repealed, or amended by a competent authority.

(d) On the Request of Two or More States (Article 252)

1. If two or more States desire a common law on a State List subject, they may pass resolutions requesting Parliament to legislate.
2. After such resolution, Parliament may legislate on the subject for those States.
3. Other States may adopt such law later by passing resolutions.
4. Once the Parliamentary law is made:
 - State Legislatures of the requesting or adopting States lose power to amend or repeal the law.
 - Only Parliament may amend or repeal it upon similar State resolutions.
5. Any inconsistent law made by a consenting State is invalid to the extent of inconsistency.
6. Example: Parliament passed the Prize Competitions Act, 1955 under this Article.

(e) To Implement International Agreements (Article 253)

1. Parliament has exclusive power to legislate for implementing:
 - Any treaty, agreement, or convention with foreign countries, or
 - Any decision made at any international conference, association, or body.
2. Parliament may enact laws on any subject in any list for this purpose.

Conclusion

- These five exceptions demonstrate that although legislative powers are distributed between the Union and the States, the Constitution permits Parliamentary intervention in State List matters under specific circumstances.
- The general distribution of powers is real, but the exceptions exist to address practical governance needs.

6. Interpretation of the Legislative Lists

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

(a) Plenary Powers

1. The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on that power, then it is to be given the widest scope that the words used are capable of, without rendering another item nugatory.
2. As stated by Gajendragadkar, C.J.:
 - “It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction, and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude.”
 - A general word used in an entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be included in it.
 - (*Jagannath Baksh Singh v. State of U.P.*, AIR 1962 SC 1563)
3. Thus, a legislature to which power is granted over a particular subject may make law on any aspect or on all aspects of that subject; it may also make a retrospective law or a prospective law.
4. The legislature can also make law on all matters ancillary to that matter.

Example: If power to collect taxes is granted, then the power not to collect taxes, or the power to remit taxes, is presumed to be included within such power.

(b) Harmonious Construction

1. Different entries in the different lists must be interpreted in such a manner that conflict is avoided and each of them is given effect.
2. It must be accepted that the Constitution does not intend to create conflict or make any entry nugatory.
3. Therefore, when there appears a conflict between two entries in two different lists, they must be interpreted in such a way that each entry is given meaning, and for this purpose, the scope or meaning of one entry may be restricted to give effect to the other also.

(c) Pith and Substance Rule

1. The rule of pith and substance means that where a law, in reality and substance, falls within an item on which the legislature is competent to legislate, such law shall not become invalid merely because it incidentally touches a matter outside its competence.
2. In a federal Constitution, as observed by Gwyer C.J., legislation may often touch subjects in more than one list, and the provisions may be so closely intertwined that a strictly verbal interpretation may result in many statutes being declared invalid because the legislature may appear to have acted in a forbidden sphere. (*Prafulla Kumar v. Bank of Khulna, AIR 1947 PC 60*)
3. Therefore, where overlapping occurs, the question to be asked is:
 - What is the pith and substance of the enactment?
 - In which list is its true nature and character to be found?
4. For this purpose, the enactment as a whole, including its object and effect, must be considered.
5. Illustration:
 - Acting under Entry 6 of List II ("Public Health and Sanitation"), the Rajasthan Legislature passed a law restricting the use of sound amplifiers.
 - The law was challenged on the ground that sound amplifiers fall under Entry 31 of List I ("Posts and telegraphs, telephones, wireless broadcasting and other like forms of communication").
 - The Supreme Court rejected this argument, holding that the object of the law was to prevent unnecessary noise affecting public health, not to legislate on broadcasting.
 - Therefore, the pith and substance of the law fell under "public health," and not "broadcasting."

(*G. Chawla v. State of Rajasthan, AIR 1959 SC 544*)

(d) Colourable Legislation

1. This principle is almost the opposite of the pith and substance doctrine. The Constitution does not permit any legislature to transgress its powers, directly or indirectly.
2. However, a legislature may pass a law in such a way that it appears constitutional in form but is, in reality, aimed at achieving something which the legislature is not competent to do.

- Such legislation is known as a colourable piece of legislation and is invalid.

3. Example:

- In *Kameshwar Singh v. State of Bihar*, AIR 1952 SC 252, the Bihar Land Reforms Act, 1950 provided that unpaid rents would vest in the State, and only half would be paid back to the landlords as compensation.
 - The relevant entry required that property could not be acquired without payment of compensation.
 - The Court held that taking the whole and returning half was effectively the same as taking the whole without return.
 - This was held to be naked confiscation, disguised as compensation, and thus a colourable exercise of power.
4. The motive of the legislature is irrelevant for applying this doctrine.
- If a legislature is authorised to do something directly or indirectly, it does not matter what motives—good or bad—were behind the law.

Conclusion

These are only some guiding principles evolved by the Courts to resolve disputes regarding the competence of laws passed by Parliament or any State Legislature.

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE (PART XIII)

1. General Introduction

- Part XIII of the Constitution is given the heading “Freedom of Trade, Commerce and Intercourse.”
- This Part originally consisted of Articles 301 to 307, out of which Article 306 has been repealed.
- Among these provisions, Article 301 creates the overall comprehensive limitation on all legislative powers of the Union and the States affecting the matters covered by that Article.

2. Article 301 – Guarantee of Freedom

- Article 301 states: “Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.”
- The opening words “subject to the other provisions of this Part” indicate that except Articles 302 to 307, no other provision of the Constitution may interfere with the free flow of trade and commerce.
- The Supreme Court has confirmed that the freedom declared by Article 301 aims to ensure that India’s economic unity is not broken by internal barriers.

3. Scope of Trade, Commerce and Intercourse

- The concept of trade, commerce and intercourse is extremely wide today.
- It includes not only ordinary sale and purchase but also:
 - broadcasting on radios,
 - communication through telephones,
 - even non-commercial movement from one place to another.

- Because of this wide scope, almost any law may appear to affect trade and commerce. Examples:
 - A licensing requirement for radios may be argued as violating the freedom of trade and commerce.
 - Regulation of electricity supply hours may be argued to affect trade because people cannot run radios, televisions, factories, etc.
- If such an interpretation were accepted, almost every law would violate Article 301 unless saved by Articles 302 to 307.

4. Judicial Interpretation – “Direct and Immediate” Test

- To avoid absurd consequences, the Supreme Court in *Atiabari Tea Co. v. State of Assam*, AIR 1951 SC 232, held that:
 - Only laws that directly and immediately restrict or impede the freedom of trade, commerce and intercourse fall within Article 301.
 - Laws that only incidentally or indirectly affect trade are not covered by Article 301.
- The term “intercourse” in Article 301 is of wide import and covers movement or dealings even of a non-commercial character. (*Chobe v. Palnitkar*, AIR 1954 Hyd. 207)

5. Nature of Freedom – Not Absolute

- The word “free” in Article 301 does not mean absolute freedom.
- Measures such as:
 - traffic regulations,
 - licensing of vehicles, etc., cannot be challenged.

6. Regulatory Measures and Compensatory Taxes

- In *Automobile Transport Ltd. v. State of Rajasthan*, AIR 1962 SC 1906, the Supreme Court held that:
 - Regulations that facilitate trade and commerce,
 - and compensatory taxes, are outside the reach of Article 301.
- The Supreme Court later doubted the correctness of the idea of compensatory tax in *Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925.

7. Freedom Applies to Intra-State and Inter-State Trade

- Article 301 applies to:
 - inter-State trade, and
 - intra-State trade.
- However, it does not cover foreign trade or trade beyond the territory of India.

8. Only Lawful Activities Protected

- Article 301 protects only lawful trading activities.
- The Supreme Court held:
 - Gambling is not trade,
 - Prize competitions being gambling in nature are also not protected. (*State of Bombay v. RMDC*, AIR 1957 SC 699)

EXCEPTIONS TO ARTICLE 301 (ARTICLES 302–305)**(a) Parliament may impose restrictions in public interest – Article 302**

- Parliament may, by law, impose restrictions on trade, commerce and intercourse as required in the public interest.

(b) Parliament may make preference or discrimination – Article 303

- Parliament cannot give preference to one State over another or discriminate between States,
- except when the law declares that such action is necessary to deal with a scarcity of goods in any part of India.

(c) Power of State Legislatures – Article 304

A State Legislature may:

1. Taxation Provision
 - Impose on goods imported from other States the same tax that similar goods produced within the State are subject to,
 - Provided that there is no discrimination against imported goods.
2. Reasonable Restrictions
 - Impose reasonable restrictions on the freedom of trade, commerce or intercourse within the State in the public interest.
3. Requirement of Prior Presidential Sanction
 - No Bill or amendment under Article 304(b) can be introduced without the previous sanction of the President.
4. Judicial Decisions
 - Article 304 empowers States to impose taxes on goods from other States if similar goods produced within the State are equally taxed. (*Kalyani Stores v. State of Orissa, AIR 1966 SC 1686*)
 - A subsequent Presidential assent is also sufficient. (*State of Karnataka v. Hansa Corporation, AIR 1981 SC 463*)

(d) Saving of Existing Laws – Article 305

- Laws in force at the commencement of the Constitution are not affected by Article 301, unless the President directs otherwise.

(e) Saving of Laws Providing for State Monopoly

- Laws creating a State monopoly in any trade are protected from challenge under Article 301.
- Even if such laws directly restrict freedom of trade and commerce, they remain valid. Examples:
 - Monopoly in road transport—private transporters cannot complain.
 - Monopoly in banking—other bankers cannot claim violation of trade freedom.

(f) Article 307 – Appointment of Authority

- Parliament may establish by law an authority to carry out the purposes of Articles 301 to 304.
- The authority may be given such powers and duties as Parliament considers necessary.

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

- Creation of monopoly rights in favour of a person or body of persons to carry on any business prima facie affects the freedom of trade.
- But in certain circumstances it can be justified.
- After the Constitution (Amendment) Act, 1951, when the State creates a monopoly in favour of itself, it is not required to justify its action in Court as being reasonable.
- Sub-clause (ii) of clause (6) of Article 19 provides that the freedom of profession, trade or business does not prevent the State from undertaking directly or through a corporation owned or controlled by it, any trade, business, industry or service, whether to the exclusion of citizens fully or partly, or otherwise.
- If a law is passed creating a State monopoly, the Court must enquire as to what provisions of the law are basically and essentially necessary for creating such monopoly.
- Sub-clause (ii) of clause (6) protects only the essential and basic provisions of the monopoly law.
- Provisions which are subsidiary or incidental to the operation of the monopoly do not fall under Article 19(6)(ii).
- In *R.C. Cooper v. Union of India* (1970) 1 SCC 248, it was held that a law prohibiting certain banks from carrying on the banking business was a necessary incident of the business assumed by the Union and hence was not liable to challenge under Article 19(6)(ii) insofar as it affected the right of a citizen to carry on business.

THE JUDICIARY

General Structure

1. The Courts in the Indian legal system consist of:
 - (i) The Supreme Court,
 - (ii) The High Courts, and
 - (iii) The subordinate courts.

THE SUPREME COURT

- The Supreme Court is the highest Court in the country, both for ordinary law matters and for interpreting the Constitution.
- It is an institution created by the Constitution.
- Before independence, the Privy Council was the highest appellate authority for British India in ordinary law matters.
- Appeals in constitutional matters from High Courts lay to the Federal Court (created under the Government of India Act, 1935) and thereafter to the Privy Council.
- The Supreme Court has inherited the jurisdiction of both the Privy Council and the Federal Court.

- The jurisdiction of the Supreme Court under the present Constitution is more extensive than that of its predecessors.
- The Supreme Court entertains appeals (civil, criminal, and others) from High Courts and certain Tribunals.
- It has writ jurisdiction for enforcing Fundamental Rights.
- It can advise the President on reference made by the President on questions of fact or law.
- The Supreme Court also exercises a variety of other special jurisdictions.

HIGH COURTS

- The High Courts functioning under the Constitution were not created for the first time by the Constitution.
- Some High Courts existed before the Constitution; others were created after 1950.
- High Courts in British India were established under the Indian High Courts Act, 1861.
- Remaining High Courts were established or continued under the Constitution or special Acts.
- High Courts for each State (or group of States) have appellate, civil and criminal jurisdiction over lower courts.
- High Courts have writ jurisdiction to enforce Fundamental Rights and for other purposes.
- Some High Courts like Bombay, Calcutta and Delhi possess ordinary original civil jurisdiction for their cities.
- High Courts can also hear references made by the Income Tax Appellate Tribunal and other tribunals.
- Before the Constitution, writ jurisdiction was vested only in the High Courts of Bombay, Calcutta and Madras (the Presidency towns).

SUBORDINATE COURTS

- Subordinate civil and criminal courts function under ordinary law.
- They are created not by the Constitution but under laws of competent legislatures.

Civil Courts

- Each district has a District Court presided over by the District Judge, with Additional District Judges attached.
- Below them are Courts of Subordinate Judges, and in some States, Munsiffs.
- Civil Courts are created under State Civil Courts Acts.

Criminal Courts

- Criminal courts consist mainly of Magistrates and Courts of Session.
- Magistrates are divided into Judicial and Executive Magistrates under the Bharatiya Nagarik Suraksha Sanhita, 2023.
- Executive Magistrates do not conduct criminal trials but handle miscellaneous matters relating to public tranquillity, etc.
- In some States, Executive Magistrates are given limited powers to try specific offences.
- Judicial Magistrates are of two classes:
 - (i) Second Class

(ii) First Class

- Judicial Magistrates function under the control of the Court of Session.
- The Court of Session is itself a court of original jurisdiction and can try all offences and award any sentence, although a death sentence requires High Court confirmation.

Special Tribunals

- Besides regular courts, many specialised tribunals exist for direct taxes, labour, excise, customs, motor vehicle accident claims, copyright, and monopolies and restrictive trade practices.
- Cases of corruption are tried by Special Judges appointed under the Criminal Law Amendment Act, 1952.

WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

- According to Dicey, prerogative writs are the “bulwark of English Liberty.”
- The expression refers to extraordinary writs granted historically by the sovereign when ordinary remedies were inadequate.
- Over time, High Courts in England issued these writs where no ordinary remedy existed or the remedy was inadequate.
- Under Article 226, every High Court has power to issue directions, orders, or writs, including Habeas Corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari.
- These writs may be issued for enforcement of Fundamental Rights or for any other purpose.
- High Court writ jurisdiction extends throughout the territory of its jurisdiction.
- Where an effective alternative remedy is available, High Courts should not readily entertain petitions under Article 226 (e.g., in Company Law matters: *Ramdas Motors Transport Co. Ltd. v. T.A. Reddy*, AIR 1997 SC 2189).
- Under Article 32, the Supreme Court may be moved for issue of writs only for enforcement of Fundamental Rights.
- Article 32 itself is a Fundamental Right, giving direct access to the Supreme Court.
- High Courts have a wider writ jurisdiction than the Supreme Court because they can issue writs for enforcement of *any* legal right involving a public duty, not just Fundamental Rights.
- Supreme Court can issue writs against any person or government within the territory of India.
- High Courts can issue writs only when the person, authority, or cause of action is within their territorial jurisdiction.
- A petitioner is not required to approach the High Court first before moving the Supreme Court (*Romesh Thappar v. State of Madras*, AIR 1950 SC 124).
- Supreme Court’s writ jurisdiction extends to all Fundamental Rights (*Common Cause v. Union of India*, AIR 1999 SC 2979).

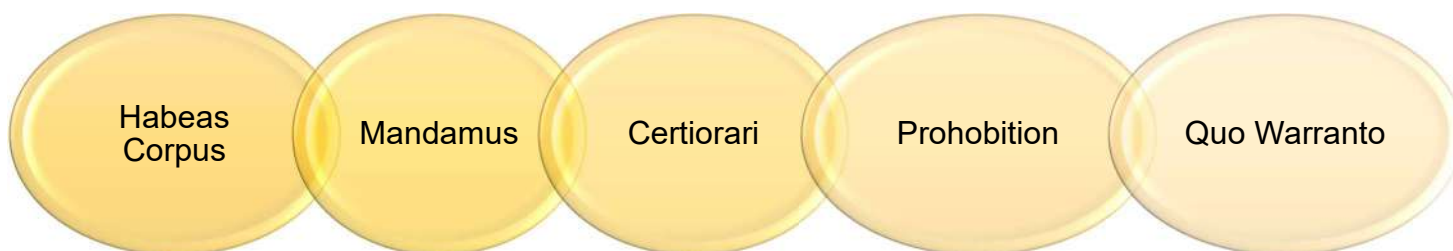
Case Law – Satender Kumar Antil vs. Central Bureau of Investigation and Ors., 2024 INSC 134 (Decided on 11 July 2022)

1. The Supreme Court noted the continuous filing of cases seeking bail after submission of the final report due to a wrong interpretation of Section 170 of the CrPC.

2. An endeavour was made by the Court to categorize different types of offences to serve as guidelines for the future.
3. The Court reaffirmed that “bail is the rule and jail is the exception”, which is based on the touchstone of Article 21 of the Constitution of India.
4. The Supreme Court issued certain directions meant for investigating agencies and courts, subject to State Amendments. These directions are:
 - a) The Government of India may consider introducing a separate enactment, similar to a *Bail Act*, to streamline the grant of bail.
 - b) Investigating agencies and their officers are duty-bound to comply with Sections 41 and 41A of the CrPC and the directions in *Arnesh Kumar*. Any dereliction should be reported to higher authorities for appropriate action.
 - c) Courts must satisfy themselves regarding compliance with Sections 41 and 41A. Non-compliance entitles the accused to the grant of bail.
 - d) All State Governments and Union Territories must facilitate standing orders for procedures under Sections 41 and 41A, keeping in view the Delhi High Court’s order (07.02.2018) and Delhi Police Standing Order No. 109/2020.
 - e) There should be no insistence on filing a bail application while considering applications under Sections 88, 170, 204 and 209 of the CrPC.
 - f) There must be strict compliance with the mandate in *Siddharth v. State of Uttar Pradesh*.
 - g) State and Central Governments must comply with directions regarding constitution of special courts. High Courts, with State Governments, must assess the need for such courts, and vacancies of Presiding Officers must be filled expeditiously.
 - h) High Courts must identify undertrial prisoners unable to comply with bail conditions and take action in terms of Section 440 of the CrPC, to facilitate their release.
 - i) While insisting on sureties, the mandate of Section 440 must be adhered to.
 - j) Similar exercises must be undertaken to ensure compliance with Section 436A of the CrPC at both district judiciary and High Court levels, as directed earlier in *Bhim Singh*.
 - k) Bail applications should be disposed of within two weeks, unless otherwise mandated by law. Anticipatory bail applications should be disposed of within six weeks, except when intervening applications exist.
 - l) All State Governments, Union Territories, and High Courts must file affidavits/status reports within four months.

TYPES OF WRITS

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



1. Habeas Corpus

- The writ of Habeas Corpus, an effective bulwark of personal liberty, is a remedy available to a person who is confined without legal justification.
- The words *Habeas Corpus* literally mean “to have the body”.
- When a prima facie case for the issue of the writ is made, the Court issues a rule nisi to the relevant authority to show cause why the writ should not be issued.
- The purpose is to let the Court know on what grounds the person has been confined, and to set him free if there is no justification for detention.
- The writ must be obeyed by the detaining authority by producing the detained person before the Court.
- Under Articles 32 and 226, any person can move the Supreme Court or High Court for this writ.
- The application may be filed by the prisoner or any person acting on his behalf to safeguard his liberty.
- No person can be punished or deprived of personal liberty except for violation of law and in the ordinary legal manner.
- Appeal to the Supreme Court may lie against an order granting or rejecting the writ (Articles 132, 134 or 136).
- Disobedience to this writ is punishable as contempt of court under the Contempt of Courts Act.

Example:

X is wrongfully detained by Y. X’s family, unaware of his whereabouts, can file a writ of habeas corpus on his behalf.

2. Mandamus

- The word Mandamus literally means “*we command*”.
- It is a command issued to direct any person, corporation, inferior court, or Government to do a particular thing specified therein which pertains to its office and is in the nature of a public duty.
- This writ is used when an inferior tribunal declines to exercise jurisdiction, while certiorari or prohibition apply when the tribunal wrongly exercises or exceeds jurisdiction.
- Mandamus can be issued against any public authority.
- It commands activity and ensures judicial enforcement of public duties.
- Courts may direct the executive to carry out Directive Principles in an appropriate case (*State of Maharashtra v. M.P. Vashi*, 1995).
- The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is sought.
- It is not issued where the authority has discretion.
- Under Articles 226 and 32, this writ can be issued by High Courts and Supreme Court.
- It does not lie against the President or Governor (Article 361).
- It does not lie against a private body unless the State is in collusion with such private party in violating a constitutional or statutory provision.
- It is a discretionary remedy, and the High Court may refuse if an alternative remedy exists, except where a fundamental right is infringed.

Example:

A direction by the High Court or Supreme Court to an authority to correct a PAN Card.

3. Prohibition

- A writ of Prohibition is issued to an inferior court preventing it from usurping jurisdiction not legally vested in it.
- It lies when a tribunal acts without jurisdiction, in excess of jurisdiction, or in violation of rules or law.
- It is generally issued before the trial is completed.
- Mandamus commands activity, whereas prohibition commands inactivity.
- It is available only against judicial or quasi-judicial authorities.
- It does not lie against a public officer who is not vested with judicial functions.
- If abuse of power is apparent, the writ may be of right and not merely discretionary.

Example:

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

4. Certiorari

- This writ is available against any body of persons having legal authority to determine questions affecting rights of subjects and having a duty to act judicially, when they act in excess of their legal authority (The King v. Electricity Commissioners, 1924).
- The writ removes proceedings to the High Court to quash a decision that exceeds jurisdiction.
- High Courts can issue certiorari throughout their territorial jurisdiction when a subordinate judicial authority:
 - (i) acts without or in excess of jurisdiction,
 - (ii) violates rules of natural justice, or
 - (iii) commits an error apparent on the face of the record.
- The Supreme Court's power arises under Article 32.
- Prohibition is issued at an earlier stage; certiorari is issued after the authority has exercised its powers, but the grounds are similar.

Example:

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

5. Quo Warranto

- The writ of Quo Warranto enables enquiry into the legality of a person's claim to a public office or franchise and allows ousting him if he is a usurper.
- The respondent must show the authority under which he holds the office.
- It is issued when:
 - (i) the office is public and substantive,
 - (ii) the office is created by statute or the Constitution,
 - (iii) the respondent has asserted a claim to the office (even if he has not assumed charge).
- The basis of quo warranto is the public interest in preventing unlawful occupation of a public office.
- It is a discretionary remedy.

Example:

Writ issued against illegal appointments to a public office.

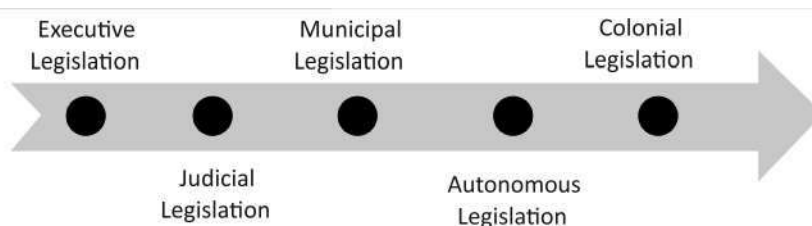
DELEGATED LEGISLATION

1. The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policies pursuant to the establishment of a welfare state as contemplated by our Constitution, have made it necessary for the legislatures to delegate its powers.
2. Further, the Parliamentary procedure and discussions in getting through a legislative measure in the Legislatures is usually time-consuming.
3. The three relevant justifications for delegated legislation are:
 - (i) the limits of the time of the legislature;
 - (ii) the limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations where direction is wanted; and
 - (iii) the need of some weapon for coping with situations created by emergency.
4. The delegation of the legislative power is what Hughes, Chief Justice, called flexibility and practicability (Currin Wallace 83 L. ed. 441).

Classification of Delegated Legislation

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

Classification of Subordinate Legislation



1. Executive Legislation

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

Thus, the rules framed by the Government under the various Municipal Acts fall under this category.

2. Judicial Legislation

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

3. Municipal Legislation

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

4. Autonomous Legislation

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

5. Colonial Legislation

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

Principles Applicable

- A body to which powers of subordinate legislation are delegated must directly act within the powers which are conferred on it, and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers.
- The doctrine of implied powers means that where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.
- Subordinate legislation cannot take effect unless published; therefore, there must be promulgation and publication in such cases, although there is no rule as to any particular kind of publication.
- Conditional legislation is defined as a statute that provides controls but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statute.
- In other words, in subordinate legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute, whereas in the case of conditional legislation, the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority the time and manner of carrying its legislation into effect (*Hamdard Dawa Khana v. Union of India*, AIR 1960 SC 554).
- While delegating powers to an outside authority, the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby.
- If an Act is contrary to the provisions of the Constitution, it is void because our Constitution embodies a doctrine of judicial review of legislation as to its conformity with the Constitution.
- In England, Parliament may delegate to any extent and even all its power of law-making to an outside authority.
- In the U.S.A., the Constitution embodies the doctrine of separation of powers, which prohibits the executive from being given law-making powers.

- On the question whether there is any limit beyond which delegation may not go in India, it was held in *In re Delhi Laws Act, 1912*, AIR 1951 SC 332, that there is a limit that essential powers of legislation or essential legislative functions cannot be delegated.
- However, there is no specific provision in the Constitution prohibiting delegation.
- On the question whether such doctrine is recognised in our Constitution, several principles have been laid down in various judicial decisions, which are as follows:
 - a. The primary duty of law-making has to be discharged by the Legislature itself; it cannot delegate its primary or essential legislative function to an outside authority in any case.
 - b. The essential legislative function consists in laying down the policy of the law and making it a binding rule of conduct.

In other words, the legislature must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority for carrying out the declared policy.

- c. If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.
- d. It follows that an Act delegating law-making powers to a person or body shall be invalid if it lays down no principles and provides no standard for the guidance of the rule-making body.
- e. In applying this test, the court may take into account the statement in the preamble to the Act, and if such statements afford a satisfactory basis for holding that the legislative policy or principle has been enunciated with sufficient accuracy and clarity, the preamble itself would satisfy the requirements of the relevant tests.
- f. In every case, it is necessary to consider the relevant provisions of the Act in relation to the delegation made, and the question whether the delegation is *intra vires* or not will have to be decided by application of the relevant tests.
- g. Delegated legislation may take different forms, such as conditional legislation, supplementary legislation or subordinate legislation, but each form is subject to the same rule that delegation made without indicating intelligible limits of authority is constitutionally incompetent.

RECENT AMENDMENTS

102nd Amendment

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

103rd Amendment

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

104th Amendment

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

SEPARATION OF POWERS

1. It is generally accepted that there are three main categories of governmental functions –
 - (i) the Legislative,
 - (ii) the Executive, and
 - (iii) the Judicial.
2. At the same time, there are three main organs of the Government in the State, i.e., legislature, executive and judiciary.
3. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government.
4. Thus, the legislature cannot exercise executive or judicial power; and the executive cannot exercise legislative or judicial power of the Government.
5. Article 50 of the Constitution of India deals with the separation of judiciary from executive and provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.
6. Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends.
7. He further said that for laws to be enforced by the same body that enacts them results in arbitrary rule and makes the judge a legislator rather than an interpreter of law.
8. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny if the legislative power would be added to the power of that person.
9. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons.
10. The different organs of government should therefore be prevented from encroaching on the province of the other organ.
11. In India, the executive is part of the legislature; the President is the head of the executive and acts on the advice of the Council of Ministers.
12. The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the Government have been sufficiently differentiated. (*Ram Jawaya v. State of Punjab*, AIR 1955 SC 549).
13. None of the three organs of the Government can take over the functions assigned to the other organs. (*Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Asif Hameed v. State of J&K*, 1989 AIR SC 1899).
14. In *State of Bihar v. Bihar Distillery Ltd.* (AIR 1997 SC 1511), the Supreme Court held that the judiciary must recognize the fundamental nature and importance of the legislative process and must accord due regard and deference to it.
15. The Legislature and Executive are also expected to show due regard and deference to the judiciary.

16. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government.
17. The concept of checks and balance is inherent in the constitutional scheme.

LAW MAKING PROCESS (HOW A BILL BECOMES AN ACT)

1. A Bill is the draft of a legislative proposal which has to pass through various stages before it becomes an Act of Parliament.

First Reading

- The legislative process starts with the introduction of a Bill in either House of Parliament – Lok Sabha or Rajya Sabha.
- A Bill can be introduced either by a Minister or by a Private Member.
- In the former case, it is known as a Government Bill and in the latter case it is called a Private Member's Bill.
- It is necessary for a Member-in-charge of the Bill to ask for leave to introduce the Bill.
- If leave is granted by the House, the Bill is introduced and this stage is known as the First Reading of the Bill.
- If the motion for leave to introduce a Bill is opposed, the Speaker may allow a brief explanatory statement by the Member who opposes the motion and the Member-in-charge who moved the motion.
- Where the motion for leave to introduce a Bill is opposed on the ground that the Bill initiates legislation outside the legislative competence of the House, the Speaker may permit a full discussion thereon.
- Thereafter, the question is put to the vote of the House.
- However, the motion for leave to introduce a Finance Bill or an Appropriation Bill is forthwith put to the vote of the House.

Publication in Gazette

- After a Bill has been introduced, it is published in the Official Gazette.
- Even before introduction, a Bill might, with the permission of the Speaker, be published in the Gazette.

Reference of Bill to Standing Committee

- After a Bill has been introduced, the presiding Officer of the House concerned can refer the Bill to the Standing Committee concerned for examination and report.
- If a Bill is referred to the Standing Committee, the Committee shall consider the general principles and clauses of the Bill referred to them and make report thereon.
- After the Bill has thus been considered, the Committee submits its report to the House.
- The report of the Committee, being of persuasive value, shall be treated as considered advice given by the Committee.

Second Reading

- The Second Reading consists of consideration of the Bill which is in two stages.
- First Stage: The first stage consists of general discussion on the Bill as a whole when the principle underlying the Bill is discussed.

- Second Stage: The second stage consists of clause-by-clause consideration of the Bill.

Third Reading

- Thereafter, the Member-in-charge can move that the Bill be passed.
- This stage is known as the Third Reading of the Bill.
- At this stage, the debate is confined to arguments either in support or rejection of the Bill.
- In passing an ordinary Bill, a simple majority of Members present and voting is necessary.
- But in the case of a Bill to amend the Constitution, a majority of the total membership of the House and a majority of not less than two-thirds of the Members present and voting is required in each House of Parliament.

Bill in the Other House

- After the Bill is passed by one House, it is sent to the other House for concurrence with a message to that effect.
- In the other House also, it goes through the stages described above, except the introduction stage.

Consideration of the Bill at a Joint Sitting

- If a Bill passed by one House is rejected by the other House, or the Houses finally disagree as to the amendments, or more than six months elapse without the Bill being passed by the other House, the President may call a joint sitting of the two Houses to resolve the deadlock.
- If at the joint sitting the Bill is passed by a majority of the total number of Members of both Houses present and voting, with amendments, if any, accepted by them, the Bill is deemed to have been passed by both Houses.
- There cannot be a joint sitting of both Houses on a Constitution Amendment Bill.

Assent of the President

- When the Bill is passed by both Houses, the Secretariat of the House last in possession of the Bill obtains the assent of the President.
- In the case of a Money Bill or a Bill passed at a joint sitting, the Lok Sabha Secretariat obtains the assent of the President.
- The Bill becomes an Act only after the President has given assent to it.

Case Laws

Skill Lotto Solutions v. Union of India, 2020 SCC OnLine SC 990

- The constitutional validity of levying taxes on lottery, betting and gambling was challenged.
- The Supreme Court held that taxation of lottery tickets and prize money is constitutionally lawful.
- The Court ruled that gaming and lotteries fall under the purview of GST and are legitimate under the law.
- It stated that the value of taxable supply must be determined as per Section 15 of the CGST Act, 2017, and prize money cannot be excluded from computation.

- The Court concluded that prize money is not to be excluded while determining taxable value for the levy of GST.

Municipal Corporation of Greater Mumbai v. Ankita Sinha, 2021 SCC OnLine SC 897

- The main issue was whether the National Green Tribunal (NGT) can exercise suo motu jurisdiction.
- The Supreme Court held that the Tribunal may initiate suo motu action, but such action is subject to providing opportunities of being heard to affected parties.
- The Court stated that even if the Tribunal initiates suo motu proceedings, it must give an opportunity to persons likely to be affected before passing adverse orders.
- Therefore, ex parte pre-emptory orders passed without giving such opportunity are to be treated as effaced from the record.

LESSON-3

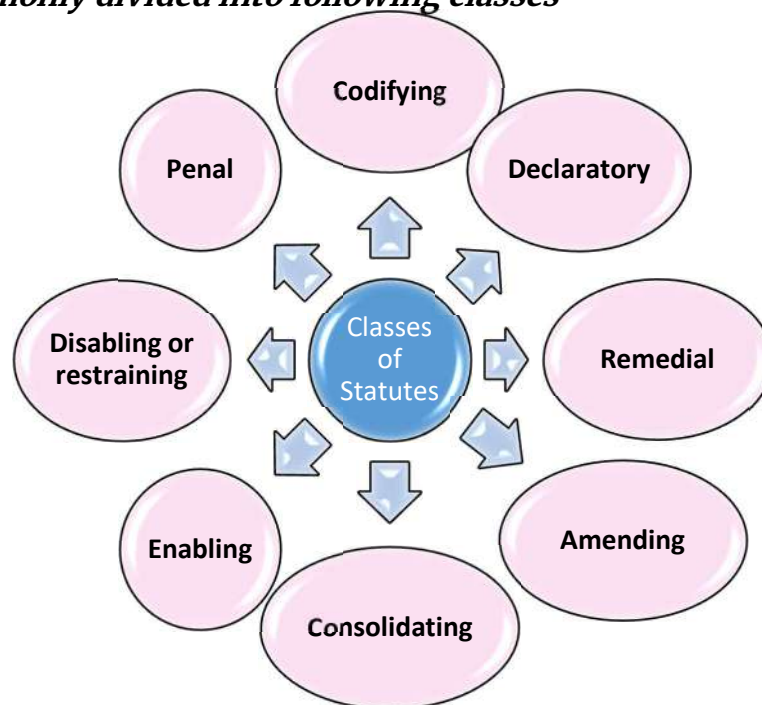
Interpretation of Statutes

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

INTRODUCTION

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

Statutes are commonly divided into following classes



- (1) Codifying, when they codify the unwritten law on a subject;
- (2) Declaratory, when they do not profess to make any alteration in the existing law, but merely declare or explain what it is;

- (3) Remedial, when they alter the common law, or the judge made (non-statutory) law;
- (4) Amending, when they alter the statute law;
- (5) Consolidating, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance;
- (6) Enabling, when they remove a restriction or disability;
- (7) Disabling or restraining, when they restrain the alienation of property;
- (8) Penal, when they impose a penalty or forfeiture.

NEED FOR INTERPRETATION OF A STATUTE

- Denning L.J., in *Seaford Court Estates Ltd. v. Asher* (1949) 2 K.B. 481 (498), observed the need for statutory interpretation:
 - It is impossible to foresee all facts that may arise and to provide for them in perfectly clear terms.
 - English language is not mathematically precise, and draftsmen of Acts are often unfairly criticized for ambiguities.
 - When defects appear, a judge cannot blame the draftsman but must find the intention of Parliament.
 - The judge should consider:
 - the language of the statute,
 - the social conditions giving rise to it, and
 - the mischief it aims to remedy.
 - The judge must supplement the written word to give “force and life” to the legislature’s intention.
 - A judge must not alter the material, but can iron out the creases in drafting.
- According to Halsbury’s Laws of England, 3rd Ed., vol. 2, p. 381:
 - The object of interpretation is to discover the intention of the author.
 - Courts must ascertain the meaning of the words used and give effect to the expressed intention.
 - It is not permissible to substitute presumed intention for the expressed intention.
 - Ordinary rules of construction must be applied even if the real intention may sometimes be defeated.
 - This ensures certainty in law.
- According to Salmond:
 - Interpretation or construction is the process by which courts ascertain the meaning of the legislature through the authoritative forms in which it is expressed.

MEANINGS OF INTERPRETATION OF STATUTES

- The phrase “Interpretation of Statutes” implies the judicial process of determining, in accordance with rules and presumptions, the true meaning of Acts of Parliament.
- It conveys understanding of the ideas of the creator, or provides clarification for a statute.

- The purpose of interpretation is to ascertain the intention of the Legislature.
- Words of the statute are interpreted to ascertain the mind of the legislature from their natural and grammatical meaning.
- No hierarchy exists among rules of interpretation; the court applies rules considering facts and intent of the statute.
- Distinction between Interpretation and Legislation:
 - Court interprets, does not legislate.
 - Misuse or gaps in law require Legislature to amend, modify or repeal.
 - Statutory interpretation identifies meaning borne by the words in context.

CASUS OMISSUS RULE

- Defined by Merriam-Webster as a situation omitted or not provided for by statute, governed by common law.
- Basic rules of interpretation:
 1. Every word in a statute is to be given meaning.
 2. Court cannot read into a statute or rewrite an unambiguous provision.
- Courts interpret law against rewriting.
- Nothing is to be added or removed unless there are adequate grounds to infer legislative intent.
- When language is clear, no need to interpret words like 'or', which should retain plain meaning.
- Judges may read in or read out words necessarily implied or surplus to avoid provisions being:
 - unintelligible,
 - absurd,
 - unworkable, or
 - irreconcilable with the statute.

INTERPRETATION OF DEFINITION CLAUSE

- Every statute usually has a definition section (interpretation clause) providing meanings of words and phrases.
- Example: Section 2 of the Companies Act, 2013 defines various terms.
- Words like "unless the context otherwise requires" indicate definitions are conclusive unless context demands otherwise.
- While interpreting undefined words:
 - Consider the context in which the word is used.
 - Use the popular sense and give due consideration to the object of the statute.
- Definitions may be:
 - Exhaustive – restricted meaning of a word.
 - Inclusive – allows further interpretation according to context.

Example - Exhaustive Definition: “abridged prospectus” means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf.

(Section 2(1) of the Companies Act, 2013.

Inclusive Definition: As per section 2(22AA) of the Income-tax Act, 1961 “document” includes an electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000

PRINCIPLES OF INTERPRETATION INCLUDING HEYDON’S RULE OF INTERPRETATION, GOLDEN RULE OF INTERPRETATION

- At the outset, it must be clarified that, it is only when the intention of the legislature as expressed in the statute is not clear, that the Court in interpreting it will have any need for the rules of interpretation of statutes.
- It may also be pointed out here that since our legal system is, by and large, modelled on Common Law system, our rules of interpretation are also same as that of the system.
- It is further to be noted, that the so called rules of interpretation are really guidelines.

Primary Rules

- The Primary Rule: Literal Construction
- The Mischief Rule or Heydon’s Rule
- Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat
- Rule of Harmonious Construction
- Rule of Ejusdem Generis

Other Rules of Interpretation

- Expressio Unis Est Exclusio Alterius
- Contemporanea Expositio Est Optima Et Fortissima in Lege
- Noscitur a Sociis
- Strict and Liberal Construction

(i) Primary Rules

(a) The Primary Rule: Literal Construction

- According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.
- The objectives ‘natural’, ‘ordinary’ and ‘popular’ are used interchangeably.
- Interpretation should not be given which would make other provisions redundant (*Nand Prakash Vohra v. State of H.P., AIR 2000 HP 65*).

- If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words.
- “The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases.”
- “Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used”. (*Brett M.R.*)
- It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.
- A construction which would leave without effect any part of the language of a statute will normally be rejected.
- Thus, where an Act plainly gave an appeal from one quarter sessions of another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated.
- Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.

Some of the other basic principles of literal construction are:

1. Every word in the law should be given meaning as no word is unnecessarily used.
 2. One should not presume any omissions and if a word is not there in the Statute, it shall not be given any meaning.
- While discussing rules of literal construction the Supreme Court in *State of H.P v. Pawan Kumar (2005) 4 SCALE, P.1* held:
 - One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.
 - If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended, abridged, so far as to avoid such an inconvenience, but no further.
 - The onus of showing that the words do not mean what they say lies heavily on the party who alleges it.
 - He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

(b) The Mischief Rule or Heydon’s Rule

- In *Heydon’s Case, [1584] [76 ER 637 360 REP 7a]*, it was resolved by the Barons of the Exchequer “that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered:

1. What was the Common Law before the making of the Act;
 2. What was the mischief and defect for which the Common Law did not provide;
 3. What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth; and
 4. The true reason of the remedy.
- Although judges are unlikely to propound formally in their judgments the four questions in Heydon's Case, consideration of the "mischief" or "object" of the enactment is common and will often provide the solution to a problem of interpretation.
 - Therefore, when the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words is the rule laid down in Heydon's case which has "now attained the status of a classic".
 - The rule directs that the Courts must adopt that construction which "shall suppress the mischief and advance the remedy".
 - But this does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregard the context and the collection in which they occur. (*See Umed Singh v. Raj Singh, A.I.R. 1975 S.C. 43*)
 - The Supreme Court in *Sodra Devi's case, AIR 1957 S.C. 832* has expressed the view that the rule in Heydon's case is applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning.
 - The correct principle is that after the words have been construed in their context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule.

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

- Normally, the words used in a statute have to be construed in their ordinary meaning, but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words, does not meet the ends as a fair and a reasonable construction.
- Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur.
- Often enough interpreting the provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve.
- According to this rule, the words of a statute must be construed ut res magis valeat quam pereat, so as to give a sensible meaning to them.
- A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.
- It is the duty of a Court in constructing a statute to give effect to the intention of the legislature.
- If, therefore, giving of literal meaning to a word used by the draftsman particularly in penal statute would defeat the object of the legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning which will advance the remedy and suppress the mischief.

Case Law

- Tirath Singh v. Bachittar Singh (A.I.R. 1955 S.C. 830)
 - Literal meaning of a statute can be modified if it leads to absurdity, injustice, or contradicts the purpose of the law.
- Kanwar Singh v. Delhi Administration (AIR 1965 S.C. 871)
 - Courts can depart from dictionary meaning to advance the remedy and suppress mischief, but must avoid guessing or assuming intentions.
 - Words of a statute may be adjusted to fit the legislature's actual intention.
 - If the literal meaning is unclear, interpretation must follow the purpose, policy, or spirit of the statute (ratio-legis).
- Newman Manufacturing Co. Ltd. v. Marrables (1931) 2 KB 297; Williams v. Ellis (1880) 49 L.J.M.C.
 - Supports modifying expressions in a statute to reflect its intended purpose.
- RBI v. Peerless General Finance & Investment Co. Ltd. (1987) 1 SCC 424
 - Statutes must be read in the context of their enactment.
 - Sections, clauses, phrases, and words should be understood as part of the whole Act.
- Chairman Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. (AIR 2007 SC 2458)
 - Reinforces reading statutes in context to understand the intended meaning of words and provisions.
- Municipal Corporation of Hyderabad vs. P.N. Murthy & Ors., 1987 SCR (2) 107
 - Relevant sections should be interpreted in a meaningful, purposeful, and rational way.
 - Example: "vest" in Section 202(1)(c) means vesting in both title and possession.

(d) Rule of Harmonious Construction

- A statute must be read as a whole.
- One provision of the Act should be construed with reference to other provisions in the same Act to make a consistent enactment of the whole statute.
- Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute.
- It is the duty of the Courts to avoid "a head on clash" between two sections of the same Act.
- Whenever it is possible to do so, Courts must construct provisions which appear to conflict so that they harmonise (Raj Krishna v. Pinod Kanungo, A.I.R. 1954 S.C. 202 at 203).
- Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be interpreted so that, if possible, effect may be given to both.
- This is what is known as the "rule of harmonious construction."

Case Laws on Harmonious Construction:

- The Supreme Court applied the rule in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution.
- It was held that the right of every religious denomination to manage its own affairs [Article 26(b)] is subject to laws for social welfare, reform, or opening Hindu religious institutions

to all classes [Article 25(2)(b)] (Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255).

- In *M/s New India Sugar Mills Ltd. vs. Commissioner of Sales Tax, Bihar*, 1963 AIR 1207, the Supreme Court observed:
 - Expressions in a statute should be understood in a sense that best harmonises with the object of the statute.
 - Interpretation should effectuate the object of the Legislature.

(e) Rule of Ejusdem Generis

- Ejusdem Generis literally means “of the same kind or species”.
- The rule can be stated thus:
 1. In an enumeration of different subjects in an Act, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed down by treating them as applying to things of the same kind as those previously mentioned, unless there is something to show that a wide sense was intended.
 2. If the particular words exhaust the whole genus, then the general words are construed as embracing a larger genus.
- In other words, the ejusdem generis rule is that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose.
- It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature (*Jage Ram v. State of Haryana*, A.I.R. 1971 S.C. 1033).
- To apply the rule the following conditions must exist:
 1. The statute contains an enumeration by specific words.
 2. The members of the enumeration constitute a class.
 3. The class is not exhausted by the enumeration.
 4. A general term follows the enumeration.
 5. There is a distinct genus which comprises more than one species.
 6. There is no clearly manifested intent that the general term be given a broader meaning than the doctrine requires (See *Thakura Singh v. Revenue Minister*, AIR 1965 J & K 102).

Question: Which of the given is not a primary rule of Interpretation?

Options:

- (A) Literal Construction
- (B) Heydon’s rule
- (C) Noscitur a Sociis
- (D) Ejusdem Generis

Answer: (C)

- The rule of ejusdem generis must be applied with great caution, because it implies a departure from the natural meaning of words, in order to give them a meaning or supposed intention of the legislature.
- The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished.
- The rule requires that specific words are all of one genus, in which case the general words may be presumed to be restricted to that genus.
- Whether the rule of ejusdem generis should be applied or not to a particular provision depends upon the purpose and object of the provision which is intended to be achieved.

(ii) Other Rules of Interpretation

(a) Expressio Unis Est Exclusio Alterius

- The rule means that express mention of one thing implies the exclusion of another.
- General words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction.
- Many things are put into a statute ex abundanti cautela, and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute.
- The method of construction according to this maxim must be carefully watched.
- Failure to make the 'expressio' complete may arise from accident. Similarly, the 'exclusio' is often the result of inadvertence or accident because it never struck the draftsman that the thing supposed to be excluded requires specific mention.
- The maxim ought not to be applied when its application leads to inconsistency or injustice.
- Similarly, it cannot be applied when the language of the Statute is plain with clear meaning (Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, AIR 1960 SC 801).

(b) Contemporanea Expositio Est Optima Et Fortissima in Lege

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

meaning will be given by the Courts, except when title to property may be affected or when everyday transactions have been entered into on such wrong interpretation.

(c) Noscitur a Sociis

- ‘Noscitur a Sociis’, i.e., “It is known by its associates”.
- Meaning of a word should be known from its accompanying or associating words.
- It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words.
- A word in a statutory provision is to be read in collocation with its companion words.
- The pristine principle based on the maxim ‘noscitur a socitis’ has much relevance in understanding the import of words in a statutory provision (K. Bhagirathi G. Shenoy v. K.P. Ballakuraya, AIR 1999 SC 2143).
- The rule states that where two or more words which are susceptible of analogous meaning are coupled together, they are understood in their cognate sense.
- It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful that the present rule of construction can be usefully applied.
- The same words bear the same meaning in the same statute. But this rule will not apply:
 1. When the context excludes that principle.
 2. If sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.
 3. Where it would cause injustice or absurdity.
 4. Where different circumstances are being dealt with.
 5. Where the words are used in a different context.

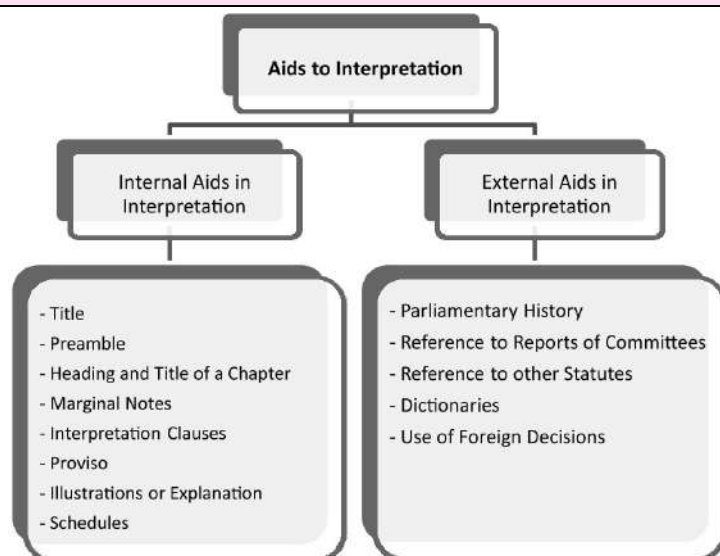
(d) Strict and Liberal Construction

- In Wiberforce on Statute Law:
 - Strict construction: “Acts are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended”.
 - Liberal construction: “Everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute”.
- Beneficial construction to suppress the mischief and advance the remedy is generally preferred.
- A Court invokes the rule which produces a result that satisfies its sense of justice in the case before it.
- Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (literal, golden, and mischief rules) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another.
- Sometimes a Court discusses all the three approaches.
- Sometimes it expressly rejects the ‘mischief rule’ in favour of the ‘literal rule’.
- Sometimes it prefers, although never expressly, the ‘mischief rule’ to the ‘literal rule’.

PRESUMPTIONS

- Where the meaning of the statute is clear, there is no need for presumptions.
- But if the intention of the legislature is not clear, there are a number of presumptions:
 1. Precision of Words: That the words in a statute are used precisely and not loosely.
 2. Protection of Vested Rights: That vested rights, i.e., rights which a person possessed at the time the statute was passed, are not taken away without express words, or necessary implication, or without compensation.
 3. Mens Rea in Criminal Law: That “mens rea”, i.e., guilty mind, is required for a criminal act. There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent. The general rule applicable to criminal cases is:
 - “actus non facit reum nisi mens sit rea” (The act itself does not constitute guilt unless done with a guilty intent).
 4. State Immunity: That the state is not affected by a statute unless it is expressly mentioned as being so affected.
 5. Consistency with International Law: That a statute is not intended to be inconsistent with the principles of International Law. Although judges cannot declare a statute void as being repugnant to International Law, if two alternatives present themselves, judges will choose that which is not at variance with it.
 6. Legislature Knows the Law: That the legislature knows the state of the law.
 7. No Unexpressed Alteration: That the legislature does not make any alteration in the existing law unless by express enactment.
 8. Knowledge of Executive and Judiciary Practices: That the legislature knows the practice of the executive and the judiciary.
 9. Necessary Powers: Legislature confers powers necessary to carry out duties imposed by it.
 10. No Mistake: That the legislature does not make mistake. The Court will not even alter an obvious one, unless it is to correct faulty language where the intention is clear.
 11. No Futility: The law compels no man to do that which is futile or fruitless.
 12. Legal Fictions: Legal fictions are statements or suppositions which are known to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome and substantial justice secured. In construing the scope of a legal fiction, it is proper and necessary to assume all those facts on which alone the fiction can operate.
 13. Delegation of Powers and Duties: Where powers and duties are interconnected and it is not possible to separate one from the other, the delegation of powers takes with it the duties.
 14. Doctrine of Natural Justice: The doctrine of natural justice is really a doctrine for the interpretation of statutes, under which the Court will presume that the legislature, while granting a drastic power, must intend that it should be fairly exercised.

AIDS TO INTERPRETATION



(a) Internal Aids in Interpretation

1. Title

- The long title of an Act is a part of the Act and is admissible as an aid to its construction.
- The long title sets out in general terms the purpose of the Act and it often precedes the preamble.
- It must be distinguished from short title, which implies only an abbreviation for purposes of reference, the object of which is identification and not description.
- The true nature of the law is determined not by the name given to it but by its substance.
- The long title is a legitimate aid to the construction.
- Illustration: While dealing with the Supreme Court Advocates (Practice in High Court) Act, 1951, S.R. Das, J. observed: “One cannot but be impressed at once with the wording of the full title of the Act.. It is now a settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of an enactment.”

2. Preamble

- The true place of a preamble in a statute was at one time, the subject of conflicting decisions.
- In *Mills v. Wilkins* (1794) 6 Mad. 62, Lord Hold said: “the preamble of a statute is not part thereof, but contains generally the motives or inducement thereof”.
- On the other hand, it was said that “the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischief it was intended to remedy”.
- The modern rule lies between these two extremes:

- Where the enacting part is explicit and unambiguous, the preamble cannot be resorted to, control, qualify, or restrict it.
- Where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it (Raj Mal v. Harnam Singh (1928) 9 Lah. 260).
- In Powell v. Kempton Park Race Course Co. (1899) AC 143, 157, Lord Halsbury said:
 - “A preamble may afford useful light as to what a statute intends to reach” and “if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment”.
- This rule has been applied to Indian statutes by the Privy Council in Secretary of State v. Maharaja Bobbili (1920) 43 Mad. 529 and by Courts in India in Burrakur Coal Co. v. Union of India, AIR 1961 SC 154, Re Kerala Education Bill, AIR 1958 SC 956, Bishambar Singh v. State of Orissa, AIR 1954 SC 139.
- In Kashi Prasad v. State, AIR 1967 All. 173, Allahabad High Court held that the preamble cannot be used to defeat enacting clauses, but it is a key for the interpretation of the statute.
- Supreme Court in Kamalpura Kochunni v. State of Madras, AIR 1960 SC 1080: The preamble may be consulted in case any ambiguity arises and may help fix the meaning of words to keep the effect of the statute within its real scope.

3. Heading and Title of a Chapter

- In different parts of an Act, there is generally found a series of enactments applicable to some special object, preceded by a heading.
- It is settled that headings or titles prefixed to sections or group of sections can be referred to in construing an Act.
- Conflicting opinions exist as to what weight should be attached to the headings:
 - One view: A heading gives the key to interpretation of clauses unless inconsistent with wording. Headings might be treated as preambles to the provisions following them.
 - Another view: Resort to the heading can only be taken when the enacting words are ambiguous.
- Lord Goddard, C.J.: Courts can look at headings to resolve doubts for ambiguous words, but headings cannot give a different effect to clear words.
- Patanjali Shastri, J.: The title of a chapter cannot restrict the plain terms of an enactment.
- Madhya Pradesh High Court, Suresh Kumar v. Town Improvement Trust, AIR 1975 MP 189: Headings can be referred to for construction of doubtful expressions but cannot restrict plain terms.
- Supreme Court, Frick India Ltd. v. Union of India, AIR 1990 SC 689: Headings cannot control plain words of the provision. They may only aid in case of ambiguity.

4. Marginal Notes

- In England, Courts disregard marginal notes.

- In India, opinions differ, but the weight of authority: Marginal notes cannot be used for construing the section.
- *Balraj Kumar v. Jagatpal Singh*, 26 All. 393: No reason to give marginal notes greater authority than in English statutes.
- *Patanjali Shastri, J., C.I.T. v. Anand Bhai Umar Bhai*, AIR 1950 SC 134: Marginal notes cannot be referred to for construing the statute.
- *Chandrajai Rao v. Income-tax Commissioner*, AIR 1970 SC 158: Marginal note cannot control the meaning of the section if language is clear.
- Privy Council, *Balraj Kumar v. Jagatpal Singh* (1904) 26 All. 393: Marginal notes are not to be referred to for construction.
- Supreme Court, *Western India Theatres Ltd. v. Municipal Corporation of Poona*, 1959 SCJ 390: Marginal note cannot be invoked where meaning is clear.
- Marginal notes in the Constitution may be used as prima facie clue, e.g., Article 286.
- Supreme Court: Reference to marginal note is permissible when the main provision is interpreted differently (*Sarbajit Rick Singh v. Union of India* (2008) 2 SCC 417; *Dewan Singh v. Rajendra Prasad* (2007) 1 Scale 32).

5. Interpretation Clauses

- Statutes often contain definitions of words used elsewhere in the statute.
- Purpose: Avoid repetition and describe subject-matter clearly.
- Definitions may be borrowed from an earlier Act.
- A definition may be restrictive or extensive:
 - 'Means' – prima facie restrictive and exhaustive.
 - 'Include' – prima facie extensive.
 - 'Means and includes' – exhaustive.
 - 'To apply to and include' – extensive.
 - 'So deemed to include' – extensive by legal fiction.
- A definition may include and exclude, where exclusion of one category implies inclusion of others.
- Definition section may be ambiguous; must be interpreted in light of other provisions and ordinary connotation.
- Definition cannot be read in isolation; it gives precision and certainty without contradicting the section.
- When a word is defined, that definition governs its use in the statute.
- For words with multiple inclusive meanings, context of the scheme, language, provision, and object must be considered (*Balkrishnan v. M. Bhai* AIR 1999 MP 86).

6. Proviso

- Natural presumption: But for the proviso, the enacting part would have included the subject-matter of the proviso.
- Lord Macmillan: Proviso excepts and deals with a case that would otherwise fall within general language; its effect is confined to that case.

- Hidayatullah, J.: Proviso qualifies or creates an exception; ordinarily not a general rule.
- Distinction:
 - 'Exception' – restrains enacting clause to particular cases.
 - 'Proviso' – removes special cases from general enactment and provides specially.
 - 'Saving clause' – preserves existing rights, remedies, or privileges.

7. Illustrations or Explanation

- Illustrations are part of the statute and furnish indication of legislative intention.
- Explanations clarify meaning of words in the section and are part of the enactment.
- Illustrations cannot modify language or curtail/expand ambit of the section.
- Meaning of explanation depends on its terms, and purpose inferred from language.
- Explanation should harmonise with section, clear ambiguity, not widen ambit.
- Explanation may be added ex abundanti cautela to allay groundless apprehension (Lalla Ballanmal v. Ahmad Shah, 1918 P.C. 249).

8. Schedules

- Schedules form part of the statute; must be read together with the Act.
- Expressions in the schedule cannot control the express enactment (Allen v. Flicker, 1989).
- Ramchand Textile v. Sales Tax Officer, AIR 1961 All. 24: If inconsistency arises, enactment prevails.
- Rules for Act and Schedule:
- If Act says schedule is for certain purpose and heading supports it, read Act and schedule together for that purpose.
- If schedule wording extends beyond purpose, give effect to clear words; do not limit by heading or Act purpose.
 - Whether requirement in a form is mandatory or directory depends on purpose, object, and relation to other provisions.
 - Where forms are part of rules, authority may prescribe form.
 - Statement of objects and reasons / notes on clauses:
 - Can be relied upon if clauses adopted without change.
 - If extensive changes, original statement may not reflect changed provisions.
 - Courts enquire what legislature enacted.
 - Reference to statement of objects and reasons can legitimately explain:
 1. What was the law before the Act.
 2. The mischief or defect in previous law.
 3. The remedy intended.
 4. The reasons for the statute.

(b) External Aids in Interpretation

- Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act.
- Where the words of an Act are clear and unambiguous, no resource to extrinsic matter, even if it consists of the sources of the codification, is permissible.
- But where it is not so, the Court can consider, apart from the intrinsic aids, such as preamble and the purview of the Act:
 - Prior events leading up to the introduction of the Bill, out of which the Act has emerged.
 - Subsequent events from the time of its introduction until its final enactment, like the legislation, history of the Bill, Select Committee reports.

Parliamentary History

- The Supreme Court enunciated the rule of exclusion of Parliamentary history in the way it is enunciated by English Courts, but on many occasions, the Court used this aid in resolving questions of construction.
- The Court has now veered to the view that legislative history within circumspect limits may be consulted by Courts in resolving ambiguities.
- The Court is entitled to take into account:
 - “Such external or historical facts as may be necessary to understand the subject-matter of the statute”.
 - “The surrounding circumstances” which existed at the time of passing of the statute.
- Inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself.

Reference to Reports of Committees

- The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into:
 - “So as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So we should not be unduly influenced by the Report”
 - [Letang v. Cooper (1964) 2 All. E.R. 929; Assam Railways & Trading Co. Ltd. v. I.R.C. (1935) A.C. 445]
- When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision.
 - [Davis v. Johnson (1978) 1 All. E.R. 1132]
- Where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.
- Present trends in the European Economic Community Countries and the European Court:

- Interpret treaties, conventions, statutes, etc., by reference to travaux préparatoires (all preparatory records such as reports and other historical material).

Reference to Other Statutes

- A statute must be read as a whole as words are to be understood in their context.
- Extension of this rule of context permits reference to other statutes in pari materia, i.e., statutes dealing with the same subject matter or forming part of the same system.
- Viscount Simonds: Right and duty to construe every word of a statute in its context, including other statutes in pari materia.
- Meaning of pari materia (American case):
 - “Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things.
 - The word par must not be confounded with similis.
 - It intimates not likeness merely, but identity.
 - Applicable to public statutes or general laws made at different times and in reference to the same subject.
 - When two pieces of legislation are of differing scopes, it cannot be said they are in pari materia.”
- Legislative practice: Incorporate by reference provisions of some other Act if relevant for the purposes of and in furtherance of the scheme and subjects of the Act.
- Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute.
- Later law is entitled to weight when it comes to the problem of construction.
- Generally, a subsequent Act affords no useful guide to an earlier Act.
- Under special circumstances, a subsequent Act may be consulted if:
 - Both laws are on the same subject.
 - Part of the earlier Act is ambiguous and capable of different meanings.
- A repealed statute must be considered as if it had never existed, but the Court can look at it in pari materia on a question of construction.
- Regulations cannot alter or vary the meaning of the words of a statute.
 - May be looked at as an interpretation by the Government department.
 - Assist in interpretation and detail provisions consistently with terms of the Act.

Dictionaries

- When a word is not defined in the Act, dictionaries may be referred to to find the general sense in common parlance.
- In selecting meanings, regard must be had to the context, as “the meaning of words and expressions used in an Act must take their colour from the context in which they appear”.
- When context makes meaning clear, no need to search dictionaries.
- Krishna Aiyar, J.:
 - “Dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically the definition clause furnish a different denotation.”

- Words may have technical or legal meaning; in that case, understood in that sense.
- Judicial decisions on statutes in pari materia have more weight than dictionaries.

Use of Foreign Decisions

- Foreign decisions from countries following the same system of jurisprudence may be referred to.
- Assistance of such decisions is subject to the qualification:
 - Prime importance is given to the language of the Indian statute, circumstances, and setting, and Indian conditions where it is applied.

Question: Which of the following is Internal aid to Interpretation?

Options:

- (A) Marginal Notes
- (B) Parliamentary History
- (C) Reference to Reports of Committees
- (D) Reference to other Statutes

Answer: (A)

Case Law

The Authority for Clarification and Advance Ruling & Anr. v. M/s. Aakavi Spinning Mills (P) Ltd

Court: Supreme Court of India

Date: 12.01.2022

Facts:

- The Authority for Clarification and Advance Ruling held that “Hank Yarn” under Entry 44, Part B, Fourth Schedule, Tamil Nadu VAT Act, 2006, meant only Cotton Hank Yarn and not Viscose Staple Fiber (VSF) Hank Yarn.
- Single Judge of the High Court agreed.
- Division Bench of the High Court held:
 - The language of Entry 44 was clear; no external aids were needed.
 - Budget speech did not indicate any restriction to Cotton Hank Yarn.
- Appeal made to the Supreme Court.

Supreme Court Decision:

- No need to refer to external aids like Finance Minister’s speech due to plain language of Entry 44.
- Even if Budget speech is considered, it does not support restricting exemption to Cotton Hank Yarn.
- Conclusion: Cotton Hank Yarn continues to be exempt under Entry 44.

LEGAL TERMINOLOGIES & LEGAL MAXIMS

Term / Maxim	Meaning
A priori	From the antecedent to the consequent
Ab initio	From the beginning
Absolute sententia expositore non indiget	Plain words require no explanation
Actio mixta	Mixed action
Actio personalis moritur cum persona	A personal right of action dies with the person
Actionable per se	The very act is punishable; no proof of damage required
Actus Curiae Neminem Gravabit	Act of the Court shall prejudice no one
Actus non facit reum nisi mens sit rea	An act does not make a man guilty unless there be guilty intention
Actus reus	Wrongful act
Ad hoc	For the particular end or case at hand
Ad idem	At the same point
Ad valorem	According to value
Aliunde	From another source
Amicus Curiae	Friend of the Court, appointed to assist the Court
Animus possidendi	Intention to possess
Audi alteram partem	Hear the other side
Benami	Nameless
Bona fide	Good faith; genuine
Caveat	Caution registered to indicate officials not to act without notice
Caveat emptor	Let the buyer beware
Caveat actor	Let the doer beware
Caveat venditor	Let the seller beware
Certiorari	Writ to remove records from inferior court to High Court to quash decision
Cestui que trust	Person with equitable right to property; beneficiary
Consensus ad idem	Common consent necessary for binding contract
Contemporanea expositio est optima et fortissima lege	Contemporaneous exposition is best and strongest in law
Corpus delicti	Body/gist of the offence
Cy pres	As nearly as may be practicable
Damnum sine injuria	Damage without injury
De facto	In fact
De jure	By right, in law
Dehors	Outside; foreign to
De novo	To make something new; to alter
Dies non	Day on which work is not performed
Deceit	Anything intended to mislead another
Del credere agent	Mercantile agent indemnifying employer for failure of contracted parties

Delegate potestas non potest delegari	Delegated power cannot be delegated further
Delegatus non potest delegare	A delegate cannot delegate
Dictum	Statement of law not necessary to decision
Dispono	Convey legally
Ejusdem generis	General words following specific words are confined to things of same kind
Estoppel	Stopped from denying
Ex parte	Proceedings in absence of the other party
Expressio unius est exclusio alterius	Express mention of one thing excludes another
Ex turpi causa non oritur actio	No action arises from illegal/immoral cause
Fatum	Beyond human foresight
Fait accompli	Things done; an accomplished act
Factum probandum	Fact in issue to be proved
Factum probans	Relevant fact
Ferae naturae	Dangerous by nature
Force majeure	Circumstance beyond one's control; irresistible force
Generalia specialibus non derogant	General things do not derogate from special
Habeas corpus	Writ to have body brought before judge
Ignorantia legis neminem excusat	Ignorance of law excuses no one
Injuria sine damno	Injury without damage
Interest reipublicae ut sit finis litium	Public interest requires a limit to litigation
Ipsa facto	By the very nature of the case
In promptu	In readiness
In posse	In a state of possibility
In limine	Initial stage; at outset
In lieu of	Instead of
Inter alia	Among other things
Inter se	Among themselves
In specie	In kind
Inter vivos	Between living persons
Intra vires	Within powers
In personam	Relief sought against a specific person
Indicia	Symbol; token; mark
Innuendo	Allusive remark
Jus in personam	Right against a person
Jus in rem	Right against the world at large
Jus non scriptum	Unwritten law; customary law
Jus scriptum	Written law
Lex Mercatoria	Law merchant; customs of merchants incorporated into common law
Lex fori	Law of the forum of court
Lis	Suit; cause of action
Lis pendens	Pending suit
Locus standi	Right to appear and be heard before tribunal

Mala fide	In bad faith
Mandamus	Writ of command by higher court to lower court/public authority
Mens rea	Guilty mind
Manesuetae naturae	Harmless by nature
Mesne profits	Rents/profits received by trespasser during occupation
Misnomer	Wrong name
Mutatis-mutandis	With necessary changes in details
Noscitur a sociis	Word known by its associates
Obiter dictum	Incidental opinion not binding
Onus probandi	Burden of proof
Pari passu	On equal footing; proportionately
Per se	By itself; taken alone
Persona non-grata	Person not wanted
Per incuriam	Through inadvertence; want of care
Prima facie	At first sight; on the face of it
Profit a prendre	Right to take profit from another's land
Pro bono publico	For public good
Pro forma	As a matter of form
Pro rata	In proportion
Posteriori	From consequences to antecedent
Puisne mortgage	Second mortgage
Pari causa	Similar circumstances; equal right
Pari materia	Relating to same person or thing
Qui facit per alium facit per se	Acts through another acts by himself
Quo warranto	Writ calling to show authority to hold office
Quia timet	Action brought to prevent apprehended wrong
Quid pro quo	Something for something
Ratio decidendi	Principle or reason underlying a decision
Res judicata	Decision once rendered cannot be re-agitated
Res ipsa loquitur	The thing speaks for itself
Respondent superior	Let principal be liable
Res sub judice	Matter under consideration
Res gestae	Facts relevant to case and admissible in evidence
Rule nisi	Rule that becomes final unless cause shown against it
Scire facias	Your cause to know
Status quo	Existing state of things
Scientiet volenti non fit injuria	Injury not done to one who knows and consents
Spes successionis	Chance to succeed as heir on another's death
Supra	Above; refers to previous part of text
Suppressio veri	Suppression of knowledge
Sui juris	Of one's own right
Simpliciter	Simply; without addition

Scienter	Knowledge of circumstances making one liable
Sine qua non	Indispensable condition
Situs	Position; situation; location
Suo motu	On its own motion
Stare decisis	Precedent; let the decision stand
Sine die	Without day being appointed
Travaux preparatoires	Preparatory records
Tortum	Civil wrong actionable without contract
Uberrimae fide	Of utmost good faith
Ubi jus ibi remedium	Where there is a right, there is a remedy
Ultra vires	Beyond power, scope, or authority
Ut lite pendente nihil innovertur	Nothing new introduced during litigation
Usufructuary	One who uses and reaps profits of property but not ownership
Ut res magis valeat quam pereat	Words of statute must be given reasonable meaning
Vis major	Act of God
Vigilantibus et, non dormientibus, jura subveniunt	Law helps those who are vigilant, not lazy
Vice versa	Reversed; other way round
Volenti non fit injuria	Damage suffered by consent gives no cause of action

READING A BARE ACT & CITATION OF CASES

Reading a Bare Act

- Bare Act is the text of legislation passed by the Parliament or State Legislature.
- Understanding a Bare Act is essential for professionals working within a regulatory framework.
- Reading a Bare Act may seem simple but is often difficult due to legal language.
- Skills required include: interpretational, comprehension, analytical, and command over the language of the Act.
- Purpose: To understand the correct meaning of a provision. Professionals should consider the object of the statute while reading.

Important Rules

1. Read the Bare Act according to the context.
2. Refer to definition clauses, pari materia statutes, and the General Clauses Act.
3. Apply literal interpretation initially.
4. Break complex sentences but understand the provision as a whole.
5. Follow Read → Understand → Apply rule.
6. Always read the updated version of the Bare Act.

Citation of Cases

- Citation is a reference to a statute, reported case, regulation, etc.
- Decisions of Higher Courts have binding force on subordinate courts.

- Citation is required in pleadings before authorities and courts.
- Citations are also used by authors in books and publications.

Common Law Reports Used:

1. All India Reporter (AIR)
 2. Supreme Court Cases (SCC)
 3. Supreme Court Journal (SCJ)
 4. Supreme Court Reports (SCR)
 5. Delhi Law Times (DLT)
- Equivalent Citation / Parallel Citation: Refers to the same case published in other journals.
 - A typical citation gives: Name of parties, Year of judgement, Volume number, Abbreviated journal title, Page number.

PROSPECTIVE AND RETROSPECTIVE OPERATION

Interpretation of Statutory and Procedural Provisions

1. Statutory Provisions (Substantive Rights)

- Provisions creating or taking away substantive rights are ordinarily prospective.
- They are retrospective only if the Legislature expressly states so or it is necessarily implied.
- Amendments to substantive law are not retrospective unless expressly provided.
- Declaration of existing law is not considered an amendment.
- Whether a law is declaratory and thus retrospective depends on the language of the statute.

2. Procedural Provisions

- No person has a vested right in procedure.
- A person has only the right to prosecute or defend in the manner prescribed at that time by the Court.
- If Parliament alters the mode of procedure, a person can only proceed according to the altered procedure.
- Changes in procedural law may operate retrospectively.
- Unlike substantive law, procedural law is not restricted to being prospective.

Case Law

Nabendu Dutta v. Arindam Mukherjee [2004] 121 Comp Cas 150 (Cal)

- Principle: Statutory words should not be interpreted to defeat the object of the Act or lead to absurdity.
- Facts: Clause (g), Section 274(1), Companies Act, 1956, dealt with directors of defaulting companies.
- Held: Even though the amendment (Companies Amendment Act, 2000) did not expressly state retrospectivity, the language (“is already a director” and “has failed to repay its deposits”) implicitly applied retrospectively.

- Words indicate the Legislature intended to cover directors in default from before the commencement of the amendment.

Use of “May” and “Shall”

- The words “shall” and “may” depend on the nature of compliance and gravity of non-compliance.
- “Shall” generally indicates a mandatory provision.
- “May” generally indicates a permissive or discretionary provision.
- “May” is used where a power, permission, benefit, or privilege may but need not be exercised; it is enabling in nature.
- The general rule is not absolute; exceptions exist in interpretation.
- Sometimes “shall” is used even for permissive or discretionary provisions, and “may” is used for mandatory provisions.
- Reasons for such usage include drafting errors, convenience, or leaving interpretation to the courts.
- “May” can be interpreted as “shall” or “must” when the duty imposed makes it obligatory to exercise the power.
- Courts have often held “shall” as “may” and vice versa depending on context and legislative intent.

Case Law

P.N. Chockalingam Pillai vs A. Natarajan And Ors. (2001) 3 MLJ 661

- The issue was whether the provision regarding laying a notification before the Legislature is mandatory or directory.
- The Madras High Court held that the word “shall” indicates mandatory nature, unless context clearly allows a permissive interpretation.
- The Court concluded that Sub-section (6) of Section 1 must be strictly followed and is mandatory, not directory.

Use of “And” and “Or”

- ‘And’ is conjunctive, connecting words, phrases, or clauses; all items connected must be complied with.
- ‘Or’ is disjunctive, separating words, phrases, or clauses; items connected are alternative.
- Sometimes, ‘and’ may need to be read as ‘or’ and vice versa depending on context.
- Example: Companies Act, 2013 defines “document” using and/or, showing context may require reading differently for correct interpretation.

Interpretation of Proviso

- A proviso begins with “Provided that” and introduces a condition or qualification to a main provision.

- It generally serves as an exception to the main enactment.
- A proviso cannot nullify the object of the main enactment.
- Care must be taken to apply the proviso only to special cases within the scope of the main provision.
- Usually, the main enactment would have included the subject-matter of the proviso.
- Occasionally, a proviso may contain matters extraneous to the main provision and may be treated as a substantive provision.
- A proviso must not be inconsistent with the main provision.
- Both the main provision and proviso should be construed together without making either redundant.

Case Law

A.N. Sehgal & Ors (1991) AIR SCW 1246 – Brief

- A proviso only applies to the field of the main provision.
- Its function is to create an exception for cases falling within the main enactment.
- A proviso cannot alter or nullify the clear and unambiguous language of the main provision.
- It operates within the same scope as the main provision and cannot be used to override the main enactment unless its words necessarily require it.

DEEMING PROVISIONS

- A provision in a statute containing the word ‘deemed’ is called a deeming provision or legal fiction.
- Deem means to regard or consider something in a specified way; to treat something as if it were something else.
- Example: Section 314(2)(a) of Companies Act, 1956 – a director shall be deemed to have vacated office in contravention of the provisions.
- Sometimes a deeming provision clarifies that something shall not be deemed to have a particular effect.
- A deeming provision is an admission of the non-existence of the fact deemed.
- Legislature can enact a deeming provision to assume a fact which does not really exist.
- In construing a legal fiction, courts must:
 - Assume all facts on which the fiction operates.
 - Ascertain the purpose of the statutory fiction.
 - Apply the fiction only to the purpose for which it was created.
 - Give full effect to the fiction and carry it to its logical end.

REPUGNANCY WITH OTHER STATUTES

- Whole section must be read together; attempt must be made to reconcile all parts.
- If reconciliation is impossible, determine which provision is leading.
- If still unresolved, the later provision prevails.

CONFLICT BETWEEN GENERAL AND SPECIAL PROVISIONS

- General provisions yield to special provisions.
- When same person gives two directions – one general and one specific – the specific direction prevails.
- Courts must harmonize conflicting provisions wherever possible.
- Latin maxim: *Generalia specialibus non derogant* – general things do not derogate from special things.
- Case: *Pretty v. Solly* (1859) – particular enactment prevails over general enactment in same statute.

SOCIALLY BENEFICIAL CONSTRUCTION

- Interpretation should consider:
 1. Common law before the Act.
 2. Mischief or defect in common law.
 3. Remedy provided by Parliament.
 4. True reason for the remedy.
- Courts must suppress mischief and advance remedy *pro bono publico*.
- Beneficial legislation must be interpreted to subserve its purpose, not defeat it.
- Courts prefer construction advancing beneficent purpose and favoring intended beneficiaries.
- Benefits of social welfare legislation cannot be defeated by relief under other Acts.

INTERPRETATION OF PROCEDURAL LAW

- Procedural provisions are meant for substantial justice.
- Violation that does not prejudice parties or deny fair hearing is directory, even if “shall” is used.

INTERPRETATION OF FISCAL AND TAXING STATUTES

- Tax provisions must be interpreted strictly.
- No additional burden by inference, analogy, or spirit of law.
- Case: *Inland Revenue Commrs. v. Duke of Westminster* (1936) – taxation only by plain words of statute.
- Case: *A. V. Fernandez v. State of Kerala* (1957) – strict letter of law governs, not legislative intent.

DELEGATED LEGISLATIONS

- Delegated legislation is made under powers conferred by an Act.
- Includes orders, regulations, rules, directions, schemes.
- Supplements Acts of Parliament; can be amended without parliamentary time.

- Treated as part of the Act if validly framed.
- Must conform to parent Act and rule-making powers, else it is void.
- Case: General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav (1988) – rules must conform to statute and within rule-making authority.
- Case: Union of India v. Namit Sharma (2013) – Court can strike down ultra vires rules but cannot compel rule-making.

DOCTRINE OF SUBSTANTIAL COMPLIANCE

- Substantial compliance = fulfilling essential requirements even if formalities are not strictly followed.
- Substance over form; vital rules cannot be broken; directory rules may be overlooked if no prejudice occurs.
- Case: Umesh Chaliyil vs K.P. Rajendran (2008) – minor defect in affidavit did not affect substance; election petition not dismissed.

DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE

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

Case Law:

- In Raj Kumar Dey and Others vs Tarapada Dey and Others (1987 AIR 2195, 1988 SCR (1) 118):
 - Arbitrators could not take back the award from the custody of the Court to take any further steps for its registration.

- Supreme Court held that the entire period during which award remained in custody of Court should be excluded.
- It could not be said that they failed to get the award registered within the period prescribed by law.

STRICT CONSTRUCTION OF PENAL STATUTES

1. Penal provisions should generally be construed strictly.
2. When two interpretations are possible of a penal provision, that which is less onerous should be preferred.
3. The rule of strict interpretation in favour of an accused may not be rigid or universal.
 - It may be considered along with other well-established rules of interpretation.
 - When strict interpretation defeats the scheme and object of the statute, courts may adopt the interpretation which furthers the object of legislation.

Case Law

- Tolaram Relumal v. State of Bombay, AIR 1954 SC 496:
- Section 138 being a penal provision, if two reasonable constructions exist, the court should prefer the construction that exempts the subject from penalty rather than imposing it.

GENERAL CLAUSE ACT, 1897

1. The General Clauses Act, 1897 is a consolidating Act.
 - It consolidates the General Clauses Act, 1868 and the General Clauses Act, 1887.
 - Prior to 1868, provisions of Interpretation Act, 1850 were followed.
2. Object of the General Clauses Act, 1868:
 - To shorten the language used in the Acts of the Governor-General of India in Council.
 - Contained only 8 sections.
3. General Clauses Act, 1897:
 - Enacted to provide a single statute as a composite structure defining different provisions regarding interpretation of words and legal principles.
4. Importance of the General Clauses Act, 1897:
 - Belongs to the class of Interpretation Acts.
 - Lays down basic rules on how courts should interpret Acts of Parliament.
 - Defines words or expressions to avoid repetition in other Acts.
 - Is both consolidating and extending.
 - As a consolidating measure, it did not make changes in provisions of law repealed and reenacted by it.
 - By section 3, it applies to every Central Act passed after 1897.
5. Central Acts to which the Act applies:
 - Acts of the Indian Parliament.

- Acts of the Dominion Legislature passed between 15th August, 1947 and 26th January, 1950.
- Acts passed before the commencement of the Constitution by the Governor-General in Council or Governor-General acting legislatively.

Case Law

Chief Inspector of Mines vs. K.C.Thapar, AIR 1961 SC 838, 843:

- Whatever the General Clauses Act says regarding meanings of words or legal principles has to be read into every Act to which it applies.

DEFINITIONS UNDER GENERAL CLAUSES ACT, 1897

1. Section 3: Principal section containing definitions.
 - Applies to the Act itself and to post-1897 Central Acts and Regulations.
 - Intended as a dictionary for commonly used phrases and terms in enactments.
2. Reason for the phrase “unless there is anything repugnant in the subject or context”:
 - Ordinarily, defined terms have the same meaning in subsequent enactments unless inconsistent with the context.
 - Even exhaustive definitions may be read differently depending on the context.

Case Law:

- N. Subramania Iyer v. Official Receiver, AIR 1958 SC 1: Definitions are subject to context.
- Knightsbridge Estates Trust Ltd. v. Byrne & Co. (1940) AC 613 and Choudhary Mohammed v. Sebait of Sri Sri Ishwar, AIR 1943 Cal. 36:
- Words like “unless there is anything repugnant in the subject or context” may be implied even if omitted.

IMPORTANT PROVISIONS OF GENERAL CLAUSES ACT, 1897

1. Applicability of definitions to Central Laws:

- Words like “affidavit”, “barrister”, “District Judge”, “father”, “immovable property”, “imprisonment”, “Magistrate”, “month”, “movable property”, “oath”, “person”, “section”, “son”, “swear”, “will”, “year”, etc.

2. Applicability of definitions to all laws:

- Words like “British India”, “Central Act”, “Central Government”, “Chief Controlling Revenue Authority”, “Chief Revenue Authority”, “Constitution”, “Gazette”, “Government”, “Government securities”, “High Court”, “India”, “Indian Law”, “Indian State”, “merged territories”, “Official Gazette”, “Part A State”, “Part B State”, “Part C State”, “Provincial Government”, “State”, “State Government”.

3. Revenues of Central or State Government:

- From 1st April, 1950, references construed as references to Consolidated Fund of India or Consolidated Fund of State.

4. Effect of repeal:

- Repeal shall not revive anything not in force at the time.
- Shall not affect previous operation of enactment.
- Shall not affect rights, privileges, obligations, liabilities accrued.
- Shall not affect penalties, forfeitures, punishments incurred.
- Investigations, proceedings, remedies may continue as if repeal had not occurred.

5. Repeal of Act making textual amendment:

- Repeal shall not affect continuance of amendment made by the enactment in operation at the time of repeal.

6. Revival of repealed enactment:

- Must expressly state purpose to revive wholly or partially repealed enactment.

7. Computation of time:

- If Court or office is closed on prescribed day, act is deemed done on next day it is open.

8. Gender and number:

- Masculine includes feminine; singular includes plural and vice versa unless repugnant.

9. Power to issue:

- Power to issue notifications, orders, rules, bye-laws includes power to add, amend, vary, rescind.

10. Recovery of fines:

- Sections 63-70 IPC and CrPC provisions apply unless expressly contrary in Act, Regulation, rule, bye-law.

11. Offences punishable under two or more enactments:

- Offender may be prosecuted and punished under either or any enactments, but not punished twice for the same offence.
- CASE LAW: Baliah v. Rangachari, AIR 1969 SC 701: Section 26 bars double punishment but allows prosecution under multiple enactments.

12. Meaning of service by post:

- Service is effected by properly addressing, pre-paying, posting by registered post, unless contrary intention appears.

READING METHODOLOGY OF THE COMPANIES ACT, 2013 AND ITS LEGAL AURA

- The Companies Act, 2013 is not a standalone piece of legislation but a complete ecosystem.
- It contains Orders, Rules, Notifications and Circulars.
- One should read each Section of the Act, with relevant Rule, Notification and Circular.
- The Act is a superior authority in law passed by the Legislature.
- Notifications and Rules are notified by the Executive under the powers derived from the Act itself.

Understanding the structure of Companies Act and the manner of identifying complementary legislations

The Principal Legislation/Statute

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

Schedules

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

Delegated Legislations

- Delegated legislation (subordinate legislation) is a legislation made under powers conferred by an Act of Parliament (an enabling statute, often called the parent Act).
- Here Parent Act is The Companies Act and the delegated legislations are Rules notified by Ministry of Corporate Affairs.
- Example: Companies (Corporate Social Responsibility Policy) Rules 2014.
- Rule, Regulation or By-Laws must not be ultra-vires.
- If a power exists by statute to make rules, regulations, by laws, forms etc., that power must be exercised strictly in accordance with the provisions of the statute which confers the power.
- If ultra-vires, it will be held incapable of being enforced.
- Before a Rule can have the effect of a statutory provision, two conditions must be fulfilled:
 1. It must conform to the provision of statute under which it is framed; and
 2. It must also come within the scope and purview of the rule making power of the authority framing the rule.
- If either of these two conditions is not fulfilled, the rules so framed would be void.

Notifications/Circulars/Clarifications by Ministry of Corporate Affairs

- A Notification means a notification published in the Official Gazette and the expression 'notify' and 'notified' shall be construed accordingly.
- In *Bachu Lal vs. State-Allahabad High Court*, it was held that the words "notification, orders, rules and by-laws" have no reference to judicial orders the passing and cancellation whereof is subject to and regulated by the procedural law of the land.
- The Ministry of Corporate Affairs (MCA) has been entrusted with the responsibility of administering the Companies Act, 2013 (Act).
- The MCA, from time to time, issues circulars and clarifications to clarify the provisions of the Act and the rules made thereunder (Rules).
- The Circulars are issued by the Department interpreting a particular provision of the Act or the Rule in certain circumstances.
- The Companies Act, 2013 does not empower the Department to issue circular.
- In a series of judicial decisions, the Supreme Court has consistently held that clarificatory circulars cannot amend or substitute statutory rules.

- But if the Act or the Rules are silent, then the Government can issue clarifications to supplement the Rules by issuing instructions.
- Notifications under Section 462 exempt certain companies from the applicable provision of the Act.
- At the time of reading a Section mentioned under an Exemption Notification dealing with a certain class of companies, one must read such Section in respect of that class of companies as amended by the Exemption Notification for that class.
- Exemption notifications effectively amend these Sections for the purpose of the class of companies with which the Exemption Notification deals.
- The Central Government may amend schedules of the Act using power given under Section 467.
- Schedules must be read with the main Section.
- Wherever a Section of the Companies Act, 2013 uses words “as may be prescribed” it is an indication the Legislature has delegated powers to the Executive on that particular point.
- Section 469 empowers the Central Government to make rules for Sections which do not delegate such powers to the Central Government.
- While provisions of the Act along with Exemption Notifications and Schedules deal with the policy framework of the law; rules deal with the procedures.
- Rules cannot change policy framework in any manner and cannot override substantial provision of the Section empowering the Rules.

Secretarial Standards

- Secretarial Standards are standards prepared by Institute of Company Secretaries of India to standardize secretarial practices under the Companies Act and other areas related to Secretarial Practices.
- By virtue of Explanation to Section 205(1), secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government are part of law itself.
- Further Section 118(10) mandates that every company shall observe secretarial standards with respect to General and Board meetings.

How to read and understand a Section

- The Companies Act, 2013 is to be read with relevant Rules, Schedules under Companies Act, Circulars/Clarifications issued by Ministry of Corporate Affairs.
- Example: Section 135 (Relating to Corporate Social Responsibility) is to be read with:
 - Companies (Corporate Social Responsibility Policy) Rules 2014
 - Schedule VII (Activities relating to Corporate Social Responsibility)
 - Circulars/clarifications issued by Ministry of Corporate Affairs on Section 135 & Rules made thereunder

Reading provisions of Companies Act, 2013 with delegated legislations

- Example: When reading sections relating to issue of capital, read with:
 - Companies (Share Capital and Debentures) Rules

- Companies (Prospectus and Allotment of Securities) Rules
- Other legislative aspects to be read in collusion include:
 - SEBI Act
 - SEBI (ICDR) Regulations
 - SEBI (LODR) Regulations
 - Provisions of Depositories Act for dematerialization provisions
 - Provisions of FEMA when shares are issued to non-residents, wherever applicable

Breaking sections into parts and preparing notes for each section

- Company law is so wide that it cannot be easily remembered after only one reading.
- Students may make notes for each topic about sections, the genesis, amendments notified, reasons for amendments along with delegated legislation.
- Students may also make notes on exemptions provided, exceptions and the reasons behind such exemptions/exceptions.
- This will help in understanding the background of the provisions, the spirit of law and would help in remembering the provisions.
- Exemptions provided for certain class of companies under Section 462 of Companies Act are provided in the e-book at MCA portal under respective sections.
- Students may break the sections at relevant places and give emphasis on critical words for more clarity.
- Example: Section 2(6) deals with the Definition of “Associate Company” and may be read as:
 - “associate company”, in relation to another company ...
 - means a company in which that other company has a significant influence ...
 - but which is not a subsidiary company of the company having such influence and ...
 - includes a joint venture company
- Explanation:
 - “significant influence” means control of at least twenty percent of total voting power, or control of or participation in business decisions under an agreement
 - “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement

Interpretations of some standard words and phrases used in Statutes

- Proviso – A clause that begins with “Provided that”. It introduces a qualification or condition to some other provision.
- Notwithstanding anything contained – A non-obstante provision giving overriding effect to a particular section or statute.
- Subject to – Dependent upon, conditional upon, subordinate to another provision.
- Nothing contained in this section shall apply – Anything in the preceding part of the section would not apply in the situation stated.
- Without prejudice to the provisions contained in this Act/any other Act – One provision does not affect the other; both provisions operate independently.

- That is to say – Explains or clarifies the preceding word, phrase or expression.
- For the purposes of this section/provision/definition – Limited applicability to only the relevant section/provision/definition.
- As the case may be – Used when a provision covers two or more things; applicable to both or all.
- Shall – Mandatory and not merely directory.
- May – Either permissive or directory.

LESSON-4

Administrative Laws

Administrative law determines the organisation, power and duties of the administrative authorities.

REGULATORY FRAMEWORK

- Constitution of India
- Delegated Legislations
- Judicial Precedents

INTRODUCTION

1. Meaning and Scope

- Administrative law is a branch of public law dealing with the powers, functions, and responsibilities of various state organs.
- It controls the executive branch to ensure fair dealings with the public.
- There is no single universal definition of administrative law as it is interpreted differently by various theorists.
- It establishes the organizational framework and power structure of administrative and quasi-judicial authorities for enforcing laws.
- It also creates control mechanisms to ensure administrative agencies act within their limits, focusing on official actions and processes.

2. Definitions by Scholars

(a) Kenneth Culp Davis

- An American legal scholar known for his work on administrative law.
- Defined administrative law as:

“The law concerning the powers and procedures of administrative agencies, including especially the law governing the judicial review of administrative action.”

- According to him, an administrative agency is a government authority (not a court or legislature) that affects private rights through adjudication or rule-making.
- His definition:
 - Restrictive – excludes agencies with only purely administrative authority (no legislative or adjudicative functions).
 - Excludes discretionary functions of agencies that are not legislative or quasi-judicial in nature.

(b) Albert Venn Dicey

- A British constitutional scholar.

- Defined administrative law as that part of the legal system which:
 - Determines legal status and liabilities of state officials.
 - Defines rights and liabilities of private individuals in their dealings with public officials.
 - Specifies the procedure for enforcement of those rights and liabilities.
- His definition focuses mainly on judicial control over public officials.
- It is narrow, as it:
 - Omits other aspects of administrative law.
 - Excludes public corporations, since they are not strictly state officials.

(c) Ivor Jennings

- Defined administrative law as:
 “The law relating to administration. It determines the organization, powers, and duties of administrative authorities.”
- His definition is broad and general, because:
 - It does not distinguish between administrative and constitutional law.
 - It omits the manner of exercising administrative powers and duties.

3. Growth and Importance of Administrative Law

- Administrative law has grown as a by-product of expanding government functions.
- The modern state is no longer a police state (limited to maintaining order and security).
- The welfare state aims to improve social and economic conditions of citizens.
- This includes dealing with complex issues like health, education, pollution, and inequality.
- Such challenges require expansion of administrative functions and agencies.
- Governments have also taken over functions previously handled by private enterprises, further increasing administrative responsibilities.
- Hence, the origin and growth of administrative law are closely linked to the rise of welfare states and increased governmental intervention in citizens' lives.

NEED AND SOURCES OF ADMINISTRATIVE LAW

- The modern state has three organs – legislative, executive, and judiciary.
- Traditionally:
 - The legislature was tasked with the making of laws.
 - The executive was responsible for the implementation of laws.
 - The judiciary dealt with the administration of justice and settlement of disputes.
- This traditional demarcation of roles has been found wanting in meeting the challenges of the present era.
- The legislature is unable to come up with the required quality and quantity of legislations because of:
 - Limitations of time,

- Technical nature of legislation, and
- Rigidity of their enactments.
- The traditional administration of justice through the judiciary is technical, expensive, and dilatory.
- The states have empowered the executive (administrative) branch to fill in the gaps left by the legislature and judiciary.
- This has led to an all-pervasive presence of administration in the life of a modern citizen.
- In such a context, a study of administrative law assumes great significance.

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

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

Importance and Role of Administrative Law

1. The ever-increasing administrative functions have created a vast new complex of relations between the administration and the citizen.
2. The modern administration is present everywhere in the daily life of an individual and has assumed a tremendous capacity to affect their rights and liberties.
3. The purpose of giving larger powers to the administration is to ensure a better life for the people.
4. It is necessary to keep a check on the administration, consistent with efficiency, so that it does not violate individual rights.
5. There is an age-old conflict between individual liberty and government control.
6. A constant vigil must be maintained to ensure a proper balance between private interest and government (public) interest.
7. It is necessary that when large powers are conferred on administrative organs, effective control mechanisms are evolved.
8. Such controls ensure that officers do not misuse their powers or act for unwarranted purposes.
9. It is the task of administrative law to ensure that governmental functions are exercised according to law, legal principles, and rules of reason and justice.
10. The goal of administrative law is to ensure that the individual is not at the receiving end of the state's administrative power.
11. If an individual is aggrieved by any administrative action, he or she should be able to get it redressed.
12. There is no contradiction between having an effective government and controlling administrative powers.
13. Administrative powers are exercised by thousands of officials and affect millions of people.
14. Administrative efficiency should not be the ultimate aim of administrative powers; the interests of people must remain central.
15. If properly exercised, administrative powers can lead to a welfare state.

16. If abused, they can result in administrative despotism and a totalitarian state.
17. Therefore, a careful and systematic study and development of administrative law is essential.
18. Administrative law serves as an instrument of control on the exercise of administrative powers.

Example:

There are many areas of law where economic stakes of the public are involved. In these areas, offenders find new ways of non-compliance to gain unjust enrichment. Therefore, it is very difficult for Parliament to provide a comprehensive law covering all the aspects due to paucity of time and the dynamic nature of these laws. So, the parliament delegates the power to legislate to the executive branch of government. Power of Government to make rules under the Companies Act, 2013 and power of Securities Exchange Board of India to make regulations under SEBI Act, 1992 may be seen as good examples of delegated legislation i.e. is administrative law.

SOURCES OF ADMINISTRATIVE LAW

There are four principal sources of administrative law in India. They are as under –

S.No.	Source	Description / Key Points
1	Constitution of India	• Primary source of administrative law. • Article 73: Executive power of the Union extends to matters where Parliament has power to make laws. • (Likely meant Article 162): Provides similar powers to the States. • The Constitution does not recognize absolute separation of powers. • It envisages tribunals, public sector undertakings, and government liability, which are vital aspects of administrative law.
Example Article 318 of the Constitution of India empowers the President (Union Public service Commission) and Governor (State Public service commission) to make regulations with respect to the number of members or staff of the Commission(s) and their conditions of service.		
2	Acts / Statutes	• Enacted by Central and State Governments for peace, order, taxation, and socio-economic development. • Empower administrative organs to carry out necessary tasks. • Define the responsibilities and powers of administration. • Provide limitations on power and grievance redressal mechanisms for affected individuals.

Example

Insolvency and Bankruptcy Board of India is empowered to make regulations under Insolvency and Bankruptcy Code, 2016.

3	Ordinances, Administrative Directions, Notifications, Circulars	• Ordinances: Issued during legislative recess to address unforeseen situations requiring immediate action. • Enable administration to take urgent steps when the legislature is not in session. • Administrative directions, notifications, and circulars: Issued by the executive under powers granted by various Acts.

Example

Ordinance – President of India promulgated The Criminal Law (Amendment) Ordinance, 2013. Notifications – State Government may notify the rates of Minimum Wages for that particular state.

4	Judicial Decisions	• Judiciary acts as the final arbiter in disputes between government organs or between citizens and administration. • Supremacy of the Constitution upheld by the Supreme Court, which interprets it. • Through various decisions, courts determine: • Scope of administrative powers, • Government liability in contracts or torts, and • Principles of administrative conduct, guiding future actions.

Example

Article 141 provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

RULE OF LAW

1. Rule of Law was developed by British Jurist A.V. Dicey.
2. He derived this term from the French Principle 'La Principe de Legalite', which means the principle of legality.
3. It states that the government should be governed by Rule of Law instead of Rule of Individual.
4. Any dictator, monarch, or one particular person should not govern the functioning of any nation.
5. Each country should follow the legality of law.
6. Dicey was highly influenced by the French concept of administrative law (*droit administratif*) or the administrative tribunals (*tribunaux administratifs*).
7. According to this, a citizen's lawsuit against a public servant for a wrongdoing done in that capacity will be handled by a special court rather than a regular court of law.
8. *Droit administratif* contains a regulation created by the judges of the administrative court, rather than laws and rules created by the French Parliament.

Three major principles given by Dicey in his book “*Rule of Law*” are:

- Supremacy of Law: Ordinary or regular laws shall remain supreme. Supremacy means absolute and predominance of regular laws as against arbitrary or wide discretionary powers.
- Equality Before the Law: All classes must be equally subject to the ordinary law of the land as administered by the ordinary law courts. There should be equality between people. All are equal before law and everyone will be subjected to the same law.
- The Predominance of a Legal Spirit: Legal spirit refers to the judicial precedents upon any dispute raised by any individual. The judgment given in any case will be the legal spirit of that particular case. It refers to the law as set by the precedents that have evolved over time.

Few jurists have criticized Dicey’s Rule of Law theory for:

- Not being clear between administrative discretion and arbitrary discretion.
- Emphasizing equality before law and feeling that specific tribunals should not exist.
- Showing opposition between ordinary courts and special courts.
- Failing to recognize the need for specific laws and bodies.

RULE OF LAW IN INDIA

1. The evolution of Rule of Law in India can be traced to the British concept.
2. The modern concept of Rule of Law was introduced after the drafting of the Constitution of India.
3. The Constitution of India laid the foundation of Rule of Law in the country and is the essence of it.
4. Rule of Law is embedded in the Constitution under multiple parts.
5. Important aspects of Rule of Law in the Constitution are as follows:
 - i. Preamble:
 - The Preamble upholds the basic structure of the Constitution.
 - It talks about justice, equality, liberty, and dignity to all individuals.
 - All these aspects ensure the Rule of Law in the country.
 - ii. Part III – Fundamental Rights:
 - Fundamental Rights are the core of the Constitution of India.
 - They imply a duty on the State towards ensuring the welfare of its citizens.
 - They help to keep a check on the actions of administrative authorities and the legislature.
 - iii. Part IV – Directive Principles of State Policy (DPSP):
 - These are the basic guidelines to be followed by all, especially the Government of India, to ensure smooth functioning of the country.
 - They are not enforceable by any court of law.
 - Examples: Laws relating to wages and labor laws.
6. Judicial Aspect:

- The Rule of Law in India has evolved with time.
- It can be understood with the help of various judicial decisions (cases).

Case Laws on Rule of Law

1. State of Madhya Pradesh vs. Thakur Bharat Singh (1967)
 - Section 3 of the MP Public Security Act gave too much discretionary power to the District Magistrate.
 - Supreme Court held it unconstitutional because it violated the rule of law.
 - Emphasized:
 - Government powers come from the people.
 - Separation of powers among legislature, executive, and judiciary.
 - Judicial review is essential to prevent arbitrary actions.
2. Kesavananda Bharati vs. State of Kerala (1973)
 - Supreme Court stated Rule of Law is part of the basic structure of the Constitution.
 - Constitutional amendments cannot destroy the basic structure or essential features, including Fundamental Rights.
 - Protects democracy, integrity, and limits misuse of power.

ADMINISTRATIVE DISCRETION

1. DEFINITION

- It is the freedom of an administrative authority to choose from among various alternatives.
- The exercise of discretion must be based on rules of reason and justice, not personal whims or fancies.
- Discretion should not be arbitrary, vague, or fanciful; it must be legal and regular.

2. NECESSITY

- The government cannot function without some discretion by its officials.
- Discretion is necessary because it is impossible to lay down a rule for every eventuality in daily governance.

3. RISKS

- Discretion is prone to abuse, so there must be a system to ensure it is exercised properly.

4. IMPORTANCE

- Administration is complex and requires flexibility, technical knowledge, expertise, and know-how.
- Freedom to choose among alternatives allows administration to respond effectively to various situations.
- Unsuitable rules can be changed, amended, or abrogated without much delay.
- Administration can adapt its approach case by case according to the situation and demands of justice.

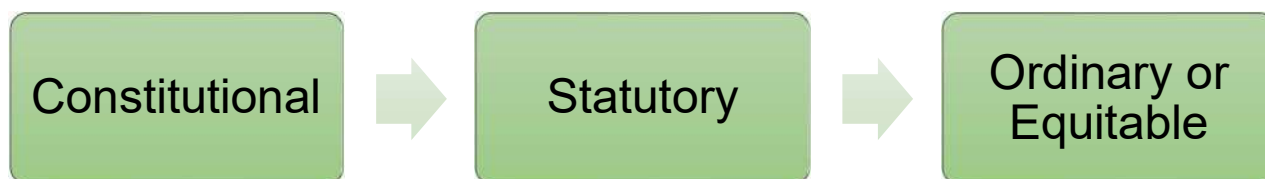
Example

Mr. A approaches RTO office for confirmation of his driving license. It is the administrative discretion of RTO office to issue him his driving license after observing performance in driving tests.

JUDICIAL REVIEW AND OTHER REMEDIES

- The judiciary plays a key role in restricting administrative discretion.
- Courts have directed lawmakers to formulate guidelines and rules to regulate the conduct of administrative officers.
- A country claiming to have a rule of law cannot allow unchecked government authority.
- Administrative organs have wide powers, which can be misused or vitiated by various factors.
- The government must provide a proper redressal mechanism for grievances.
- In India, this is especially significant due to the aim of building a socialistic pattern of society, leading to the proliferation of administrative agencies and processes.

In India the modes of judicial control of administrative action can be conveniently grouped into three heads:

**(A) Constitutional**

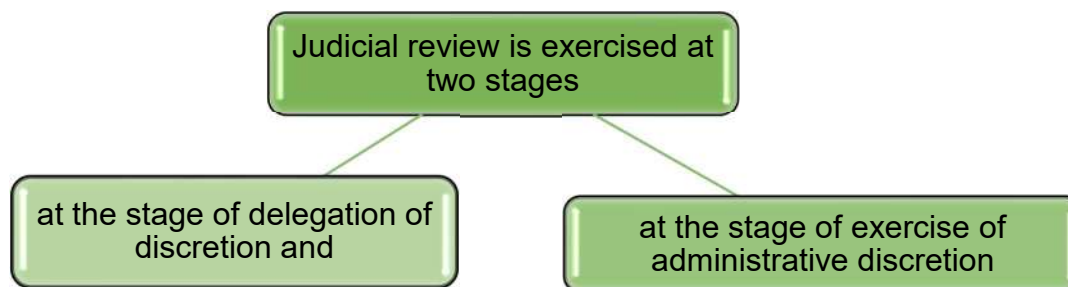
Topic	Details
Constitutional Supremacy	○ Constitution of India is supreme. ○ All state organs derive their existence from it. ○ Acts of legislature must conform to the Constitution. ○ Courts can declare unconstitutional acts void. ○ Articles 13, 245, 246 provide express limits.
Judicial Definition	Review: ○ Power of courts to declare acts of legislature/executive void if unconstitutional. ○ Ensures public authorities act according to the Constitution. ○ Focuses on the legality and procedure of decision-making, not the decision itself.
Scope	○ Applies to legislative and executive/administrative acts. ○ Supreme Court and High Courts have authority to review. ○ Ensures all government actions comply with the Constitution.
Origin	○ Developed by the American Supreme Court. ○ Not explicitly mentioned in American Constitution. ○ Concerned with reviewing the process, not appealing decisions.
Effect of Violation	○ Acts found ultra vires (beyond powers) of Constitution or relevant law are void.

- Discretionary Powers**
- Courts allow discretion but require proper guidelines.
 - Intervenes if discretion is uncontrolled, unguided, or abused.
 - Ensures discretion is exercised legally and fairly.

CASE LAW

Case	Year / Citation	Key Point / Observation
Airport Authority of India vs. Centre for Aviation Policy, Safety and Research	30.09.2022, CIVIL APPEAL NOS. 6615-6616 OF 2022	Courts should not interfere with administrative/policy decisions of tender authorities unless actions are arbitrary, discriminatory, or mala fide. Tender terms and contracts allow greater discretion to the State.
S. Pratap Singh vs. The State of Punjab	AIR 1964 SC 72	Courts cannot act as an appellate forum over government orders. Judicial review applies only if authority acted mala fide, abused power, or exceeded legal authority.
Hind Construction and Engineering Co. Ltd. vs. Their Workmen	AIR 1965 SC 917	Punishment by employer must be reasonable. If punishment is shockingly disproportionate, it can indicate victimization or unfair labour practice.

Stages of Judicial Review



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

- Any law can be challenged if it violates the Constitution, including laws conferring administrative discretion.
- In delegated legislation, courts often accept vague or broad policy statements, except when discretion affects fundamental rights.
- Courts control delegation of discretionary powers by examining the constitutionality of the law under Part III (Fundamental Rights) of the Indian Constitution.
- Laws giving vague and wide discretionary powers to administrative authorities may be declared ultra vires Article 14, Article 19, or other constitutional provisions.
- Even if a statute does not directly give discretionary power to act, it may allow framing rules and regulations affecting citizens' rights.
- Courts can control such discretion on the ground of excessive delegation.

- Fundamental rights provide a basis for the judiciary to control administrative discretion extensively.
- Many cases exist where laws conferring discretionary powers have been held violative of a fundamental right.

Administrative Discretion and Article 14

- Article 14 provides equality before law and prevents arbitrary discretion in the executive.
- It ensures fairness and equality of treatment in state actions.
- Article 14 protects against:
 - Discretionary laws by the legislature.
 - Arbitrary discretion vested in the executive.
- Administrative officers are often given wide discretionary powers.
- Statutes have been challenged when they allow discriminatory selection or classification, violating Article 14.
- Courts check if statutes provide principles or policies guiding discretionary power.
- Courts reject uncontrolled delegation that allows discrimination.

Case Law

- State of West Bengal v. Anwar Ali, AIR 1952 SC 75
 - Act violated Article 14 by allowing special courts without clear criteria for classification.
 - "Speedier trial" was too vague and indefinite to justify classification.

Administrative Discretion and Article 19

- Article 19 guarantees certain freedoms, but they are not absolute.
- Reasonable restrictions can be imposed and are subject to judicial review.
- Administrative discretion can affect Article 19 rights, including:
 - Article 19(1)(b): Right to assemble peacefully without arms.
 - Article 19(1)(e): Right to reside and settle anywhere in India.
- Government laws may grant executive power to restrict rights in the interest of peace and safety.
- Regarding trade and business:
 - Executive power should not be arbitrary.
 - Discretion must have checks or higher authority control.
 - Courts uphold laws with general principles guiding discretion.
 - Courts strike down laws granting unfettered power to interfere with property or trade.

Case Laws on Administrative Discretion

1. Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211
 - D.M. empowered under East Punjab Safety Act, 1949, to detain a person if necessary for public peace.
 - Supreme Court upheld the law because:

- The law was temporary.
 - The externee had a right to know the grounds of externment.
2. Hari v. Deputy Commissioner of Police, AIR 1956 SC 559
- Section 57 of Bombay Police Act allowed officers to extern convicted persons if likely to commit similar offences.
 - Supreme Court upheld the law because:
 - Safeguards existed: right of hearing and right to appeal to State Government.
3. H.R. Banthis v. Union of India, 1979 1 SCC 166
- Gold (Control) Act, 1968 allowed Administrator to grant/renew licenses for gold dealers based on vague factors.
 - Supreme Court declared it invalid because:
 - Factors like region, anticipated demand, suitability, and public interest were vague and undefined.
 - Power was uncontrolled and unguided, lacking objective standards.

ii. Judicial Review at the Stage of Exercise of Discretion

- No law can make administrative action completely final, even if the law states so.
- Courts examine the ambit and mode of administrative action to ensure conformity with fundamental rights.
- Courts in India have developed formulations to control administrative discretion under two broad heads:
 1. Abuse of discretion – Authority has not exercised its discretion properly.
 2. Non-application of mind – Authority is deemed not to have exercised its discretion at all.

1. Abuse of Discretion

i. Mala fides

- Discretionary power exercised with bad faith or dishonest intention is quashed by the court.
- Malafide exercise of discretionary power is always bad and taken as abuse of discretion.
- Malafide may mean dishonest intention or corrupt motive.
- In statutory powers, it may comprise dishonesty (or fraud) and malice.
- Power is exercised fraudulently if intended for an object other than for which it was conferred.
- Intention may be to promote another public or private interest.

Case Law

Tata Cellular v. Union of India, AIR 1996 SC 11

- The Government has the right to refuse the lowest or any other tender.
- While accepting or refusing a tender, the principles of Article 14 (equality before law) must be followed.

- Choosing the best person or quotation is not considered arbitrary.
- If the power is exercised for a collateral or improper purpose, it will be struck down.

ii. Irrelevant considerations

- If a statute confers power for one purpose, using it for a different purpose is invalid.
- Considering factors, circumstances, or events irrelevant to the statute's purpose vitiates the action.

iii. Leaving out relevant considerations

- Authority must consider all relevant facts when exercising discretionary power.
- Ignoring relevant considerations makes the action invalid.

iv. Arbitrary orders

- Orders must be based on facts and cogent reasoning.
- Decisions based on whims or fancies are invalid.

v. Improper purpose

- Discretionary power must be used for the purpose it was given.
- Using it for a different purpose amounts to abuse of power.

vi. Colourable exercise of power

- Discretionary power exercised ostensibly for the given purpose but actually for another purpose.
- Such exercise is declared invalid.

vii. Non-compliance with procedural requirements and principles of natural justice:

- If mandatory procedural requirements in the statute are not complied with, the exercise of power is invalid.
- Court decides whether the procedural requirement is mandatory or directory.
- Principles of natural justice must be observed.

viii. Exceeding jurisdiction

- Authority must exercise power within statutory limits.
- Exceeding limits makes action ultra vires and void.

2. Non-application of mind

1. Acting under dictation

- Authority exercises discretionary power under instructions or dictation from a superior.
- Considered non-exercise of power; decision or action is bad.
- Authority does not take action on its own judgment and does not apply its mind.
- Example: *Commissioner of Police v. Gordhandas Bhanji*, AIR 1952 SC 60 – Police Commissioner granted and later cancelled a cinema license on Government direction; cancellation was declared bad.

2. Self-restriction

- Authority imposes fetters on its discretion by rigidly applying pre-announced rules or policies to all cases.
- Action or decision is bad.
- Discretion must be exercised after considering individual cases; fixed rules should not be applied rigidly.

3. Acting mechanically and without due care

- Non-application of mind to an issue requiring discretionary exercise renders the decision bad in law.

(B) Statutory

The method of statutory review can be divided into two parts:

(i) Statutory appeals: There are some Acts, which provide for an appeal from statutory tribunal to the High Court or Supreme Court on point of law.

Example

Under section 53B of the Competition Act, 2002 the Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT). Further, under section 53T of the said act, the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order.

(ii) Reference to the High Court or statement of case: There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court.

Example

Under Section 256 of the Income-tax Act, 1961, where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.

(C) Ordinary or Equitable Remedies

- Ordinary or equitable remedies are available against administrative authorities through ordinary courts.
- These remedies are provided under ordinary law and include preventive and corrective measures.

1. Injunction:

- A preventive remedy restraining a person from invading or threatening to invade another's rights.
- Governed in India by the Specific Relief Act, 1963.
- Action for declaration may lie where:
 - Jurisdiction has been wrongly exercised, or
 - Authority is not properly constituted.
- Purpose: To restrain a person or authority from acting contrary to law or beyond statutory powers.
- Applicable to both administrative and quasi-judicial bodies.
- Highly useful to prevent ultra vires acts by statutory bodies.
- Can also apply against private individuals (e.g., to prevent torts, breach of contract, or statutory duty).
- Types of injunctions:
 - Prohibitory – restrains from doing an act.
 - Mandatory – compels performance of an act.

a. Prohibitory Injunction

- Forbids the defendant from doing a wrongful act that infringes the plaintiff's rights.
- Types:

i. Interlocutory or Temporary Injunction

- Continues until a specified time or further court order (Section 37, Specific Relief Act).
- Granted as an interim measure to preserve status quo until the case is decided.
- Can be granted at any stage of a suit.
- Regulated by the Civil Procedure Code; provisional in nature.
- Does not conclude or determine a right.
- It is a mere order; granting is at the court's discretion.

ii. Perpetual Injunction

- Granted at the conclusion of proceedings; definitive of the parties' rights.
- May be awarded for a fixed period, with leave to apply for extension, or for an indefinite period.
- Can be terminable when conditions imposed on the defendant are complied with.
- Operation may be suspended to allow the defendant to comply, with leave for the plaintiff to respond afterward.

b. Mandatory Injunction

- Granted to prevent breach of an obligation by compelling performance of certain acts.
- Acts as a command to restore things to their former condition or undo what has been done.
- Prohibits the defendant from continuing a wrongful act.
- Imposes a duty on the defendant to perform a positive act.

(ii) Declaratory Action

- Judicial order declaring the rights of the parties without giving further relief.
- Declares the rights of the parties and removes existing doubts about them.
- Secures enjoyment of rights.
- Equitable and discretionary remedy; cannot be claimed as a matter of right.

(iii) Action for Damages

- Filed when an individual suffers injury due to wrongful or negligent acts of a government servant.
- Aggrieved person can sue the Government for recovery of damages.

SUMMARY OF ORDINARY OR EQUITABLE REMEDIES

Remedy	Definition / Purpose	Key Features / Notes
Injunction	Preventive remedy restraining a person from wrongful act	○ Judicial process to prevent invasion of rights ○ Governed by Specific Relief Act, 1963 ○ Can be issued against administrative/quasi-judicial bodies or individuals ○ Types: Prohibitory & Mandatory
Prohibitory Injunction	Forbids defendant from committing a wrongful act	○ Interlocutory / Temporary: preserves status quo until case decided, provisional, discretionary ○ Perpetual: granted at end of proceedings, definitive of rights, may be fixed/indefinite period
Mandatory Injunction	Compels performance of certain acts to prevent breach of obligation	○ Commands defendant to restore things to former state or undo wrongful act ○ Prevents continuation of wrongful act ○ Imposes duty to do a positive act
Declaratory Action	Judicial declaration of rights without further relief	○ Declares rights of parties ○ Removes doubts about rights ○ Equitable and discretionary, not a matter of right
Action for Damages	Recovery of compensation for injury caused by wrongful/negligent act of a government servant	○ Filed against Government for compensation ○ Remedy for wrongful/negligent acts

PRINCIPLES OF NATURAL JUSTICE

- Justice must not only be done but also seen to be done.
- Necessary to inspire confidence in the judicial system.
- Natural justice is a concept of Common Law and represents procedural principles developed by judges.
- It has no express constitutional status but is important to ensure faith in adjudication.
- Principles are not precise rules; their scope varies according to context.
- Provides the foundation for judicial control of administrative action.
- In India
 - Derived from Article 14 and Article 21 of the Constitution.
 - Courts insist that administrative agencies follow a minimum of fair procedure.
 - Originally included only two rules:
 1. Rule against bias
 2. Rule of fair hearing
 - Over time, many sub-rules have been added.

Rule against bias (nemo judex in causa sua)

- No person should be made a judge in their own cause.
- Bias means an operative prejudice, conscious or unconscious, regarding a party or issue.
- Presumption that a person cannot take an objective decision in a case in which they have an interest.
- Two main aspects:
 1. Judge must not have any direct personal stake in the matter.
 2. There must not be any real likelihood of bias.

Bias can be of the following three types:

1. Pecuniary bias

- Any financial interest of the adjudicatory authority in the matter, however small, vitiates the adjudication.
- Even an insufficient pecuniary interest disqualifies a person from acting as a judge.

Case Law

J. Mohapatra and Co. and Ors. vs. State of Orissa and Ors. (10.08.1984 - SC) : 1984 AIR 1572

- Odisha government formed an assessment committee to recommend books for government schools.
- Committee included authors whose books were being recommended.
- Supreme Court struck down the recommendation due to possibility of bias.
- Court observations:
 - Author-members create embarrassment for other members in discussing merits.
 - Author-members may hold high official positions, influencing other members.

- Actual bias is not necessary; the possibility of bias is sufficient.
- Author-members should not be part of such committees or sub-committees.

2. Personal Bias

- Situations creating personal bias in a judge include:
 - Friendship with a party
 - Family, professional, or business ties with a party
 - Hostility toward a party
- Such situations create bias in favor of or against a party and disqualify the judge.

Case Laws

1. Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468
 - Petitioner company owned by Raja Kamakhya Narain Singh, lessee of 3026 villages in Bihar for mica exploitation.
 - Minister of Revenue canceled his license under Bihar Mica Act.
 - Owner had opposed the minister in the 1952 general election; minister filed a criminal case under Section 500 IPC.
 - Cancellation by the minister (a quasi-judicial act) was vitiated due to personal rivalry.
2. Manek Lal v. Prem Chand, AIR 1957 SC 425
 - Complaint of professional misconduct filed against Manek Lal, an advocate of Rajasthan High Court.
 - Chief Justice appointed Bar Council tribunal; Chairman had earlier represented the respondent in a case.
 - Supreme Court held:
 - Even without personal contact or memory of representing the client, the Chairman was disqualified.
 - Justice must not only be done but must appear to be done.
 - Actual proof of prejudice is not necessary; reasonable ground for possibility of bias is sufficient.

3. Subject Matter Bias

- A judge may have bias in the subject matter if:
 - He is a party to the case
 - He has a direct connection with the litigation
- To disqualify on this ground, there must be:
 - Intimate and direct connection between adjudicator and the issues in dispute
 - Real likelihood of bias to vitiate the decision
- Categories of Subject Matter Bias:
 1. Partiality or connection to the issue
 2. Departmental bias
 3. Prior utterances and pre-judgment of issues

4. Acting under dictation

RULE OF FAIR HEARING (AUDI ALTERAM PARTEM):

1. Principle: Audi alteram partem means “hear the other side”; no one should be condemned unheard.
2. Requirement: Both sides must be heard before passing an order.
3. Implication: A person against whom a prejudicial order is passed must be informed of the charges and given an opportunity to explain.

Ingredients of the Rule of Fair Hearing:

1. Right to Notice

- Hearing begins with notice by the concerned authority to the affected person.
- Without knowing the case against him, a person cannot defend himself.
- The authority must give notice before proceedings start.
- Omission to serve notice is not fatal if due to the person’s own fault.

Sufficiency of Time:

- The notice must give sufficient time for the person to prepare his case.
- Adequacy of time depends on the facts of each case.

Adequacy and Clarity of Notice:

- Notice must be adequate, reasonable, clear, and unambiguous.
- Vague or ambiguous notice is not proper.
- Notice must specify the proposed action; if not, it is considered vague and improper.

Case Law

Annamalai Cotton Mills (P) Ltd. vs. The Chairman, Tamilnadu Electricity Board (AIR 1996 Mad 364):

1. Court emphasized the adequacy of show cause notice regarding alleged electricity theft.
2. Details such as meter reading, time period, and authority taking action were missing.
3. Observations of the Court:
 - Quasi-judicial orders must record reasons.
 - In this case, the 3rd respondent did not record reasons, violating natural justice.
 - Show cause notice was vague, only stating inspection and reported theft.
 - Both the notice and the impugned order violated natural justice principles and were bad in law.
 - Full and adequate opportunity of being heard is mandatory before condemnation.

2. Right to Present Case and Evidence

1. The party against whom proceedings are initiated must be given full opportunity to present their case and supporting evidence.

2. The reply is usually in written form.
3. The party may also be given an opportunity to present the case orally, though it is not mandatory.

3. Right to Rebut Adverse Evidence

1. The adjudicating authority must disclose to the person concerned any evidence or material against them.
2. The person must be given an opportunity to rebut the evidence or material.

(i) Cross-Examination

1. Examination of a witness by the adverse party is called cross-examination.
2. The main aim is to detect falsehood in the witness's testimony.
3. Evidence cannot be used against a party unless it has been cross-examined or an opportunity for cross-examination has been given.

Case Law

S.C. Girotra vs. United Commercial Bank (UCO Bank) and Ors. (1995 Supp (3) SCC 212):

1. The petitioner was dismissed based on a committee report prepared by an enquiry officer.
2. The petitioner claimed he was not given the opportunity to cross-examine the enquiry officer.
3. Court held that denying this opportunity violated the principles of natural justice.
4. Court stated that refusal to allow cross-examination of the report makers and officers who certified evidence denied the appellant reasonable opportunity of defence.

(ii) Legal Representation

1. Ordinarily, representation through a lawyer in administrative adjudication is not considered indispensable for fair hearing.
2. Denial of legal representation may violate natural justice in certain situations:
 - Case involves a question of law.
 - Matter is complicated or technical.
 - The person is illiterate.
 - Expert evidence is on record.
 - Prosecution is conducted by legally trained persons.
3. In such conditions, the party must be allowed professional assistance to effectively present their case.

Case Laws

1. Nandini Satpathy vs. P.L. Dani and Ors. (1978 AIR 1025)
 - Accused must be allowed legal representation during custodial interrogation.
 - Police must wait a reasonable time for the representative to arrive.
 - Denial violates Article 22(1) of the Constitution and principles of natural justice.
 - Right to consult an advocate of choice shall not be denied to any arrested person.
2. Suresh Koshy George vs. University of Kerala and Ors. (1969 AIR 198)

- Committee inquired into alleged malpractice during examination.
- Petitioner received a show cause notice but not the inquiry report.
- Court held no breach of natural justice because:
 - Inquiry officer was impartial.
 - Charges were known before the inquiry commenced.
 - Witnesses were examined in the petitioner's presence.
 - Petitioner was allowed to cross-examine witnesses.
 - Petitioner was given every opportunity to present his case before the inquiry officer.

4. Disclosure of evidence

- A party must be given full opportunity to explain every material that is sought to be relied upon against him.
- Unless all the material (e.g., reports, statements, documents, evidence) on which the proceeding is based is disclosed to the party, he cannot defend himself properly.

5. Speaking orders

- Reasoned decision may be taken to mean a decision which contains reason in its support.
- When the adjudicatory bodies give reasons in support of their decisions, the decisions are treated as reasoned decision.
- It is also called speaking order.
- In such condition, the order speaks for itself or it tells its own story.
- Reasoned decision introduces a check on the administrative powers because the decisions need to be based on cogent reasons.
- It excludes or at least minimizes arbitrariness.
- A part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself.
- Reason-based judgments and orders allow the party affected by it to go into the merits of the decision and, if not satisfied, exercise his right to appeal against the judgment/order.
- In the absence of reasons, he might not be able to effectively challenge the order.

Case Law

1. Canara Bank and Ors. vs. Debasis Das and Ors. (12.03.2003 – SC) [(2003) 4 SCC 557]:

- Natural Justice rules are not codified but can be traced in statutes, especially in the Constitution.
- Principles of natural justice are minimum protections against arbitrary procedures by judicial, quasi-judicial, or administrative authorities.
- These rules aim to prevent authorities from doing injustice while making orders affecting individual rights.

2. Sunil Batra v. Delhi Administration AIR 1980 SC 1579:

- Interpreting Section 56 of the Prisons Act, 1894, the Court observed an implied duty on the jail superintendent to give reasons for imposing bar fetters on a prisoner.

- Providing reasons ensures compliance with Article 21 of the Constitution.
- Established the requirement for adjudicatory authorities to substantiate their orders with reasons, laying the foundation for a sound administrative process.
- Though normally a person affected by administrative action is entitled to claim natural justice, it may be excluded under certain circumstances.

EXCEPTIONS TO NATURAL JUSTICE

1. Statutory Exclusion

- Natural justice may be excluded by statutory provision.
- If the statute expressly provides for observance of natural justice, it is mandatory and the authority is bound by it.
- If the statute is silent, such silence may imply observance of natural justice.
- Principles of natural justice can be excluded by statute, either expressly or by necessary implication.
- Courts do not ignore statutory mandate but the statute must conform to constitutional provisions.
- Courts may read the requirement of natural justice into a statute to sustain its constitutionality.

2. Emergency

- In cases of urgency or emergency requiring prompt preventive action, natural justice need not be observed.
- Pre-decisional hearing may be excluded to protect public safety or morality when delay would cause injury to public interest.
- Courts may review the administrative determination requiring exclusion of natural justice rules.

Case Law

- *Maneka Gandhi v. Union of India AIR 1978 SC 597*: Passport may be impounded in public interest without pre-decisional hearing, but post-decisional hearing must be given. Public interest is justiciable; administrative determination is not final.

3. Interim Disciplinary Action

- Natural justice rules do not apply to interim disciplinary actions, e.g., suspension pending inquiry.

Case Law

- *Abhay Kumar v. K. Srinivasan AIR 1981 Delhi 381*: Student debarred pending criminal case; order was interim and preventive, so natural justice did not apply.

4. Academic Evaluation

- Pre-decisional hearing is excluded when a student is removed for unsatisfactory academic performance.
- Competent academic authority may assess work over time and declare it unsatisfactory.
- Exclusion does not apply in disciplinary matters.

5. Impracticability

- When a large number of persons are involved, giving all an opportunity to be heard may be impracticable.
- Courts do not insist on natural justice in such conditions.

Case Law

P. Radhakrishna v. Osmania University AIR 1974 AP 283: Entire M.B.A. entrance examination canceled due to mass copying; impossible to give all examinees a hearing before cancellation.

Effect of Failure of Natural Justice

- When an authority required to observe natural justice fails to do so, the question arises whether the order is void or voidable.
- Voidable order: Legally valid at inception; remains valid until set aside or quashed by the courts; has legal effect up to the time it is quashed.
- Void order: No order at all from its inception; nullity; void ab initio.
- Affected person cannot be sure whether the order is valid until the court decides the matter.
- The affected person cannot ignore the order as a nullity and must go to court for authoritative determination.
- Key question in challenge: Was the authority required to follow natural justice?
- Usually, a voidable order cannot be challenged in collateral proceedings; it must be set aside by the court in separate proceedings.
- If a person is prosecuted criminally for infringing an order, he cannot plead that the order is voidable; such a plea can only be raised if the order is void.
- In India, judicial thinking generally holds that a quasi-judicial order made without following natural justice is void and a nullity.
- In India, generally, quasi-judicial orders made without following natural justice are considered void and nullity.

Case Law

Nawabkhan v. Gujarat, 1974 AIR 1471:

- Section 56 of the Bombay Police Act allowed the Police Commissioner to extern undesirable persons.
- The petitioner disobeyed an externment order and was prosecuted.
- High Court initially quashed the order for failure of natural justice, leading to the petitioner's acquittal.
- On appeal, the High Court convicted him, saying the order was not void from the beginning.

- Supreme Court held: The order affected a fundamental right (Article 19) and was made without hearing the petitioner.
- Such an order is void ab initio, and a person cannot be convicted for disobeying it.
- Where hearing is required by law affecting fundamental rights, failure to give hearing is fatal.

Question: One of the most important principles in the administration of justice is that justice must not only be done but also seen to be done. Choose the most suitable option relating to said principle.

Options:

- (A) Principle of Bias
- (B) Principle of Natural Justice
- (C) Principle of Administrative Justice
- (D) Principle of Pecuniary Bias

Answer: (B)

LIABILITY OF THE GOVERNMENT, PUBLIC CORPORATION

The liability of the government can either be contractual or tortious.

Liability of State or Government in Contract

- The Constitution of India allows the central and state governments to enter into contracts under Article 299.
- Conditions for validity of a government contract:
 1. The contract must be made in the name of the President or the Governor, as applicable.
 2. The contract must be executed on behalf of the President or the Governor, indicating it must be in writing.
 3. A person duly authorized by the President or the Governor must execute the contract.
- Article 299(2): Neither the President nor the Governor is personally liable for contracts or assurances made for constitutional purposes or government enactments.
- Subject to Article 299(1), the general law of contract applies to government contracts.
- The Supreme Court has held that Article 299(1) provisions are mandatory; contracts made in contravention are void and cannot be ratified or enforced, even under the doctrine of estoppel.
- Section 65, Indian Contract Act, 1872: If a contract is void, any person who has received an advantage must restore it or make compensation to the person from whom it was received.
- Therefore, if a government agreement is void due to non-compliance with Article 299(1), the party receiving the advantage is bound to restore it or compensate the other party.

Effect of a Valid Contract with Government

- Once a contract is executed with the Government in accordance with Article 299, the entire law of contract under the Indian Contract Act, 1872 applies.
- The usual remedy for breach of a government contract is a suit for damages.
- Gujarat State Financial Corporation v. Lotus Hotels, 1983 3 SCC 379:
 - Writ of mandamus can be issued against the Government or its instrumentality to enforce contractual obligations.
 - Government cannot claim that a party suffering breach of contract may only sue for damages and cannot compel specific performance.
- Shrelekha Vidyarathi v. State of U.P., 1991 SCC 212:
 - The State must act justly, fairly, and reasonably in contractual matters.
 - Contractual actions of the State have a public element, attracting Article 14.
 - State acts for public good; its public character remains even when statutory or contractual rights exist for the other party.
 - State's contractual actions are public in nature and subject to judicial review under Articles 32 and 226 of the Constitution.
- Provisions of Sections 73, 74, and 75 of the Indian Contract Act, 1872, regarding determination of damages, apply to government contracts.

Quasi-Contractual Liability

- Section 70, Indian Contract Act, 1872:
 - If a person lawfully does anything for another or delivers anything to another, and the latter enjoys the benefit, he is bound to compensate or restore the thing.
 - Requirements of Section 70 fulfilled make the Government liable to pay for work done or services rendered by the State.
 - Section 70 is based on quasi-contract or restitution, not on an existing contract.
 - Enables a person who supplies goods or renders services, not intending to do so gratuitously, to claim compensation from the beneficiary.
 - Liability arises on equitable grounds, even without an express agreement or contract.

Suit against State in Torts

- Tort: A civil wrong arising from breach of civil duty or non-contractual obligation; remedy is damages.
- Essential requirement: breach of duty towards people in general.
- Civil wrongs arising out of breach of contract are not torts; torts arise from breach of duty towards the public.
- Vicarious liability: Responsibility of one person's act falls on another; e.g., a master held liable for servant's wrongful acts.
- The State can be vicariously liable for torts committed by its servants in the exercise of their duty.
- The State is not liable for acts necessary for protection of life or property.

- Acts like judicial or quasi-judicial decisions done in good faith do not attract liability.
- Specific statutory provisions protect administrative authorities from liability; protection does not extend to malicious acts.
- Burden of proving an act was malicious lies on the person challenging the administrative action.
- Principles of law of torts apply in determining torts, and all defenses available to respondents in a tort suit are available to public servants.

Damages

- Public servants may be negligent in exercising their duties; recovering compensation from them directly may be difficult.
- Compensation is more important than punishment for the aggrieved person.
- The State is vicariously liable for wrongful acts of its servants.
- Indian courts are increasingly holding the government liable for damages even where sovereign function could have negated liability.

Case Laws

1. Rudal Shah v. State of Bihar, AIR 1983 SC 1036
 - Petitioner detained illegally for over 14 years after acquittal.
 - Court awarded Rs. 30,000 as damages.
2. Bhim Singh v. State of J&K, AIR 1986 SC 494
 - MLA arrested on way to Legislative Assembly in violation of Articles 21 & 22(2).
 - Court awarded Rs. 50,000 as exemplary costs.
3. C. Ramkonda Reddy v. State, AIR 1989 AP 235
 - State's plea of sovereign function rejected.
 - Damages awarded despite exercise of sovereign function.
4. Saheli, a Women's Resource Center v. Commissioner of Police, Delhi, AIR 1990 SC 513
 - Death of 9-year-old due to assault by police officer.
 - Court directed State to pay Rs. 75,000 to victim's mother.
5. Lucknow Development Authority v. M.K. Gupta, 1994 1 SCC 245
 - Malafide, oppressive, capricious acts of public servant causing injustice or harassment make State liable for damages.
 - State must recover compensation paid from the public servant responsible.

Liability of the Public Servant

- Liability of the State is distinct from the liability of individual officers.
- Individual officers are liable like any private citizen if they act outside the scope of their powers or illegally.
- Ordinary law of contract, torts, or criminal law governs their liability.

- Officers acting in good faith in discharge of duty are not personally liable for losses caused.
- Acts must be in pursuance of official duty and not ultra vires powers.
- Special statutory provisions may protect public servants from liability for acts done in the course of duty.

Statutory Corporation / Public Corporation

- Organisations incorporated under special Acts of Parliament or State Legislature.
- Their management, powers, functions, area of activity, employee rules, and government relations are specified in the Act.
- Multiple corporations can be established under the same Act.
- Examples include State Electricity Boards and State Financial Corporations.

Examples of Public Corporations

- Life Insurance Corporation (LIC)
- Food Corporation of India (FCI)
- Oil and Natural Gas Corporation (ONGC)
- Air India
- State Bank of India (SBI)
- Reserve Bank of India (RBI)
- Employees State Insurance Corporation (ESIC)
- Central Warehousing Corporation
- Damodar Valley Corporation
- National Textile Corporation
- Industrial Finance Corporation of India (IFCI)
- Tourism Corporation of India
- Minerals and Metals Trading Corporation (MMTC)

The main features of Statutory Corporations are as follows:

It is incorporated under a special Act of Parliament or state legislative Assembly

It is an autonomous body and is free from government control in respect of its internal management. However, it is accountable to the Parliament or the state legislature

It has a separate legal existence

It is managed by Board of Directors, which is composed of Individuals who are trained and experienced in business management. The members of board of Directors are nominated by the government

It is supposed to be self-sufficient in financial matters. However, in case of necessity it may take loan and/or seek assistance from the government

The employees of the enterprises are recruited as per their own requirements by following the terms and conditions of recruitment decided by the Board

Principal Benefits of Public Corporation

- Freedom from government regulations and controls.
- High degree of operating and financial flexibility.
- Balances autonomy of private enterprise with responsibility to the public.
- Challenges: reconciling autonomy with public accountability.

Characteristics

- Public corporation is a separate and independent entity from the Government.
- Not a government department; employees are not government servants.
- Employees are not entitled to protection under Article 311 of the Constitution.
- Public corporations fall under the meaning of 'State' (Article 12); fundamental rights are enforceable against them.
- They are 'other authorities' subject to writ jurisdiction:
 - Supreme Court under Article 32
 - High Court under Article 226

Contracts and Liability

- Article 299 requirements for government contracts do not apply to public corporations.
- On principles of vicarious liability, corporations are liable for wrongs done by their officers or servants.
- Liability extends even to torts requiring mental elements, e.g., malicious prosecution.
- Local authorities (Municipalities, District Boards) are also liable for torts committed by their officers or servants.

LESSON-5

Law of Torts

The purpose of law is not to prevent a future offense, but to punish the one actually committed.

Ayn Rand

REGULATORY FRAMEWORK

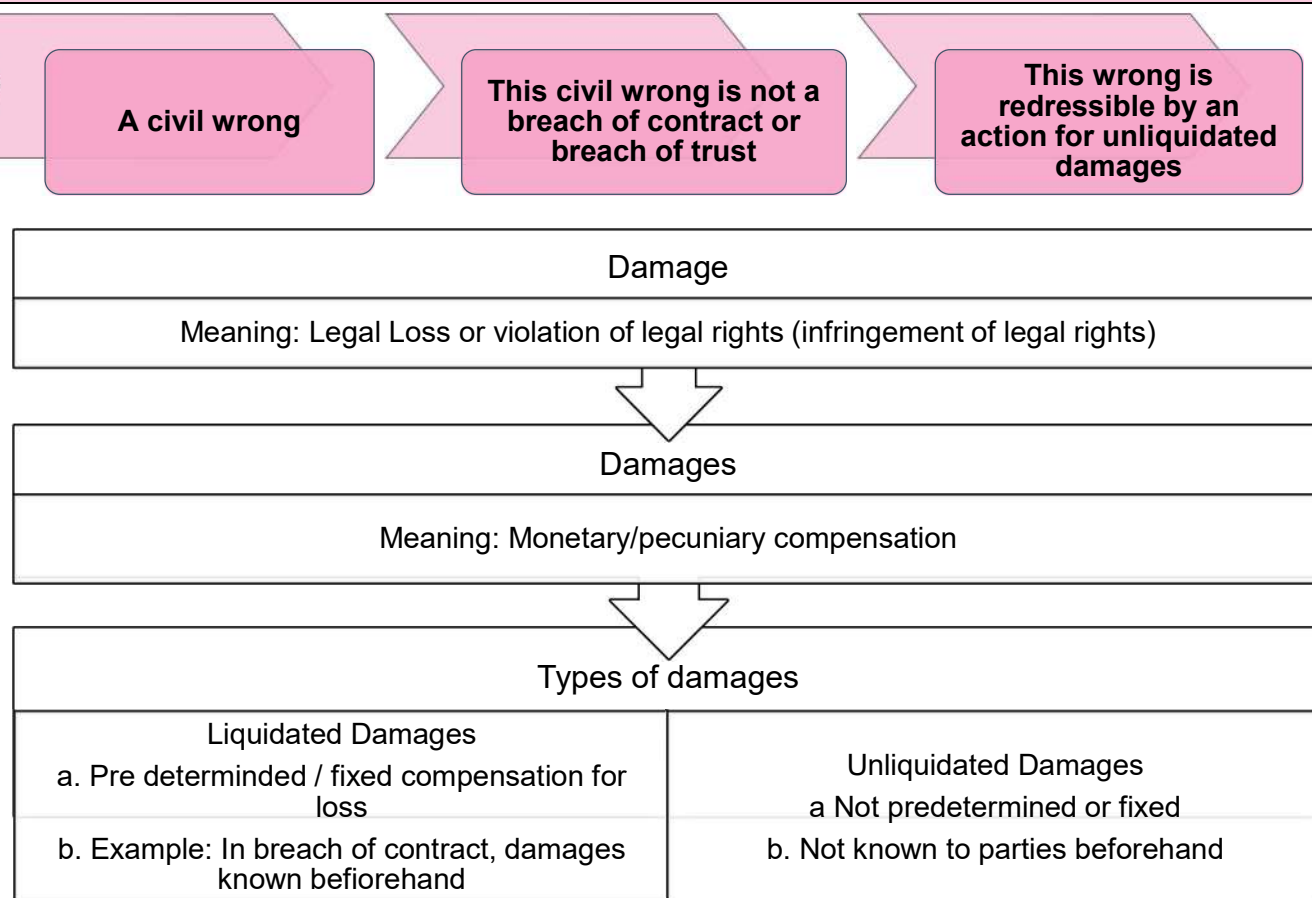
- Judicial Precedents
- Section 2(m) of the Limitation Act, 1963

INTRODUCTION TO LAW OF TORTS

- Law is the great civilizing machinery.
- Law liberates the desire to build and subdues the desire to destroy.
- If war can tear us apart, law can unite us – through fear, love, reason, or all three.
- Law is the greatest human invention.
- All other things give man mastery over his world; law gives mastery over himself. (Lyndon B. Johnson, TIME, Sept 24, 1965, p.48)
- Justice is one of the greatest concerns of mankind.
- Edmund Burke: Justice is the “great standing policy of civil society”.
- Administration of justice is one of the primary objects for which society was formed.
- The Constitution’s preamble cherishes justice as a great value.
- The word ‘tort’ is the French equivalent of the English word ‘wrong’.
- The word ‘tort’ is derived from the Latin word ‘Tortum’.
- Simply stated, ‘tort’ means wrong.
- Not every wrong or wrongful act is a tort.
- Tort is a kind of civil wrong as opposed to a criminal wrong.
- Wrongs in law are either public or private.
- Public wrongs are violations of public law and offenses against the State.
- Private wrongs are breaches of private law, i.e., wrongs against individuals.
- Public wrongs or crimes are made punishable under penal law and belong to the public law group.
- Section 2(m) of the Limitation Act, 1963: “Tort means a civil wrong which is not exclusively a breach of contract or breach of trust.”
- Salmond: “A civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.”
- Fraser: “An infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.”

- Winfield: “Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.”
- Two key elements of tort:
 1. Tort is a species of civil injury or wrong, as opposed to a criminal wrong.
 2. Every civil wrong is not a tort.
- Tort can be distinguished from a crime, contract, trust, and quasi-contract.
- The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law.

Elements of Tort



Question: Which type of wrong the torts is?

Option:

- (A) Civil Wrong
- (B) Criminal Wrong
- (C) Both Civil & Criminal Wrong
- (D) Constitutional Wrong

Answer: (A)

Case Law

- Case: Jay Laxmi Salt Works (P) Ltd vs State of Gujarat, 1994 SCC (4) 1, JT 1994 (3) 492
- Date: 4 May 1994
- Observation by Supreme Court:
 - Law of torts is founded on morality; no one has the right to harm others, intentionally or innocently.
 - Tortious liability should not be rigidly classified; it is ever-expanding.
 - A liberal approach to tortious liability promotes social development, orderly growth, and cultural refinement.

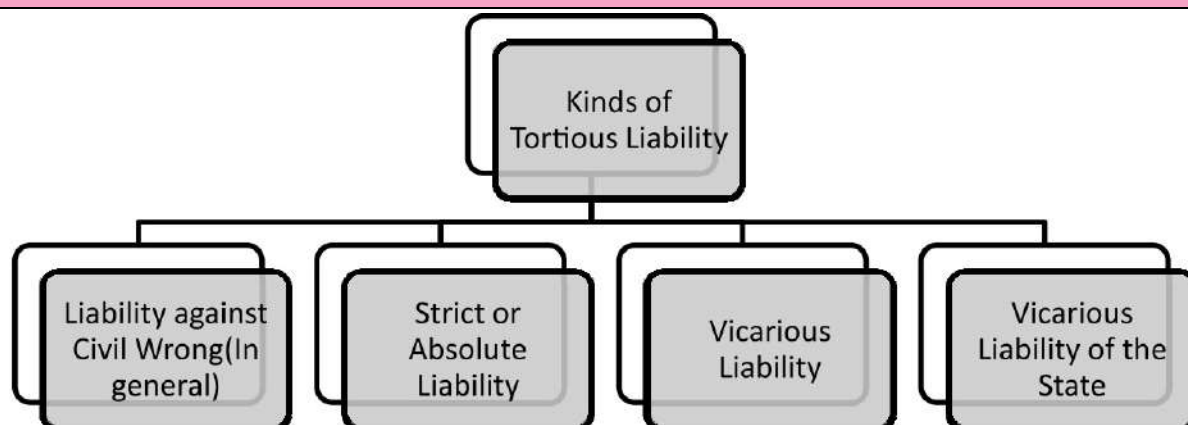
Example

An action against the railway company for loss of goods in carriage is due to presence of contract but any action by a passengers for any injuries occurred due to negligence of the railway employees is tort.

Example

A patient while getting operated his injuries got seriously injured due to the negligence of surgeon. The surgeon shall be liable for breach of contract as well as in law of torts because his negligence caused the harm to other person without any lawful justification.

KINDS OF TORTIOUS LIABILITY & GENERAL CONDITIONS

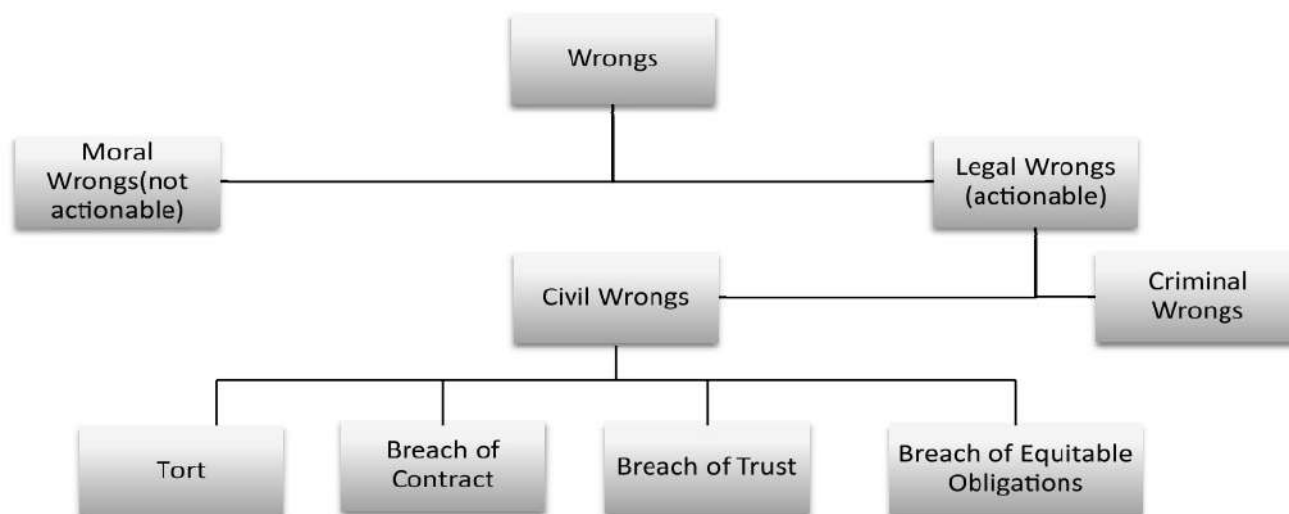


(A) Liability against Civil Wrong (In general)

Civil Wrong

- Civil Wrong refers to wrongful acts that satisfy conditions of liability and are remedied by law.
- Occurs when someone loses money due to the negligence of another.
- Examples of civil wrongs include:
 - Damage to property
 - Damage to reputation
 - Failure to fulfill contractual duties
 - Physical or mental harm

- The victim of a civil wrong has the right to sue the wrongdoer to recover damages.
- Civil wrongs include:
 - Tort
 - Breach of Contract
 - Breach of Trust
 - Breach of Equitable Obligation



General Conditions of Liability for a Tort

- There is no fixed catalogue of circumstances that universally define torts.
- Some situations are recognized as torts and will continue to be so unless repealed by statute.
- Other situations have been held not to be torts.
- Certain general conditions for tortious liability can be laid down.
- Generally, a tort consists of:
 - An act or omission by the defendant (tortfeasor)
 - Without just cause or excuse
 - Causing harm to the plaintiff

A wrongful act or omission of the defendant;

The wrongful act must result in causing legal damage to another; and

The wrongful act must be of such a nature as to give rise to a legal remedy

(i) Wrongful Act

- The act complained of must be legally wrongful with respect to the party complaining.
- It should prejudicially affect interests protected by law.

- Persons whose legal rights are violated without legal excuse have a right of action, whether or not loss results.
- Legal rights include:
 - Right of reputation
 - Right of bodily safety and freedom
 - Right to property
- Case Law:
 - *Glasgow Corporation v. Taylor, 1922*: Corporation failed to fence a poisonous tree; a child ate its fruit and died. Court held the corporation liable.
 - *General Cleaning Corporation v. Christmas, 1953*: Employer failed to provide safety belts, resulting in employee injuries. Employer held liable.

(ii) Legal Damages

- Not every damage is recognized by law as a legal damage.
- There must be legal injury or invasion of a legal right.
- Infringement of a legal right allows an action even if no actual damage occurred.
- Case Law: *Ashby v. White, 1703*: Legal damage is neither identical with actual damage nor necessarily pecuniary.

Two maxims, namely:

(a) Damnum sine injuria (Damage without injury), and

(b) Injuria sine damnum (injury without damage)

Maxim Concept	Meaning / Explanation	Case Law
Damnum Sine Injuria	• Damnum means harm, loss, or damage (e.g., money, comfort, health). • Injuria means infringement of a legal right of the plaintiff. • The maxim "Damnum Sine Injuria" means a person may suffer damage but has no action in tort if the damage is not to an interest protected by law. • Causing damage, however substantial, is not actionable unless there is also a violation of a legal right. • Common example: damage resulting from an act done in the exercise of legal rights.	- <i>Gloucester Grammar School Case, 1410</i>: Defendant started his own school; students left plaintiff's school. Plaintiff suffered monetary loss. Court held defendant not liable; competition is not actionable. - <i>Chasemore v Richards, 1859</i>: Defendant's well disrupted plaintiff's water supply. Monetary loss occurred, but court held defendant not liable as no legal right was violated.
Injuria Sine Damnum	• Injuria Sine Damnum means injury without damage. • It occurs when there is an infringement of a legal right but no actual harm or damage results.	- <i>Ashby v White, 1703</i>: Plaintiff prevented from voting. No monetary loss occurred. Court held defendant liable as legal right to vote was violated. Defendant committed a tort.

- The plaintiff can still sue in tort even if no damage has occurred.
- Some rights or interests are so important that their violation is actionable without proof of damage.
- Violation of an “absolute” private right allows the plaintiff’s action to succeed even if there is no Damnum.
- An absolute right is one whose violation is actionable per se, i.e., without proof of any damage.
- Examples include trespassing on another’s land, which is actionable even if no harm is caused.

(iii) Legal Remedy

- Legal Remedy is the third condition of liability for a tort.
- To constitute a tort, the wrongful act must be recognized under the law.
- The main remedy for a tort is an action for unliquidated damages.
- Other remedies may include:
 - Injunctions (to prevent further harm)
 - Specific restitution (e.g., in detention of a chattel)
- Self-help is a remedy available to the injured party without going to court.
- Self-help does not apply to all torts; best example is trespass to land.

Example

if “A” finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

Mens Rea

- Mens Rea means a guilty mind.
- Liability in tort is not created by the act alone; the act must be accompanied by the mind.
- Principle: “actus non facit reum nisi mens sit rea” – the act itself does not create guilt without a guilty mind.
- For tort law, the act need not have an evil motive, but the mind must concur with the act.
- The act must be done with wrongful intention or negligence.
- It is not easy to generalize liability in tort based solely on mens rea.
- Mens Rea can be interpreted in two ways (details to follow in further sections).

a) Fault / State of mind when relevant

- Applicable in torts like assault, battery, false imprisonment, deceit, malicious prosecution, and conspiracy.

- The state of mind of the defendant is considered to determine liability.
- Defendant's conduct may be innocent or accidental; these factors are taken into account.

b) Liability without fault

- In some cases, the mental state of the doer is irrelevant.
- Liability arises even if the act was done without wrongful intention or malice.
- Tort liability can be fixed even when mens rea is absent.

Example

1. In case of defamation, the defendant is liable even when he did not intend to defame but acted in a way that turned out to be defamatory.
2. The provisions regarding no fault liability are covered in Section 140 of Motor Vehicle Act, 1988, it says. Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, be jointly and severally, liable to pay compensation in respect of such death or disablement. The amount of compensation in respect of the death is fifty thousand rupees and in case of permanent disablement twenty-five thousand rupees.

(B) Strict or Absolute Liability

- Defendant is liable even if harm occurred without intention or negligence.
- Liability arises without fault.

Categories of Strict / Absolute Liability

1. Liability for Inevitable Accident:
 - Arises when damage is caused by the escape of dangerous substances from a person's land.
 - Law makes a person an insurer against the results of his activities.
2. Liability for Inevitable Mistake:
 - Occurs when a person interferes with the property or reputation of another.
3. Vicarious Liability for Wrongs committed by others:
 - Responsibility is imputed by law on grounds of social policy or expediency.
 - Example: Liability of a master for acts of his servant.

Rule in Rylands v. Fletcher

- A person acts at his peril and is an insurer of the safety of his neighbour against accidental harm.
- Duty is absolute, independent of negligence by the defendant or his servants.
- If a person brings or accumulates anything on his land that may cause damage if it escapes, he is liable even if he took precautions.
- Case Facts:
 - B, a mill owner, employed contractors to construct a reservoir.

- Old mining shafts under the site were not blocked.
- Water from the reservoir escaped and flooded plaintiff's coal mines.
- B had no knowledge of the shafts and was not negligent, but was held liable.
- Blackburn, J.: Person who brings anything likely to do mischief on their land must keep it at their peril; liable for natural consequences of escape.
- Read v. Lyons [(1946) 2 All E.R. 471 (H.L.)]: Two conditions for Rylands v. Fletcher rule:
 1. Escape from Control: Object escapes from a place under defendant's control to a place outside it.
 2. Non-natural Use of Land: Defendant must have made non-natural use of land.
- If either condition is absent, strict liability under Rylands v. Fletcher does not apply.

Exceptions to the Rule of Strict Liability



Defence Exception	/ Explanation	Example
(i) Damage due to Natural Use of Land	○ In Rylands v. Fletcher, water collected in a large reservoir was held to be non-natural use of land. ○ Natural use of land refers to ordinary/domestic purposes. ○ Examples of natural use include: • Keeping water for domestic purposes. • Water pipe installations in buildings. • Working of mines and minerals in a standard manner. • Lighting a fire in a fireplace at home.	Reservoir for generating power on residential land → non-natural use → liable. Swimming pool or water tank for domestic use → natural use → not liable.

- Necessary wiring for supplying electric light.
- Non-natural use involves unusual or potentially dangerous activities on the land, e.g., creating a large reservoir for power generation.

(ii) Consent of the Plaintiff

- Consent of the Plaintiff: If the plaintiff has consented to the accumulation of a dangerous thing on the defendant's land, the defendant is not liable under Rylands v. Fletcher.
- Implied Consent: Consent is implied when the source of danger is for the common benefit of both the plaintiff and defendant.
- Effect: Liability under strict liability rules does not arise in such cases.

Neighbors A & B allow installation of water pipes. Pipe leaks → neither A nor B can claim damages.

Example (optional for clarity):

- Two neighbors agree to install water pipes for mutual use. If a pipe leaks, neither can claim damages.

(iii) Act of Third Party

- If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor under the defendant's control, the defendant will not be liable.
- In Box v. Jubh (1879) 4 Ex. D. 76, the overflow from the defendant's reservoir was caused by the blocking of a drain by a stranger; the defendant was held not liable.
- If the act of the stranger is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care, prevent the damage.

Bull properly fenced in A's garden. B opens fence → bull escapes and hits C. A not liable.

- Failure on the part of the defendant to avoid such damage will make him liable.

(iv) Statutory Authority	• Sometimes, public bodies storing water, gas, electricity, etc., are exempted from liability by statute if they have taken reasonable care. • In <i>Green v. Chelsea Water Works Co.</i> (1894) 70 L.T. 547, the defendant company had a statutory duty to maintain a continuous supply of water. • A main belonging to the company burst without any fault on its part, causing the plaintiff's premises to be flooded. • The company was held not liable as it was engaged in performing a statutory duty.	<i>Green v. Chelsea Water Works Co.</i> (1894): Burst water main while maintaining water supply. Company not liable.
(v) Act of God	• If an escape is caused through natural causes and without human intervention. • Occurs under circumstances which no human foresight can anticipate. • And of which human prudence is not bound to recognize the possibility. • In such cases, there exists the defence of Act of God.	Plaintiff's artificial lake overflowed due to heavy rainfall → damage to crops. Defendant not liable.
(vi) Escape due to Plaintiff's Own Default	• Damage caused by the plaintiff's own default is a valid defence, as considered in <i>Rylands v. Fletcher</i>. • If the plaintiff suffers damage due to his own intrusion into the defendant's property, he cannot claim compensation for such damage.	Thief A enters basement with chemicals, rearranges containers, spills chemicals → cannot claim damages.

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

- The Supreme Court discussed the applicability of the rule in *Rylands v. Fletcher* in the case of *M.C. Mehta v. Union of India and Others* (1987) 1 Comp. L.J. 99 (S.C.).
- The case dealt with the liability of enterprises engaged in hazardous or inherently dangerous industries when an accident occurs.
- The Court stated the need to evolve new principles and norms suitable for a highly industrialized economy, rather than relying on English or foreign law.
- The Court observed that the rule in *Rylands v. Fletcher* in England has certain limitations and restrictions.
- The Supreme Court held that an enterprise engaged in a hazardous or inherently dangerous industry:
 - Owes an absolute and non-delegable duty to the community to ensure no harm results to persons working in the factory or living nearby.
 - Must ensure that the activity is conducted with the highest standards of safety.
 - If harm results from such activity, the enterprise is absolutely liable to compensate for the harm.
 - It is no defence for the enterprise to claim that it took all reasonable care or that the harm occurred without negligence.
- The Court thus imposed the principle of absolute liability for enterprises dealing with hazardous substances.
- Under this rule in India, it is not necessary to prove:
 - Non-natural use of land, or
 - Escape of a dangerous substance, which are otherwise required under *Rylands v. Fletcher*.

Case Law

M.C. Mehta & Ors. v. Union of India (1987) – Oleum Gas Leak Case

- Incident: Oleum gas leaked from Shriram Food & Fertilizers Industries on 4th and 6th December 1985, causing harm to nearby people.
- Issue: Applications were filed for compensation to victims affected by the gas leak.
- Court's Decision:
 - Industries engaged in hazardous activities must ensure no harm is caused to workers or nearby residents.
 - Such industries have a duty to maintain the highest safety standards.
 - If harm occurs, the industry is fully and absolutely liable to compensate victims — even if it took all possible care.
- Importance: This case introduced the rule of absolute liability in India, replacing the older rule of strict liability from *Rylands v. Fletcher*.

(C) Vicarious Liability

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is vicariously liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This is known as vicarious liability in tort.

Principle of Liability

A person may be liable in respect of wrongful acts or omissions of another in ways as given under:

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

Essential elements of Vicarious Liability

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

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

Types of Vicarious Liability

(a) Principal and Agent [Specific Authority]

- Maxim: *Qui facit per alium facit per se* – “He who acts through another acts himself.”
- When an agent commits a tort in the ordinary course of his duties, the principal is liable.
- Case: *Lloyd v. Grace, Smith & Co. (1912) A.C. 716*
 - A managing clerk of a solicitor firm defrauded a client by making her sign documents transferring her property to him.
 - The principal was held liable, even though he was unaware of the fraud, as it occurred in the course of employment.

(b) Partners

- When a partner commits a tort in the ordinary course of the firm’s business, all partners are liable to the same extent as the guilty partner.
- The liability is joint and several.
- Case: *Hamlyn v. Houston & Co. (1903) 1 K.B. 81*
 - One partner bribed the plaintiff’s clerk to get trade secrets.
 - The court held that both partners were liable for the tort, even though only one committed it.

(c) Master and Servant [Authority by Relation]

- A master is liable for torts committed by his servant in the course of employment.
- The servant is also liable — their liability is joint and several.
- Characteristics of vicarious liability:
 1. Liability is independent of the master’s own wrongful intention or negligence.

2. Liability is joint and several.
3. Liability arises due to the relationship between master and servant (unlike strict or absolute liability, which arises from the act itself).
 - The master is liable for:
 - Acts specifically authorized, and
 - Acts not authorized but done in the course of employment.
 - Maxims:
 - *Respondeat Superior* – “Let the principal be liable.”
 - *Qui facit per alium facit per se* – “He who acts through another acts himself.”
 - The master remains liable even if the servant acted against express instructions, as long as the act was within the course of employment and for the master’s benefit.

d) Employer and Independent Contractor

- An employer is vicariously liable for the torts of his servants committed in the course of employment, but not liable for torts committed by independent contractors.

Difference Between Servant and Independent Contractor

- A servant works under the control and supervision of the employer in performing the work.
- An independent contractor works for another person but is not controlled by that person in how the work is done.
- Thus, a person is a servant when the employer retains control over the actual performance of the work.

When Employer *Is Liable* for Acts of an Independent Contractor

An employer can be held liable in the following situations:

1. When the employer authorizes the contractor to commit a tort.
 2. In cases of strict liability (where liability arises irrespective of negligence).
 3. Negligence of the independent contractor — when the employer fails to take reasonable care.
- Employers are also liable for “collateral negligence” of their contractors if harm arises during work involving public risk.
 - Example:
 - A employed B to fit casement windows.
 - B’s servant left a tool on the window sill; wind blew it off, injuring a passerby.
 - The employer was held liable because the work was being done on a highway, and the employer had a duty to prevent harm to the public.

When Employer *Is Not Liable* for Acts of an Independent Contractor

- The employer is not liable if he has taken due care in selecting a competent contractor.
- Case: *Philips v. Britannia Hygienic Laundry Co. (1923)*

- The owner of a lorry was not held liable when a third party's vehicle was damaged due to the negligent repair of the lorry by a garage proprietor (independent contractor).

(e) Liability for the Acts of Servants/Employees

- An employer is liable when his servant commits a tort in the course of employment.
- An act is considered done in the course of employment if it is either:
 1. A wrongful act authorized by the employer, or
 2. A wrongful or unauthorized mode of doing an act authorized by the employer.

Explanation:

- For authorized wrongful acts, the employer's liability is direct and clear.
- For unauthorized modes of doing authorized acts, the employer is still liable if the act was done in the course of employment.

Case Laws

1. Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board (1942) A.C. 509
 - A driver of a petrol lorry, while transferring petrol to an underground tank, lit a cigarette and threw the lit match on the floor, causing an explosion and fire.
 - Held: The employer was liable, as the act was an unauthorized mode of performing his duty of delivering petrol.
2. Bayley v. Manchester, Sheffield & Lincolnshire Railway Co. (1873) L.R. 7 C.P. 415
 - A porter mistakenly thought the plaintiff was in the wrong train and forcibly removed him.
 - Held: The railway company was liable, as the porter acted in the course of employment, though in an unauthorized manner.

Case Laws

1. Dinbai R. Wadia & Ors. v. Farukh Mobedjna & Anr. (AIR 1958 Bom 218)
 - The Bombay High Court held that a principal can be held liable for any fraud or illegal act committed by his agent if it is done within the scope of the agent's authority.
 - Whether an act falls within the agent's authority depends on the facts of each case.
2. Lakshminarayan Ram Gopal & Sons v. Government of Hyderabad (AIR 1954 SC 364)
 - The Supreme Court explained the difference between a servant, an independent contractor, and an agent:
 - A servant works under the direct control and supervision of the master.
 - An independent contractor works independently and uses his own methods to achieve a specified result.
 - An agent must follow lawful instructions of the principal but is not under direct control like a servant.
 - An agent is not a servant, but a servant can act as an implied agent of the master depending on his duties.

(D) Vicarious Liability of the State

(a) The Position in England

- Under Common Law, the Crown could not be sued in tort, whether for wrongs authorized by it or committed by its servants in the course of employment.
- The Crown Proceedings Act, 1947 changed this position.
- After the Act, the Crown became liable for torts committed by its servants just like a private individual.
- Hence, in England, the Crown is vicariously liable for the torts of its employees.

(b) The Position in India

- India has no statute similar to the Crown Proceedings Act, 1947.
- When a tort case arises against the Government, the court examines whether the act was a sovereign or non-sovereign function.
- If the act is a sovereign function, the State enjoys immunity from tortious liability.
- If the act is a non-sovereign function, the State is liable.
- Non-sovereign functions include commercial or administrative activities that could also be performed by private individuals.

Role of the State in the Law of Torts

1. Importance of Tort Law and State Liability

- The State interacts frequently with citizens in modern society — these interactions often lead to legal disputes under tort law.
- Tort law deals with civil wrongs (not arising from contract or trust) for which unliquidated damages are claimed.
- With the State's expanding role in welfare, administration, and industry, determining the State's liability in tort has become crucial.

2. Constitutional Basis – Article 300

- Article 300(1) of the Indian Constitution provides:
 - The Union of India and States can sue and be sued in their own names.
 - The liability of the Government is the same as that of the Dominion of India or Provinces before the Constitution came into effect.
 - Parliament or State Legislatures may make laws modifying this liability.

3. Key Judicial Decisions on State Liability

(a) State of Rajasthan v. Vidyawati (AIR 1962 SC 933)

- Facts: A government jeep driven rashly by a driver (servant of the State) killed a pedestrian.
- Held: The State was vicariously liable for the negligence of its employee.
- Reasoning:
 - India is a Republic and Welfare State; the old rule that “the King can do no wrong” has no place here.

- The Crown immunity in England was abolished by the Crown Proceedings Act, 1947, and similar reasoning should apply in India.
- The State should be as liable as any employer for torts committed by its servants in the course of employment.

(b) Kasturi Lal v. State of U.P. (AIR 1965 SC 1039)

- Facts: Police seized gold from the plaintiff during arrest. The gold was stolen by a negligent constable from the malkhana.
- Held: The State was not liable, as the police officers were exercising sovereign powers (arrest, search, seizure).
- Principle:
 - The State is immune when the act arises from a sovereign function.
 - However, the Court suggested that legislation should be passed (like England's Crown Proceedings Act, 1947) to define State liability more clearly.

4. Sovereign vs. Non-Sovereign Functions

(a) N. Nagendra Rao & Co. v. State of A.P. (AIR 1994 SC 2663)

- The Supreme Court reviewed earlier cases and redefined sovereign functions.
- Key Principles:
 - The distinction between sovereign and non-sovereign powers no longer fully exists.
 - Only core sovereign functions (like defence, foreign affairs, law and order) are immune.
 - For other administrative or commercial acts, the State can be held liable.
- Tests Suggested:
 - If the act is political or external (defence, war, foreign affairs) → Sovereign, no liability.
 - If the act is administrative or commercial → Non-sovereign, State is liable.
- Court's Observation:
 - The State cannot act arbitrarily and claim immunity in the name of sovereignty.
 - The rule of law demands that the State be accountable for negligence of its officers.

(b) Emphasis on Welfare State

- In a Welfare State, government functions extend beyond defence or justice to education, health, trade, and social welfare.
- Therefore, most State functions today are non-sovereign and attract liability if negligence occurs.

5. Vicarious Liability of the State

- The State's liability is linked to the negligence of its officers.
- If officers can be personally liable, the State can also be sued for their tortious acts.

6. Case Law

Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat (1994 SCC 4 1)

- The Supreme Court observed:
 - Injury and damage are essential elements of tort.
 - Tort liability arises from breach of a legal duty fixed by law, unlike contractual duties fixed by agreement.
 - Tort law is ever-evolving—its boundaries cannot be rigidly fixed.
 - Concepts like strict liability, absolute liability, and fault liability have developed over time to ensure fairness and justice.

7. Summary of Principles

- The State can be sued for torts committed by its servants in non-sovereign functions.
- Immunity applies only to sovereign functions (defence, foreign affairs, law enforcement).
- The line between sovereign and non-sovereign is now narrow and context-dependent.
- Courts promote accountability and fairness, consistent with the Welfare State and Rule of Law.

CASE LAW

Anita Bhandari and Ors. v. Union of India (2005) ACC 780

In this case, the husband of the petitioner went to bank to deposit the cash and alongside cash box of the bank was also being carried inside, the security guard in a haste ended up firing the petitioner's husband thereby killing him. The petitioner claimed that the bank was vicariously accountable for the incident since the security guard had committed the conduct while on the job, but the bank argued that it had not given the employee permission to fire. The bank was found to be responsible by the court because providing the guard with a gun amounted to giving him permission to shoot when he felt it was necessary, even though the guard had acted too vigorously in the performance of his duty.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual

Battery
Assault
Bodily Harm
False Imprisonment
Malicious Prosecution
Nervous Shock
Defamation
Negligence

(a) Battery

- Definition: Any direct application of force to the person of another individual without consent or lawful justification.
- Essentials to constitute battery:
 1. Use of force, however trivial, without the plaintiff's consent.
 2. Force applied without lawful justification.
- Key principle: Even a very trivial force, or touching someone in anger without justification, constitutes battery.
- Example:
 - A incites a bull to spring upon Z without Z's consent. If A intends to cause injury, fear, or annoyance, it is battery.
- Defence:
 - Touching a person with reasonable force is not battery (*Coward v. Baddeley*).
 - Indian case *Sitaram v. Jaswant Singh* (1951 NLJ 477):
 - An occupier may forcibly remove a trespasser from premises.
 - Force must be reasonable and not excessive or disproportionate to the situation.

(b) Assault

- Definition: Any act by the defendant that causes the plaintiff to immediately apprehend contact with their person.
- Essentials:
 1. The defendant creates apprehension in the mind of the plaintiff that battery will be committed.
 2. Unlike battery, actual physical contact is not necessary; apprehension alone is sufficient.
- Relation to battery:
 - Usually, battery also involves assault, but assault can exist without actual contact (e.g., when hit from behind without seeing it coming).
- Examples of assault:
 - Pointing a loaded gun at the plaintiff.
 - Shaking a fist under the plaintiff's nose.
 - Threatening gestures or curses.
 - Aimed blow intercepted before contact.
 - Surrounding the plaintiff with a display of force.
- Example case:
 - A shakes his fist at Z, intending or knowing it is likely that Z believes A is about to strike. A has committed an assault.

(c) Bodily Harm

- Definition: A wilful act or statement by the defendant, intended to cause physical harm to the plaintiff, which actually results in physical harm.

- Essentials:
 1. Intentional act or statement by the defendant.
 2. Act calculated to cause physical harm.
 3. Physical harm actually occurs.
- Example:
 - *Z* is riding in a chariot. *A* lashes *Z*'s horses, causing them to quicken pace.
 - This change of motion affects *Z*.
 - If done without *Z*'s consent, and with intent or knowledge that it may injure, frighten, or annoy *Z*, *A* has committed a tort of bodily harm.

Question: When the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him. He commits

Options: (A) Attempt to Battery

(B) Assault

(C) Slander

(D) Defamation

Answer: (B)

(d) False Imprisonment

- Definition: Imposition of total restraint on a person's liberty, however short, without lawful justification.
- Essentials:
 1. Unauthorized restraint on a person's body.
 2. Restriction prevents the person from moving freely.
 3. Violation of personal liberty, whether in a confined space or open area.
 4. Restraint may occur by threats or physical confinement.
- Example:
 - *A* locks *Z* in a walled space, preventing *Z* from moving beyond the wall.
 - *A* has wrongfully confined *Z*, committing false imprisonment.

(e) Malicious Prosecution

- Definition: Instigating judicial proceedings (usually criminal) maliciously and without reasonable cause, which terminate in favor of the plaintiff and cause damage.
- Essentials:
 1. Plaintiff is prosecuted by the defendant.
 2. Lack of reasonable and probable cause for the prosecution.
 3. Defendant acts maliciously (improper motive, not justice).
 4. Plaintiff suffers damage (reputation, freedom, property).
 5. Prosecution terminates in favor of the plaintiff.
- Example:
 - *A* falsely accuses *B* of theft due to a grudge.
 - Court acquits *B*; *B* can sue *A* for malicious prosecution.

(f) Nervous Shock

- Definition: Relief is provided when a person suffers physical injury not by direct impact but through emotional or nervous shock.
- Essentials:
 1. Nervous shock alone is not actionable.
 2. Some physical injury or illness must result from emotional disturbance.
 3. Covers fear, sorrow, or distress caused by defendant's negligence or actions.
- Example:
 - *A* negligently drives a carriage onto railway tracks as a train approaches.
 - A lady suffers nervous shock, leading to health issues.
 - *A* is liable for damages resulting from the nervous shock.

(g) Defamation

- Definition: An attack on the reputation of a person; publication of a statement which tends to:
 - Lower a person in the estimation of right-thinking members of society, or
 - Make others shun or avoid the person.
- Classification:
 1. Libel: Defamation in permanent form (e.g., written words, pictures, caricatures, cinema films, effigies, statues, recorded words).
 2. Slander: Defamation in transient form (e.g., spoken words, gestures).
- Legal Position:
 - Both libel and slander are torts and crimes in India.
 - Section 356, Bharatiya Nyaya Sanhita, 2023, recognizes both as offences.
 - Punishment for libel is generally more severe than slander.
- Example:
 - *A* points to *Z* as a thief of *B*'s watch, intending to damage *Z*'s reputation — constitutes defamation.
 - A newspaper publishes engagement of *Mr X* with *Miss Y*. *Mrs A*, *X*'s wife, sues for defamation and is entitled to compensation.

(h) Negligence

- Definition: Inadvertence or carelessness; failure to act in a reasonable manner.
- Essentials:
 1. Legal duty to exercise due care.
 2. Breach of duty.
 3. Consequential damage to the plaintiff.
- Key Points:
 - Became independent tort due to technology and regulatory environment.
 - Negligence in medical treatment is a common example.

- Winfield: Negligence is breach of legal duty resulting in undesired damage to plaintiff.
- Consumer Protection Act provides remedies for unliquidated damages in cases of negligence.
- Landmark cases:
 - *Indian Medical Association v. V.P. Shantha & Ors.* – Medical services are services under Consumer Protection Act; deficiency may lead to liability.
 - *Poonam Verma vs. Ashwin Patel & Ors.* – Defined negligence in terms of duty, breach, and damage.

SUMMARY

TORT	PARTICULARS	EXAMPLE
Battery	○ Direct application of force to another person without consent or lawful justification. ○ Essentials: (i) Use of force, however trivial, without consent; (ii) Force without lawful justification. ○ Even trivial touching in anger constitutes battery. ○ Defence: Reasonable force is allowed (Coward v. Baddeley; Sitaram v. Jaswant Singh).	A incites a bull to spring upon Z without Z's consent, intending to cause injury, fear, or annoyance.
Assault	○ Act causing plaintiff to immediately apprehend contact. ○ Essentials: Apprehension of battery is sufficient; actual contact not required. ○ Usually accompanies battery, but can exist alone (e.g., hit from behind).	A shakes his fist at Z, intending or knowing Z believes he is about to be struck.
Bodily Harm	○ Wilful act or statement causing physical harm. ○ Essentials: Intentional act, calculated to cause harm, and actual harm occurs.	Z is riding a chariot; A lashes horses causing them to speed, harming Z.
False Imprisonment	○ Total restraint of a person's liberty without lawful justification. ○ Essentials: Unauthorized confinement; restriction of movement; violation of personal liberty; can be by threats or physical restraint.	A locks Z in a walled space, preventing Z from moving beyond it.
Malicious Prosecution	○ Instigating judicial proceedings maliciously and without reasonable cause, causing damage. ○ Essentials: (i) Plaintiff prosecuted by defendant; (ii) Lack of reasonable cause; (iii) Defendant acts maliciously; (iv) Plaintiff	A falsely accuses B of theft due to a grudge; B is acquitted and can sue A for damages.

	suffers damage; (v) Prosecution ends in plaintiff's favor.	
Nervous Shock	○ Relief for physical injury caused by emotional/nervous shock. ○ Essentials: Nervous shock alone insufficient; physical injury/illness must result; caused by emotional disturbance, fear, or sorrow.	A negligently drives carriage onto railway tracks; a lady suffers nervous shock affecting her health.
Defamation	○ Attack on reputation; publication tending to lower estimation or make others shun the person. ○ Types: Libel (permanent form), Slander (transient form). ○ Legal: Both tort and crime in India (Section 356, Bharatiya Nyaya Sanhita, 2023).	A points to Z as thief of B's watch, intending to harm Z's reputation. Newspaper publishes engagement of Mr X & Miss Y; Mrs A sues for defamation.
Negligence	○ Inadvertence or carelessness; failure to act reasonably. ○ Essentials: (i) Legal duty of care; (ii) Breach; (iii) Consequential damage. ○ Key points: Independent tort; medical negligence is common; Consumer Protection Act provides remedies.	Medical practitioner gives substandard care; patient suffers harm.

Case Law

Poonam Verma vs. Ashwin Patel & Ors (1996)

Key Points:

- Respondent No.1 (Ashwin Patel) practiced Allopathy without having the proper qualification.
- The court held this as negligence per se (negligence in itself, obvious due to lack of qualification).
- Principle applied: Sic utere tuo ut alienum non laedas – “Use your own skill so as not to harm others.”
- Practicing medicine without qualification or registration makes a person liable for punishment (imprisonment, fine, or both).
- The case had also been examined by the National Consumer Disputes Redressal Commission regarding medical negligence.

In short: A person practicing medicine without proper qualifications is automatically negligent and legally liable for any harm caused.

LIABILITY OF A CORPORATE ENTITY/COMPANY IN TORTS

Liability of a Corporate Entity/Company in Torts

- Corporates play a significant role in economic growth and undertake complex business activities.

- Companies, being not natural persons, can still be held liable for torts after considering the lifting of the corporate veil.
- Generally, companies are responsible for wrongs committed by their employees.
- Liability is based on the legal maxim: “Qui facit alium facit per se” – “He who acts through another, acts through himself.”

Case Law

Union Carbide Corporation vs. Union of India (1987 AIR 1086, 1987 SCR (1) 819)

- Incident: Bhopal Gas Tragedy on 2nd–3rd December 1984, caused by escape of Methyl Isocyanate (MIC) gas.
- Result: Thousands suffered serious and permanent injuries, including respiratory, ocular, gastro-intestinal problems, mental distress, and pain.
- Court ruling: No-Fault Liability / Absolute Liability applied.
- Principle: If a company engages in a hazardous or inherently dangerous activity, it is strictly and absolutely liable for any harm caused.
- Exception: No defenses apply, unlike strict liability under Rylands v. Fletcher.

Consumer Protection Act and Liabilities of Torts

- The Consumer Protection Act provides broader protection to consumers compared to the old Act.
- Key improvements in the new Act include:
 - Expanded definitions of ‘Consumer’ and ‘Unfair Trade Practice’.
 - Introduction of unfair contracts: contracts favoring the manufacturer or service provider and against consumer interests.
 - Helps regulate businesses, including banks and e-commerce sites that exploit market dominance.
- Central Consumer Protection Authority (CCPA) established in 2019:
 - Regulates and protects consumer interests.
 - Enforces matters related to unfair trade practices.
- The Ministry of Consumer Affairs has enacted rules under its powers, including:
 - Consumer Protection (E-Commerce) Rules, 2020.

Case Law

Branch Manager, Indigo Airlines & Anr. v. Kalpana Rani Debbarma & Ors.

Facts:

- Complainants were traveling from Kolkata to Agartala with Indigo Airlines.
- Boarding passes were issued, but the airline left them at Kolkata Airport without informing them.
- Indigo staff refused to accept their written complaint and forcibly took their boarding passes.
- No alternative travel arrangements were provided.

Proceedings:

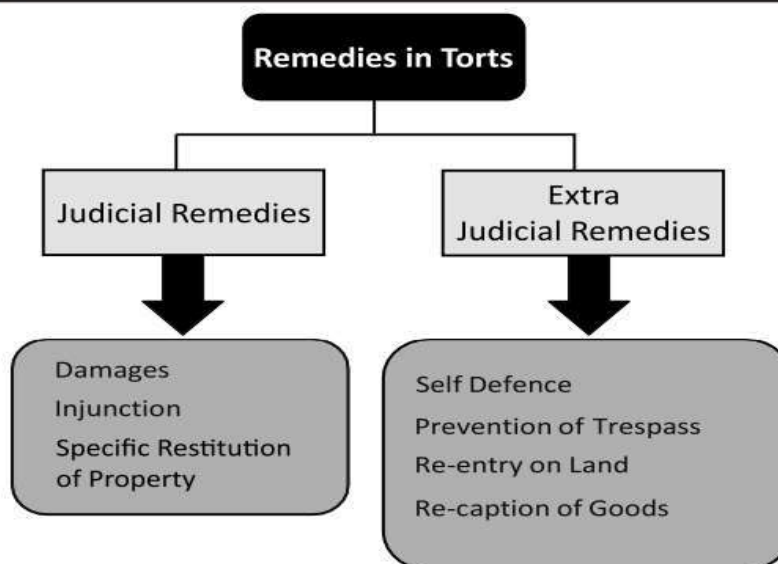
- Complainants approached the District Consumer Forum and were awarded compensation.
- State Forum enhanced the compensation.
- Indigo Airlines filed a revision petition, claiming passengers did not report on time.

Decision (NCDRC):

- Indigo Airlines forcibly took boarding passes and failed to make alternate travel arrangements.
- Complainants suffered mental agony and inconvenience, staying in a hotel for two days.
- Revision petition dismissed.
- Indigo ordered to pay Rs. 20,000/- as costs to the complainants.

Medical Negligence (Bolitho v. City and Hackney Health Authority):

1. Assess whether the medical practitioner acted according to a practice accepted by a competent medical practitioner.
2. If not, check if the deviation from the accepted norm can be justified as reasonable.
3. Liability of medical practitioners is three-fold:
 - Consumer Protection Act, 1986 – payment of damages.
 - Civil liability – tort of negligence where CPA does not apply.
 - Criminal liability – under Bharatiya Nyaya Sanhita, 2023.
1. Global supply chains, international trade, and e-commerce have created new delivery systems for goods and services.
2. Consumers face vulnerabilities to unfair trade and unethical practices (e.g., misleading advertisements, telemarketing, multi-level marketing, direct selling, e-commerce).
3. Executive interventions are required to prevent consumer detriment.
4. Amendments to the Consumer Protection Act are necessary to address emerging consumer vulnerabilities.
5. Complaints under the Consumer Protection Act often overlap with tort law and may be covered under torts if consumer protection laws were absent.

REMEDIES IN TORTS

Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely:

- (i) Damages,
- (ii) Injunction, and
- (iii) Specific Restitution of Property

Remedy	Description
Damages	- When a plaintiff's right is violated by the defendant, the court will grant the plaintiff damages, which are compensation for such infringement of the right for the loss they have suffered. - Only those damages can be recovered which are directly the result of the act of defendant. - It is based on the legal maxim, <i>In jure non remota causa sed proxima spectator</i> which means law considers the direct or immediate cause and not the remote one. - Damages are the primary judicial remedy served in torts.
Injunction	- Injunction is an order of the Court redirecting commission, omission or amendments to an act. - It orders a person to do an act, to not to do an act or correct his wrongful act. - It is done entirely upon the discretion of the Court. - It can be prohibitory, mandatory, interim or perpetual in nature. - Rule 1 Order 39 of Civil Procedure Code 1908 provides for the Cases in which temporary injunction may be granted. - Injunctions can also be granted under Specific Relief Act, 1963.
Specific Restitution of Property	- This is the third kind of judicial remedy in which a court may direct for in case of any breach of rights. - Restitution is the process of returning property to its rightful owner. - A person is entitled to the restitution of his property when it has been unfairly taken away from him. - Wrongly dispossession of certain property invokes this remedy. - For example, in case of immovable property, plaintiff may bring an action for restitution under Section 6 of Specific Relief Act, 1963.

Extra Judicial Remedy	Description & Example
Self Defence	- It is lawful for any person to use reasonable force to protect himself or any other person against any unlawful use of force. - Example: X seeks a restraining order against F due to stalking, fearing injuries. This recourse is a part of self defence.
Prevention of Trespass	- An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them. - The force should be reasonable for the purpose. - Example: A uses a fence to avoid people from entering his personal garden. The fencing will be taken as reasonable force to prevent trespass.

Re-entry Land	on	○ A person wrongfully dispossessed of land may retake possession if he can do so in a peaceful and reasonable manner. ○ Example: X trespasses into B's property, his home. B has the right to use reasonable force to remove him from his property and re-enter himself.
Re-capture Goods	of	○ It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by reasonable force from one who has wrongly taken or detained it. ○ Example: A wrongfully acquires the possession of B's watch. B is entitled to use reasonable force to get it back from A. Only reasonable force may be used.
Abatement Nuisance	of	○ The occupier of land may lawfully abate any nuisance injuriously affecting it. ○ Conditions: (i) upon giving notice; (ii) by choosing the least mischievous method; (iii) avoiding unnecessary damage. ○ Example: X and Y are neighbors. Branches of a tree growing in X's garden enter Y's personal pathway from over the wall. After giving due notice to X, Y cuts the branches as they were causing him nuisance. Y is entitled to do so.
Distress Damage Feasant		○ An occupier may lawfully seize any cattle or chattel unlawfully on his land doing damage and detain them until compensation is paid. ○ This right is known as distress damage feasant — to distrain things which are doing damage. ○ Example: C's cattle wrongfully move to D's property and spoil his crops. D is entitled to take possession of the cattle until he is compensated for the loss suffered.

Question: Which of the following is not an Extra Judicial Remedy of law of Torts.

Options:

- (A) Abatement of Nuisance
- (B) Prevention of Trespass
- (C) Injunction
- (D) Self Defence

Answer: (C)

LESSON-6

Law relating to Civil Procedure

INTRODUCTION

- The Company Secretary and the Secretarial Staff of a Company are required to be familiar with the essentials of the basic procedural laws of the country.
- While specific corporate, industrial, taxation, property and urban land laws have direct relevance for the efficient performance of the duties and responsibilities of the Company Secretary, the procedural law provides the parameters for the pursuance of legal action.
- It is therefore necessary to keep in view the requirement of the procedural law.
- Such law is often termed “adjective law”, and it becomes important in the handling of corporate business, even in initial stages, which might have legal implications at some subsequent stage.
- Such monitoring and guidance is required to be rendered by the Company Secretary and other Secretarial Executives to the line management for safeguarding the interests of the company.
- It has been endeavoured in this Chapter to summarise one of such aspects of Indian procedural laws which have to be referred to by the Company Secretaries.

AIM AND SCOPE OF CIVIL PROCEDURE CODE, 1908 (C.P.C.)

- The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction.
- The Code does not affect any special or local laws, nor does it supersede any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.
- The Code is the general law, so that in case of conflict between the Code and the special law, the latter prevails over the former.
- Where the special law is silent on a particular matter, the Code applies, but only in a manner consistent with the special enactment.
- One of the defining characteristics of the Indian judicial system is the time it takes to settle a dispute.
- While some of this delay is because of huge pendency of cases and lack of infrastructure, the procedural laws like Civil Procedure Code also have a role to play.
- With the current focus on Ease of Doing Business (EoDB), and ‘enforcement of contract’ being one of the sub-parameters for the determination of EoDB rank, judicial delays have been one of the focus areas of judicial reforms.
- Keeping this in mind, the Government came up with ‘The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015’ (Commercial Courts Act, 2015 for short).
- Section 16 of this new Act has amended CPC in its application to Commercial Disputes which are covered under the Act.

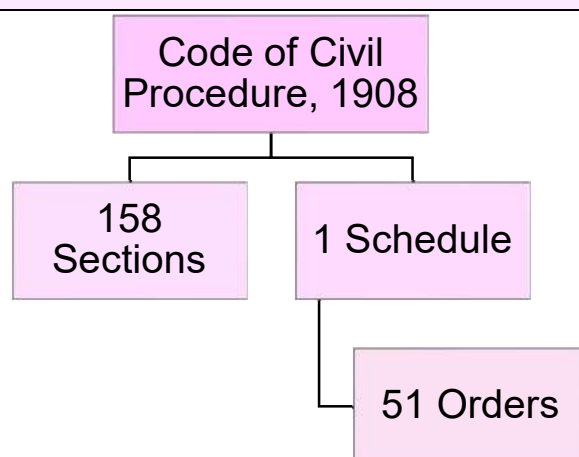
Question- Where a general statute and a specific statute relating to the same subject matter cannot be reconciled, which law shall prevail?

Options:

- A. General Law
- B. the special or specific statute
- C. Both shall cease to operate

Answer: B

SCHEME OF THE CODE



- The Civil Procedure Code consists of two segments.
- 158 Sections form the first segment, and the rules and orders contained in Schedule I form the second segment.
- The object of the Code generally is to create jurisdiction, while the rules indicate the mode in which the jurisdiction should be exercised.
- Thus, the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.
-

Question: How many sections are in Code of Civil Procedure, 1908?

Options: (A) 156 (B) 157 (C) 158 (D) 159

Answer: (C)

SOME IMPORTANT TERMS

Cause of Action

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

- 4 It may also be described as a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed and is the foundation of suit.
- 5 Section 20 of CPC introduces the concept of cause of action.
- 6 A cause of action in respect of a suit is essentially its *raison d'être* – the factual circumstances which led to the dispute arising between the parties.
- 7 Section 20(c) provides jurisdiction to the court which is located in the local limits of where the cause of action, “wholly or in part”, arises.
- 8 The phrase “wholly or in part” is an important qualifier.
- 9 The Supreme Court, in *South East Asia Shipping v. Nav Bharat Enterprises*, has held that cause of action is essentially a bundle of facts which led to the genesis of the dispute, and to the plaintiff obtaining a right in law to approach the court for legal redress.
- 10 The cause of action, therefore, necessarily includes an act of the defendant, in the absence of which the suit itself could not possibly exist.
- 11 Mentioning the cause of action in pleadings is prerequisite under the CPC, with Order II Rule 2 and Order VII Rule 1.

Judgement

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

Decree (Definition & Essentials)

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

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

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

But decree does not include: (a) any adjudication from which an appeal lies as an appeal from an Order, or (b) any order of dismissal for default.

Essentials of a decree are:

- There must be formal expression of adjudication.
- There must be a conclusive determination of the rights of parties.
- The determination must be with regard to matters in controversy.
- The adjudication should have been given in the suit.

According to the explanation to the definition, a decree may be partly preliminary and partly final.

A decree comes into existence as soon as the judgement is pronounced and not on the date when it is sealed and signed. (Order 20 Rule 7).

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

The preliminary decree is not dependent on the final.

On the other hand, final decree is dependent and subordinate to the preliminary decree, and gives effect to it.

The preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree.

If the preliminary decree is set aside the final decree is automatically superseded.

Example of Preliminary and Final Decree

In a matter of suit of possession of an agricultural land (immovable property), A approaches the Court along with the evidence of title he claimed along with claim of mesne profit over the same, and the court may –

- Pass a decree ascertaining the possession of the property.
- Give a direction to conduct an enquiry regarding mesne profit.

Passing of a decree deciding the possession will be final decree, whereas the part wherein the enquiry regarding the mesne profit is directed will be a preliminary decree.

Decree-holder

- “Decree-holder” means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)]
- Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

Judgement-debtor

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

The definition does not include legal representative of a deceased judgement-debtor.

Example: Due to negligence of Y, person X suffers injuries and approaches the court to claim compensation against Y. Court decides in favour of X awarding compensation.

- X will be the decree-holder here.
- Y will be the judgement-debtor.

Order

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

APPEALS FROM ORDERS

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

Under the Code appealable orders are:

- an order under Section 35A – compensatory costs for false or vexatious claims within pecuniary jurisdiction, but only on grounds that no order should have been made or should have been made for a lesser amount.
- an order under Section 91 or Section 92 refusing leave to institute a suit regarding public nuisances or breach of trust for public purposes of a charitable or religious nature.
- an order under Section 95 – compensation for obtaining arrest, attachment or injunction on insufficient grounds.
- An order under any provisions of the Code imposing a fine or directing arrest/detention in civil prison except where such arrest or detention is in execution of a decree.
- Any order made under rules from which an appeal is expressly allowed by the rules.
- No appeal lies from any order passed in appeal under this section.
- In the case of other orders, no appeal lies except where a decree is appealed from; any error, defect or irregularity in any order affecting the decision of the case must be set forth as a ground in the memorandum of appeal.
- A decree shall be deemed to include the rejection of a plaint but not any adjudication from which an appeal lies or any order of dismissal for default.
- A preliminary decree decides the rights of parties on all or any of the matters in controversy but does not completely dispose of the suit.
- A preliminary decree may be appealed against and does not lose its appellate character even if a final decree is passed before the appeal is presented.
- The Court may, on the application of any party, pass orders on different applications and any order not being the final order in a suit is called an “interlocutory order”.
- An interlocutory order does not dispose of the suit but is merely a direction to procedure and reserves questions for further determination.
- The main difference between an order and a decree is: in an adjudication which is a decree an appeal and second appeal lie (Section 100), but no appeal lies from an order unless expressly provided in Section 104 and Order 43 Rule 1.
- No second appeal lies at all in case of appealable orders [Section 104(2)].
- A decree conclusively determines rights and liabilities of the parties and may be preliminary or final; this is not the case with an order.
- A person in whose favour a decree is passed includes not only a plaintiff but also a defendant in cases like decree for specific performance executable by either party.

Question:

Which of the given is not an essential of Decree? Options:

- (A) Formal expression of adjudication
- (B) Adjudication should have been given in a suit

(C) It shall be made on the same day of pronouncement of Judgement

(D) Conclusive determination of the suit of the parties

Answer: (C)

Case Law

In *Vidyacharan Shukla v. Khubchand Baghel* (1963), the Supreme Court clarified the distinction between judgment, decree, and order in civil procedure.

The Court stated that:

- A decree is the formal expression of a court's decision that conclusively determines the rights of the parties in a suit.
- An order is the formal expression of any decision of a civil court which is not a decree.
- A judgment is the statement of reasons given by the judge explaining the basis for a decree or an order.

The Court further held that even if the judgment and order are written in the same document, each retains its own legal character; combining them does not change their nature.

STRUCTURE OF CIVIL COURTS

- Section 3 of the Civil Procedure Code lays down that for the purposes of this Code:
 - the District Court is subordinate to the High Court,
 - every Civil Court of a grade inferior to that of a District Court is subordinate to the District Court,
 - and every Court of Small Causes is subordinate to the High Court and the District Court.

STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

- Section 10 provides that no Court shall proceed with the trial of any suit:
 - in which the matter in issue is also directly and substantially in issue in a previously instituted suit,
 - between the same parties or between parties under whom they or any of them claim,
 - litigating under the same title,
 - where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed,
 - or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction,
 - or before the Supreme Court.
- However, the pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.
- To prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue, Section 10 is enacted.
 - The purpose is also to avoid conflict of decision.
 - It is really intended to give effect to the rule of res judicata.
 - The institution of a second suit is not barred by Section 10.

- It merely says that the trial cannot be proceeded with.
- A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same colour combination etc. as that of plaintiff company.
 - A subsequent suit was instituted in a different Court by the defendant company against the plaintiff company with the same allegation.
 - The Court held that the subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as the issue involved in the two suits was totally identical (*M/s. Wings Pharmaceuticals (P) Ltd. and another v. M/s. Swan Pharmaceuticals and others*, AIR 1999 Pat. 96).
- Even though if a case is not governed by the provisions of the Section and matters in issue may not be identical, yet the Courts have inherent powers to stay suit on principle analogous to Section 10.

Essential conditions for stay of suits

- There must be two suits instituted at different times.
- The matter in issue in the latter suit should be directly and substantially in issue in the earlier suit.
- Such suits should be between the same parties.
- The earlier suit must be still pending either in the same Court or in any other competent Court, but not before a foreign Court.
- If these conditions exist, the later suit should be stayed till the disposal of the earlier suit, the findings of which operate as *res judicata* on the later suit.

Cases where Section 10 does not apply

- For the applicability of Section 10, the two proceedings must be suits.
 - Example: A suit for eviction of tenant under a rent control statute cannot be stayed under Section 10 on the ground that tenant has earlier filed a suit for specific performance against the landlord based on an agreement of sale of the disputed premises.
 - In such a case, it cannot be said that the matter in the earlier suit for specific performance is directly and substantially in issue in the later suit for eviction.
 - A suit for specific performance of contract has nothing to do with the question regarding the relationship of landlord and tenant.
- Regarding inherent powers under Section 151:
 - These would also not be used for staying the eviction suit as the same would frustrate the very purpose of the legislation.
 - Invoking powers of the Court under this Section on the facts and circumstances of the case amounts to an abuse of the process of the Court.
 - Such a course cannot be said to subserve the ends of justice (*N.P. Tripathi v. Dayamanti Devi*, AIR 1988 Pat. 123).

Case Law- In *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara* (AIR 2005 SC 242), the Supreme Court held that the fundamental test for applying Section 10 CPC is

whether the final decision in the earlier suit would operate as res judicata in the later suit. If the earlier decision would conclude the issues in the subsequent suit, then Section 10 is attracted. Question: Which of the following section of Code of Civil Procedure, 1908 provides for Stay of Suits in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties?

Option: (A) Section 9

(B) Section 10

(C) Section 12

(D) Section 15

Answer: (B)

RES JUDICATA (Section 11 CPC)

- Section 11 of the Civil Procedure Code deals with the doctrine of Res Judicata.
- According to this provision, no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit (i.e., suit previously decided),
 - either between the same parties,
 - or between parties under whom they or any of them claim,
 - litigating under the same title,
 - in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised,
 - and finally decided by such Court.
- It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.
- The doctrine underlines the general principle that no one shall be twice vexed for the same cause (S.B. Temple v. V.V.B. Charyulu, (1971) 1 SCJ 215).
- The doctrine of res judicata prevails over the doctrine of lis pendens where there is a conflict between the two.
- It prevents two different decrees on the same subject.
- Section 11 says that once a res is judicata, it shall not be adjudged again.
- The principle applies to suits in Section 11 of the Code;
 - but even where Section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of giving finality to litigation.

Requirements for applicability of Res Judicata

(1) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit

- The expression “directly and substantially in issue” means an issue alleged by one party and denied or admitted by the other either expressly or by necessary implications (Lonakutty v. Thomman, AIR 1976 SC 1645).
- In taxation for levy of municipal taxes, there is no question of res judicata as each year’s assessment is final for that year and does not govern later years (Municipal Corporation v. Madan Mohan, AIR 1976 43).

- A suit for eviction on reasonable requirement was compromised and the tenant was allowed to continue as tenant; for the subsequent suit for ejectment on the ground of reasonable requirement, it was found that some reasonable requirement had been present during the earlier suit. Hence the second suit was not maintainable.
- (2) The former suit has been decided
- “Former suit” means the suit which is decided earlier.
- (3) The said issue has been heard and finally decided
- When the issue or the suit itself is heard and finally decided, it operates as res judicata and not the reasons leading to the decision (Mysore State E. Board v. Bangalore W.C. & S. Mills, AIR 1963 SC 1128).
 - No res judicata operates when the points could not have been raised in the earlier suit (Prafulla Chandra v. Surat Roit, AIR 1998 Ori. 41).
 - But when a suit has been decided on merits, and an appeal is dismissed on a preliminary point, it amounts to the appeal being heard and finally decided and the decision operates as res judicata (Mukunda Jana v. Kanta Mandal, AIR 1979 NOC 116).
- (4) The former suit and the latter suit are between the same parties, or litigating under the same title, or persons claiming under parties above
- (Isher Singh v. Sarwan Singh, AIR 1965 SC 948).
 - In short, this principle applies where an issue which has been raised in a subsequent suit was directly and substantially in issue in a former suit between the same parties and was heard and finally decided.
 - Findings incidentally recorded do not operate as res judicata (Madhvi Amma Bhawani Amma v. Kunjikutty P.M. Pillai, AIR 2000 SC 2301).

Additional Principles and Case Law

- In Gouri Naidu v. Thandrothu Bodemma, AIR 1997 SC 808, the Supreme Court held that the law is well settled that even if erroneous, an inter-party judgment binds the parties if the court of competent jurisdiction has decided the lis.
 - Thus, a decision that a gift made by a coparcener is invalid under Hindu Law binds the parties when the same question is in issue in a subsequent suit for partition.
- A consent or compromise decree is not a decision by Court.
 - It is an acceptance of something to which the parties had agreed.
 - The Court does not decide anything.
 - The compromise decree merely has the seal of the Court on the agreement of the parties.
 - Therefore, the principle of res judicata does not generally apply to a consent or compromise decree.
 - But if it is shown that the parties intended the consent decree to have the effect of deciding the question finally, res judicata may apply.

Relation between Res Sub Judice and Res Judicata

- The rule of res sub judice relates to a matter pending judicial enquiry.
- The rule of res judicata relates to a matter adjudicated upon or on which judgment has been pronounced.

- Res sub judice bars the trial of a suit in which the matter directly or substantially in issue is pending adjudication in a previous suit.
- Res judicata bars the trial of a suit or issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title.
- Res judicata arises from considerations of public policy, namely that there should be an end to litigation on the same matter.
- Res judicata presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case.
- It is essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

Applications and Exceptions

- An application for amendment of a decree is not a “suit” and may be entertained.
 - But if such application is heard and finally decided, it will debar a subsequent application on principles analogous to res judicata.
- Dismissal of a suit for default, where there has been no adjudication on merits, does not operate as res judicata.
- Rejection of an application for review of judgment does not bar a subsequent suit for the same relief on the same grounds.
- In the case of conflicting decrees, the last decree alone is the effective decree which can operate as res judicata.

Explanations to Section 11

- The expression “former suit” has been clarified in the Explanation.
- The competence of a Court to decide an issue is to be determined irrespective of provisions as to a right of appeal from such decision.
- Explanation III states that the matter must have been alleged by one party and denied or admitted expressly or impliedly by the other.
- Constructive res judicata, provided in Explanation IV, states that any matter which might or ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Example

- P sues Q for arrears on rent.
 - Q contends that there are no arrears and therefore the suit is baseless and false.
 - P’s claim for arrears of rent is therefore the matter directly and substantially in issue.

Doctrine of Res Judicata is based on these grounds of public policy

There should be an end to litigation.	The parties to a suit should not be harassed to agitate the same issues or matters already decided between them	The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties	It is a rule of convenience and not a rule of absolute justice.

Additional Explanations under Section 11 (Res Judicata)

- Explanation V states that any relief claimed in the plaint but not expressly granted shall be deemed to have been refused.
- Explanation VI provides that in the case of a representative suit or class action,
 - all persons interested in any public or private right claimed in common for themselves and others
 - are to be deemed to claim under the persons so litigating,
 - and res judicata shall apply to them.
- Explanations VII and VIII, added by the Amendment Act of 1976, state as follows:
 - Explanation VII specifically lays down that the principles of res judicata apply to execution proceedings.
 - The general principles of res judicata have been summarized in Explanation VIII.
 - It provides that the decision of a “Court of limited jurisdiction competent to decide such issue” operates as res judicata in a subsequent suit
 - even though the former Court had no jurisdiction to try the subsequent suit.
- The general principle of res judicata is wider in scope than Section 11,
 - and is applied when a case does not come within the four corners of Section 11.
 - However, when the case falls under Section 11 but its conditions are not fulfilled,
 - the general principles of res judicata cannot be resorted to.
- The conditions may be summarized as follows:

Conditions of res judicata

The matter must be directly and substantially in issue in two suits

The prior suit should be between the same parties or persons claiming under them

The parties should have litigated under the same title

The court which determines the earlier suit must be competent to try the later suit

The same question is directly and substantially in issue in the later suit

Example

- A District Court passed an order over a dispute.
- In this case, the matter cannot be reinstated in the District Court again due to the principle of Res Judicata.
- However, it may be brought before the Appellate Court as an appeal.

Bar to Further Suit (Section 12 CPC)

- Section 12 puts a bar to every suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action.
- The Section comes into force only when a plaintiff is precluded by rules.

JURISDICTION OF COURTS AND VENUE OF SUITS

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

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

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

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

<i>Original Jurisdiction</i>	<i>Appellate Jurisdiction</i>	<i>Criminal and appellate Jurisdiction</i>
A Court tries and decides suits filed before it.	A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.	The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to Try All Civil Suits Unless Barred – Section 9 CPC

- Section 9 of the Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature
 - excepting suits of which their cognisance is either expressly or impliedly barred.
- The Explanation appended to Section 9 provides that:
 - a suit in which the right to property or to an office is contested is a suit of civil nature,
 - notwithstanding that such right may depend entirely on the decision on questions as to religious rites or ceremonies.
- Civil Courts have jurisdiction to entertain a suit of civil nature unless barred by law.
- Every person has an inherent right to bring a suit of a civil nature.
- A Civil Court has jurisdiction to decide the question of its jurisdiction, even though as a result of the enquiry, it may be found that it has no jurisdiction over the matter.
- Jurisdiction depends not on the truth or falsehood of facts, but upon their nature.
- Jurisdiction is determinable at the commencement, not at the conclusion of the inquiry
 - [Rex v. Boltan, (1841) 1 QB 66, 74].
- A suit is expressly barred if a legislation expressly says so.
- A suit is impliedly barred if a statute creates a new right or liability and prescribes a particular tribunal or forum for its assertion.
- When a right is created by a statute and a special tribunal or forum is provided for its assertion and enforcement,
 - the ordinary Civil Court would have no jurisdiction to entertain such disputes.

Question: Which of the given is not a criteria for determining jurisdiction of the courts under Code of Civil Procedure, 1908?

- Options: (A) Subject Matter
 (B) Territorial Jurisdiction
 (C) Pecuniary Jurisdictions
 (D) Jurisdiction of Police station

Answer: (D)

Example

- Pecuniary jurisdiction of the Courts may be decided on the basis of the amounts involved in each case.
- This may be understood with the help of the below example:
 - Suits amounting to Rs. 1 Lakh – Rs. 3 Lakh may lie with the Civil Judge in a particular State.
 - Suits amounting to Rs. 3 Lakh – Rs. 2 Crore may lie with the District Court in a particular State.
 - Suits amounting to above Rs. 2 Crore may lie with the High Court in a certain State.

Case Law - A.R. Antulay vs. R.S. Nayak (1988)

- The Supreme Court held that a case which is required to be tried by a Special Judge under the Criminal Law Amendment Act, 1952 cannot be transferred to the High Court, as the High Court does not have such original jurisdiction.

- The Court stated that jurisdiction cannot be conferred or enlarged by judicial directions.
- The power to create, enlarge, or remove jurisdiction, including rights of appeal, is legislative, and only Parliament can make such changes.
- No Court, whether superior or subordinate, can increase another Court's jurisdiction or take away a person's legal rights of revision or appeal.

PLACE OF SUING (TERRITORIAL)

- Section 15 lays down that every suit shall be instituted in the Court of the lowest grade competent to try it.
- According to Section 16, subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:
 - (a) for recovery of immovable property with or without rent or profits;
 - (b) for partition of immovable property;
 - (c) for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;
 - (d) for the determination of any other right to or interest in immovable property;
 - (e) for compensation for wrong to immovable property;
 - (f) for the recovery of movable property actually distrained or attachment.
- It has also been provided by a proviso that where relief could be obtained through personal obedience of the defendant, such suit to obtain relief for compensation or respecting immovable property can be instituted either:
 - in a local Court within whose local limits of jurisdiction the property is situated, or
 - in the Court within whose local limits of jurisdiction the defendant voluntarily resides or carries on business or personally works for gain.
- According to the Explanation, "property" means property situated in India.
- **Where immovable property is situated within the jurisdiction of different Courts (Section 17):**
 - Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within whose local limits the property is situated, provided the value of the entire claim is cognizable by such Court.
- **Where local limits of jurisdiction of Courts are uncertain (Section 18):**
 - Where jurisdiction is alleged to be uncertain as within the local limits of the jurisdiction of which of two or more Courts any immovable property is situated, any of the said Courts may proceed to entertain the suit after recording a statement that it is satisfied that there is ground for such alleged uncertainty.
- **Where wrong done to the person or to movable property (Section 19):**
 - Where a suit is for compensation for wrong done to the person or to movable property, and the wrong was done within the local limits of one Court but the

defendant resides or carries on business or works for gain within the local limits of another Court, the suit may be instituted at the option of the plaintiff in either Court.

• Other suits (Section 20):

- Subject to Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within whose local limits the defendant, or each of the defendants (if more than one), actually and voluntarily resides, or carries on business, or personally works for gain.
- Where such defendants actually and voluntarily reside or carry on business or personally work for gain, the suit may be instituted there, provided:
 - either the leave of the Court is obtained, or
 - the defendant(s) who do not reside or carry on business or personally work for gain at such place acquiesce in such institution, or
 - the cause of action, wholly or in part, arises there.
- In the case of a body corporate or company, it shall be deemed to carry on business at its sole or principal office in India; or, if the cause of action arises at any other place and it has a subordinate office there, then at such place.
- Where there might be two or more competent Courts which could entertain a suit due to part of the cause of action arising within their jurisdiction, and the parties to the contract agree to vest jurisdiction in one such Court, such agreement would be valid.
 - *Angile Insulations v. Davy Ashmore India Ltd., (1995) 3 SCALE 203.*

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

Set-off

- Order VIII, Rule 6 deals with set-off, which is a reciprocal acquittal of debts between the plaintiff and defendant.
- It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.
- Under Order VIII Rule 6:
 - Where in a suit for recovery of money, the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff,
 - Not exceeding the pecuniary jurisdiction of the Court,
 - And where both parties fill the same character as in the plaintiff's suit,
 - The defendant may, at the first hearing of the suit (but not afterwards unless permitted by the Court), present a written statement containing the particulars of the debt sought to be set-off.

Effect of Set-off

- Under clause (2), the written statement shall have the same effect as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in respect of both the original claim and the set-off.

- This shall not affect the lien upon the amount decreed of any pleader in respect of costs payable to him under the decree.

Counter-claim

- A defendant may, in addition to pleading set-off under Rule 6, set up a counter-claim against the plaintiff:
 - In respect of a cause of action accruing to the defendant either before or after the filing of the suit,
 - But before delivering his defence or before the time for delivering defence expires,
 - Whether such counter-claim is in the nature of damages or not.
- The counter-claim must be within the pecuniary jurisdiction of the Court.
 - *Order VIII, Rule 6A.*

Equitable Set-off

- The defendant may be permitted to claim set-off even for an unascertained sum where:
 - The claim arises out of the same transaction, or
 - Transactions considered as one transaction, or
 - There is mutual knowledge of an existing debt and credit between the parties.
- These suits generally emerge from cross-demands in the same transaction, and the doctrine is intended to save the defendant from having to file a separate cross-suit.
- In India, the distinction between legal and equitable set-off is recognised:
 - Order VIII, Rule 6 → legal set-off.
 - Order VIII, Rule 6A → counter-claim.
 - Equitable set-off can still be claimed independently of the Code.

Case Law

Jitendra Kumar Khan v. Peerless General Finance (2013)

- The Supreme Court held that equitable set-off is distinct from legal set-off.
- Equitable set-off is based on justice, equity and good conscience.
- The Court stated that:
 - Equitable set-off is independent of the Code of Civil Procedure.
 - Mutual debts, credits, or cross-demands must arise from the same transaction or be connected in nature and circumstances.
 - Such a plea is not a matter of right.
 - It lies within the discretion of the Court whether to entertain and allow it.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS (ORDER XXXIX)

Temporary Injunction

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

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - (b) the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or
 - (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.
2. It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages.

Interlocutory Orders

Power to order interim sale

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

Case Law

Dalpat Kumar v. Prahlad Singh (1991 / AIR 1993 SC 276)

- The Supreme Court held that three essential requirements must be satisfied for granting a temporary injunction:
 1. Prima facie case,
 2. Irreparable injury if injunction is not granted, and
 3. Balance of convenience in favour of the plaintiff.
- The Court clarified that a prima facie case alone is not sufficient.
- The Court must also be satisfied that:
 - Non-interference would cause *irreparable injury*,
 - No other adequate remedy exists, and
 - The *balance of convenience* supports granting the injunction.

Example

X files a suit to recover possession of a movable property against Y. During the hearing, X alleges that Y may dispose of the property to his benefit. The Court may pass an interlocutory order to deposit the same in safe custody as it may deem fit.

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

- The Court may, on application of any party to a suit, and on such terms as it thinks fit—
- make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein;
 - for all or any of the purposes mentioned in (a), authorise any person to enter upon or into any land or building in the possession of any other party to such suit;

- for all or any of the purposes in (a), authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)
- Application for such order to be after notice:
 - (1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.
 - (2) An application by the defendant for such an order may be made at any time after appearance.
 - (3) Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court:

- Where the subject-matter of a suit is money or some other thing capable of delivery, and any party admits that he holds such money or thing as trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to further direction of the Court. (Rule 10)
- Temporary injunction in cases of breach of contract or injury:
In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after commencement of the suit, and either before or after judgement, apply for a temporary injunction to restrain the defendant from committing the breach or injury complained of, or any similar breach or injury arising out of the same contract or relating to the same property or right.
- The Court may grant an injunction on such terms, including keeping of an account and furnishing security etc., as it may think fit.
- The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that the matter should be preserved in status until final disposal of that question.
- In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides.
- If the object of granting temporary injunction is liable to be defeated by delay, the Court while passing the order granting interim injunction has notice served on the defendant to show cause why the order should not be confirmed.
- After hearing the objection of the defendant, the Court either confirms the interim injunction or cancels the order of injunction.
- Institution of Suit (Order IV): Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are –



1. The plaint consists of:
 - a heading and title,
 - the body of the plaint,
 - the relief(s) claimed.
2. Every suit shall be instituted in the Court of the lowest grade competent to try it, which is determined with regard to:
 - the subject matter being immovable or movable property, or
 - the place of abode or business of the defendant.
3. A suit for a tort may be brought either:
 - where the wrong was committed, or
 - where the defendant resides or carries on business.
4. A suit for breach of contract may be instituted in a Court within the local limits of whose jurisdiction:
 - the defendant, or each of the defendants (where there are more than one), at the time of commencement of the suit, actually or voluntarily resides or carries on business or personally works for gain; or
 - where any of the defendants so resides or works for gain or carries on business, provided the leave of the Court is given or the other defendants acquiesce in such institution.
5. A suit for breach of contract may also be instituted:
 - where the cause of action arises,
 - i.e., where the contract was made or where the breach was committed.
6. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property, or any part of it, is situate.
7. Claims for recovery of immovable property may be for:
 - (a) mesne profits or arrears of rent;
 - (b) damages for breach of contract under which the property or any part thereof is held;
 - (c) claims in which the relief sought is based on the same cause of action.
8. Where a plaintiff omits or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
9. Other suits shall be instituted in a Court within the local limits of whose jurisdiction:
 - (a) the defendant or each of the defendants (if more than one) actually or voluntarily resides or carries on business or personally works for gain at the time of commencement of the suit; or
 - (b) any of the defendants so resides or carries on business or works for gain, provided leave of the Court is given or the other defendants acquiesce; or
 - (c) the cause of action wholly or in part arises.

‘Necessary party’ and ‘Proper party’

- A necessary party is one whose presence is indispensable for proceeding with the suit and for its final decision.

- A proper party is one in whose absence an effective order can be passed, but whose presence is required for complete and final decision of the suit.
- In *Hardeva v. Ismail*, AIR 1970 Raj 167, two tests were laid down to determine whether a party is necessary:
 - There must be a right to some relief against such party regarding the matter involved in the proceeding; and
 - It should not be possible to pass an effective decree in the absence of such a party.
- Order I, Rule 8 provides that where numerous persons have the same interest in one suit, one or more may, with permission of the Court, sue on behalf of all.
- There is a distinction between necessary and proper parties:
 - A necessary party is one against whom relief is sought and without whom no effective order can be passed.
 - A proper party is one whose presence is necessary for complete and final decision though an effective order can be passed without him.
- Order I, Rule 9 (CPC) states:
 - No suit shall be defeated by reason of mis-joinder or non-joinder of parties.
 - The Court may deal with the matter as regards rights of parties actually before it.
 - *Provided:* This rule does not apply to non-joinder of a necessary party.
- Thus, the general rule is that no suit can be decided without necessary parties.
- Order I, Rule 10 (CPC) allows substitution or addition of parties on two grounds:
 - (vi) He ought to have been joined as plaintiff or defendant and is not so joined; or
 - (vii) Without his presence, the issues involved in the suit cannot be completely decided.

Mis-joinder and Non-joinder of Parties

- Order I, Rule 9 reiterates that suits shall not be defeated for mis-joinder or non-joinder, except in case of non-joinder of necessary parties.
- Non-joinder:
 - When a necessary party is not joined.
 - The suit should not be dismissed on this ground unless no effective decree can be passed without them.
- If the decree cannot be made effective without absent parties, the suit is liable to be dismissed.
- Where joinder is only a matter of convenience, the absent party may be added or the suit may proceed without them.
- Mis-joinder occurs:
 - When multiple plaintiffs or defendants are joined but their right to relief does not arise out of the same act or transaction,
 - and a common question of law or fact does not arise.
- Mis-joinder of defendants occurs in the reverse situation.
- In *B.P. Rao v. State of Andhra Pradesh* (1985), the Supreme Court held that where absent persons had identical interests sufficiently represented by persons before the court, the petition would not be dismissed merely because all affected persons were not joined.

Cause of Action

- Cause of action means every fact which the plaintiff must prove to support his right to judgment.
- It is a bundle of essential facts comprising:
 - (a) a right, and
 - (b) an infringement for which relief is claimed.
- Cause of action must be antecedent to the institution of the suit.
- Every breach of contract gives rise to cause of action and suit may be filed in the place where:
 - (a) the contract was made,
 - (b) the breach occurred, or
 - (c) the place where money is payable.
- The place of breach is where the contract had to be performed or completed.
- Where place of payment is not specified, it is determined by intention of parties and circumstances.

Mis-joinder of Causes of Action

- Mis-joinder of causes occurs when plaintiffs are not jointly interested in all causes of action.
- Objections regarding mis-joinder of parties or causes must be taken:
 - at the first hearing, and
 - before settlement of issues, unless the ground arises later.

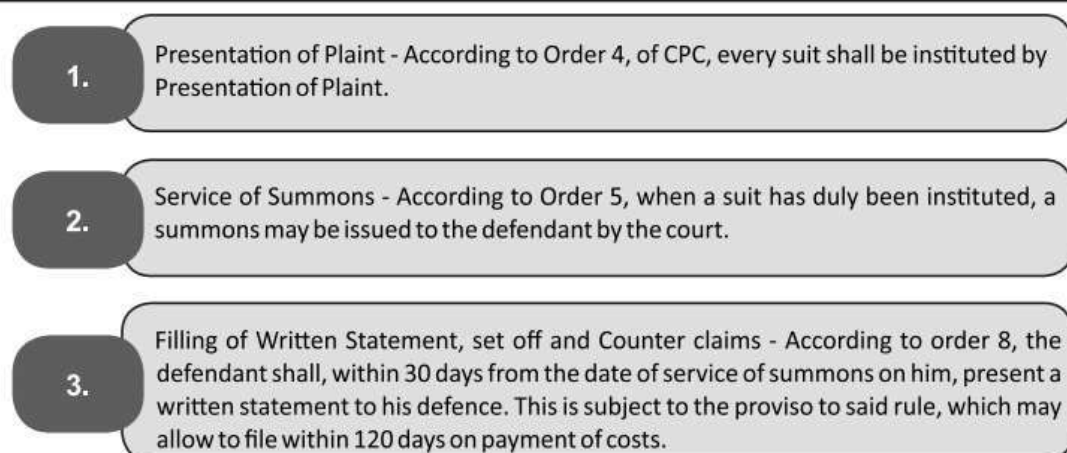
Example of mis-joinder of parties:

- X and Y have a property dispute over land in Y's possession.
- X files suit against Y but also makes Z (Y's brother and a businessman) a party.
- This is mis-joinder of parties.

Example of mis-joinder of cause of action:

- X files suit against Y not regarding the disputed property but concerning a property never possessed by Y.
- This is mis-joinder of cause of action

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT



4. Appearances of Parties - According to Order 9, the parties should appear on the day fixed by summons.

5. Examination of Parties - Order 10, the court examines the parties to the court.

6. Framing of Issues - The court frames the Issues according to Order 14.

7. Hearings - The court hears the parties according to Order 18.

8. Judgement - The court pronounces the decree according to Order 20.

Question: Which of the given Order of Code of Civil Procedure, 1908 provides the provision relating to Institution of Suit?

Option: (A) II

(B) IV

(C) IX

(D) X

Answer: (B)

DELIVERY OF SUMMONS BY COURT

1. When the suit has been duly instituted, the Court issues an order (summons) to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within 30 days from the date of service of summons.
2. No summons is to be issued when the defendant has appeared at the presentation of plaint and admitted the plaintiff's claim.
3. The defendant may appear:
 - in person, or
 - by a duly instructed pleader, or
 - by a pleader accompanied by some person capable of answering all material questions relating to the suit.
4. Every summons must:
 - be signed by the judge or authorised officer,
 - be sealed with the Seal of the Court, and
 - be accompanied by a copy of the plaint (Order 5).
5. If the Court feels the requirement of personal appearance of either the defendant or the plaintiff, it must make an order directing such appearance.
6. The summons must contain a direction stating whether:
 - it is for settlement of issues only, or
 - for final disposal of the suit.

7. Every summons must be accompanied by a copy of the plaint; where no date is fixed for appearance of defendant, the Court has no power to dismiss the suit in default.
8. The summons must also state that the defendant is required to produce all documents in his possession or power on which he intends to rely.

ORDINARY MODE OF SERVICE

Direct service is done by delivering or tendering a copy of the summons, signed by the judge or competent officer, to:

- the person summoned personally, or
- his agent, or
- any adult male or female member of his family, against signature acknowledging service.

Order 5, Rule 9 (as substituted in 2002 Amendment)

- Where the defendant resides within the jurisdiction of the Court or has an agent so residing empowered to accept service:
 - summons shall be delivered or sent to the proper officer, or
 - to a courier service approved by the Court, unless the Court directs otherwise.
- Service may be made by delivering or transmitting a copy:
 - by registered post (acknowledgement due),
 - by speed post,
 - by courier approved by the High Court,
 - or by any other means of transmission (fax, electronic mail) as provided by High Court rules.

Service under this sub-rule shall be at the plaintiff's expense.

- Where the defendant resides outside jurisdiction and Court directs service by the above modes (except registered post AD), Rule 21 shall not apply.
- When acknowledgement or receipt signed by the defendant or agent is received, or if postal article is returned with endorsement that defendant refused delivery, the Court shall declare that summons has been duly served.
- Proviso: If summons was properly addressed, prepaid and duly sent by registered post AD, the Court shall declare service even if acknowledgement is lost, mislaid or not received within 30 days.

SUBSTITUTED SERVICE (Order 5, Rule 20)

If the Court is satisfied that the person summoned is keeping out of the way to avoid service or summons cannot be served ordinarily, it shall order service:

- by affixing a copy in a conspicuous place in the Court house, and
- on a conspicuous part of the house where the person last resided or carried on business or worked for gain,
- or in any other manner as the Court thinks fit.

SUMMONS OUTSIDE THE STATE

- Where defendant resides in another province, summons may be sent for service to such Court and manner as prescribed by rules in force in that State.
- The above provisions apply also to summons to witnesses.

SPECIAL CATEGORIES OF DEFENDANTS

- For a public officer, servant of railways or local authority, the Court may send summons to the head of the office in which he is employed.
- For a corporation, service may be:
 - (a) on the secretary, director or principal officer, or
 - (b) by leaving or posting it at the registered office, or if none, at the place where the corporation carries on business (O.29, R.2).

For a partnership firm:

- summons shall be served upon one or more partners, or
- at the principal place of business of the partnership in India, or
- upon any person having control/management of the business. After dissolution, summons must be served upon every person sought to be made liable.

DEFENCE

- Defendant must file written statement within 30 days of service of summons.
- If not filed within 30 days, Court may allow filing on another day for reasons recorded in writing, but total period shall not exceed 90 days.
- Provision is directory and procedural; it does not restrict Court's power (Shaikh Salim Haji Abdul Khayumsab v. Kumar, AIR 2006 SC 398).
- Under Commercial Courts Act, 2015:
 - If defendant fails to file WS within 30 days, he may file within 120 days with reasons recorded and payment of costs.
 - After expiry of 120 days, defendant forfeits the right to file written statement and Court shall not take it on record.
- If defendant relies on any document:
 - it must be entered in a list,
 - produced with the written statement, and
 - a copy must be delivered for filing with the WS.
- Documents not so produced shall not be admitted in evidence without Court's leave (O.8, R.1 & 1A).

This does not apply to:

- documents for cross-examination of plaintiff's witnesses, or
- documents handed to a witness to refresh memory.
- Particulars of set-off must be included.
Counterclaim, if any, must also be stated.
- Defendant must specifically plead new facts and specifically answer each allegation.
Evasive denial is not permissible.
Undenied allegations are taken as admitted.

APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE

- If both parties do not appear when suit is called for hearing, Court may dismiss the suit (O.9, R.3 & 4).
- If defendant is absent despite service and plaintiff appears, Court may proceed ex-parte.
- If defendant not served, Court shall order a second summons.
- If summons served without sufficient time to appear, Court may postpone hearing.
- If insufficient time is due to plaintiff's default, Court shall order plaintiff to pay costs of adjournment.
- If hearing is adjourned ex-parte and defendant appears later and gives good cause for absence, he may be heard on terms.
- Defendant may still take part in proceedings even if not allowed to file written statement.
- If plaintiff is absent and defendant is present:
 - suit shall be dismissed,
 - unless defendant admits whole or part of claim,
 - in which case decree is passed as per admission and suit dismissed for remainder (O.9, R.8)

SETTING ASIDE EX-PARTE DECREE

- Defendant may apply to set aside ex-parte decree on grounds:
 - summons not duly served, or
 - prevented by sufficient cause from appearing when hearing was called.
- If satisfied, Court shall set aside decree and fix a day for proceeding (O.9, R.13).
- Defendant has four remedies against an ex-parte decree:
 - (i) Appeal under Section 96 CPC,
 - (ii) Application for review (O.47, R.1),
 - (iii) Application to set aside ex-parte decree,
 - (iv) A suit to set aside decree obtained by fraud (but no suit lies for non-service of summons).
- At trial, a party may use any answer from opposite party's interrogatories without producing all answers; Court may direct connected answers to be produced.

Example

Suit between A (plaintiff) and B (respondent) initiated; Court decided in favour of A due to non-appearance of B. Court passed an ex-parte decree. B may apply to set aside ex-parte order by stating sufficient cause.

Discovery and Interrogatories and Production of Documents

Discovery – Meaning and Types

- “Discovery” means finding out material facts and documents from an adversary in order to:
 - know and ascertain the nature of the case,
 - support one's own case,
 - narrow the points at issue, or

- avoid proving admitted facts.
- Discovery may be of two kinds:
 - (a) by interrogatories
 - (b) by documents

Objects of Discovery

- (a) To ascertain the nature of the case of the adversary or material facts for the adversary's case.
- (b) To obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.
- (c) To narrow the points at issue.
- (d) To avoid expense and effort in proving admitted facts.

Discovery by Interrogatories

- Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties.
- Interrogatories will not be allowed for the following purposes:
 - (i) For obtaining discovery of facts which relate exclusively to the evidence of the adversary's case or title.
 - (ii) To interrogate any confidential communications between the adversary and his counsel.
 - (iii) To obtain disclosures injurious to public interests.
 - (iv) Interrogatories of a 'fishing' nature, i.e., which do not relate to some definite and existing state of circumstances, but are resorted to in a speculative manner to discover something which may help a party.

Discovery by Documents

- All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents.
- Any party may apply to the Court for an order directing any other party to make discovery on oath the documents which are or have been in his possession or power relating to any matter in question.
- The Court may:
 - refuse the application,
 - adjourn it if such discovery is not necessary or not necessary at the stage,
 - or make an order for limited discovery of certain classes of documents.
- Every party may give notice to the other party at or before settlement of issues to produce for inspection any document referred to in the pleadings or affidavits of the other party.
- If the other party refuses to comply with the order:
 - he shall not be allowed to put any such document in evidence (O.11, R.15), unless he satisfies the Court that the document relates only to his own title or other acceptable grounds.
- Documents not referred to in pleadings or affidavits may also be inspected if the Court allows (O.11, R.18).
- A party may refuse to produce documents on the following grounds:
 - (i) where it discloses a party's evidence;
 - (ii) when it enjoys legal professional privilege;

- (iii) when it is injurious to public interest;
- (iv) denial of possession of the document.
- If a party denies by affidavit the possession of any document:
 - the party claiming discovery cannot cross-examine upon it nor adduce evidence to contradict it, because the oath of the party making the discovery is conclusive.
 - (Kedarnath v. Vishwanath, (1924) 46 All. 417)

Admission by Parties

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

Issues

- Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.
- Issues may be:
 - of fact,
 - or of law.
- The Court, at the first hearing after reading the plaint and written statement and after ascertaining/examining the parties if necessary, must frame issues.
- Where the Court finds that the suit can be disposed of on issues of law only, it shall:
 - try those issues first,
 - postpone framing of other issues,
 - and may dispose of the suit according to the decision on that issue.
- Issues are to be framed from:
 - (i) Allegations in plaint and written statement;
 - (ii) Allegations made by parties or pleaders on oath;
 - (iii) Allegations in answers to interrogatories;
 - (iv) Contents of documents produced by parties;
 - (v) Statements when parties/representatives are examined;
 - (vi) Examination of a witness or documents ordered to be produced.

Hearing of the Suit

- The plaintiff has the right to begin unless:
 - the defendant admits the facts alleged by the plaintiff and contends that either in law or on additional facts he is not liable for the relief;
 - in such case, the defendant has the right to begin (O.18, R.1).
- Where there are several issues:
 - the party beginning may produce evidence on those issues whose burden lies on the other party, or reserve it for answer after the other party’s evidence.

- If the plaintiff produces part-evidence on issues he intended to reserve, he loses the right of reserving evidence (O.18, R.3).

Affidavit

- An affidavit is a written statement of the deponent on oath affirmed before:
 - a Court,
 - Magistrate,
 - Oath Commissioner,
 - or Notary Public.
- An affidavit may be used:
 - (i) When the Court orders any fact to be proved by affidavit (Section 30).
 - (ii) When the Court orders that the affidavit of any witness may be read at hearing unless the other party desires cross-examination and the witness can be produced (O.19, R.1).
 - (iii) When evidence of a witness may be given by affidavit on application, but the Court may require the deponent to attend for cross-examination unless exempt.

Affidavits must contain facts within the deponent's knowledge except in interlocutory applications (O.19, R.2 & 3).

Judgement

- After hearing, the Court shall pronounce judgement in open court either at once or on a date fixed with due notice (Order XX, Rule 1).
- Judgement should be supported by cogent reasons reflecting the judge's final conclusion.
- If not pronounced at once:
 - every endeavour must be made to pronounce within 30 days from conclusion of hearing,
 - and in exceptional circumstances, within 60 days with notice.
- Cases:
 - *Kanhaiyalal v. Anup Kumar*, AIR 2003 SC 689 – judgement after 2.5 years set aside.
 - *Ramkishan Guru Mandir v. Ramavtar Bansraj*, AIR 2006 Guj. 34 – judgement after more than 2 years set aside.
- Judgement must be dated and signed by the judge.
- Once signed, it cannot be altered except under Section 152 or on review.
- If judgement does not dispose of questions presented, it is defective (*Reghunatha v. Sri Brozo Kishoro*, 1876).
- If judgement is unintelligible, appellate court may remand (*Harbhagwan Ahmad*, AIR 1922 Lah. 12).

Decree

- A decree follows the judgement.
- It must be drawn expeditiously, preferably within 15 days of the judgement.
- Contents of a decree:
 - (i) number of the suit(s);
 - (ii) names/descriptions/addresses of parties;

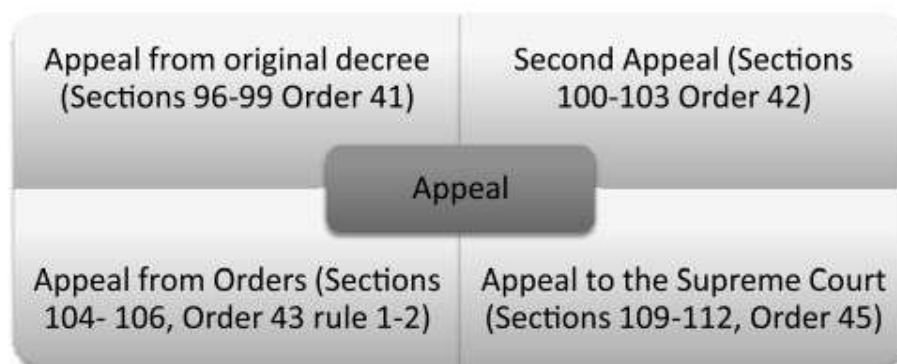
- (iii) particulars of the claim;
- (iv) relief granted or determination;
- (v) costs and who must pay.

Execution

- Execution means enforcement of decrees or orders.
- A decree may be executed:
 - by the Court which passed it, or
 - by the Court to which it is sent for execution (Section 36; see Order 21).

APPEALS

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



APPEALS, REFERENCE, REVIEW & REVISION

Appeals from Original Decrees

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

Second Appeal (Section 100 CPC)

- Under Section 100, an appeal lies to the High Court from every decree passed in appeal by any subordinate court if the High Court is satisfied that the case involves a substantial question of law.
- An appeal may lie from an appellate decree passed ex parte.
- The memorandum of appeal must precisely state the substantial question of law involved.
- If the High Court is satisfied that a substantial question of law is involved:

- it shall formulate such question,
 - and the appeal is to be heard on the question so formulated.
- The respondent is permitted to argue that the case does not involve such question.
- The High Court may hear the appeal on any other substantial question of law, not formulated earlier, if it is satisfied that the case involves such question.
- As a general rule, the second appeal lies on questions of law alone (Section 100).
- The Privy Council in *Durga Choudharain v. Jawaher Singh*, (1891) 18 Cal. 23 P.C., held that there is no jurisdiction to entertain a second appeal on an erroneous finding of fact, however gross the error may appear.
- Where there is no procedural error or defect, the finding of the first appellate court upon any question of fact is final, provided it had evidence before it proper for consideration.

Appeal from Orders

- Appeals lie only from the following orders on grounds of defect or irregularity in law:
 - (i) An order under Section 35A allowing special costs, and an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to therein.
 - (ii) An order under Section 95 awarding compensation for obtaining attachment or injunction on insufficient grounds.
 - (iii) An order imposing a fine or directing detention or arrest of any person except in execution of a decree.
 - (iv) Appealable orders listed under Order 43, Rule 1.
- However, no appeal shall lie:
 - (a) from any order specified in clause (a), and
 - (b) from any order passed in appeal under Section 100.

Appeals to the Supreme Court

- Appeals lie in the following cases:
 - (i) From any decree or order of a Civil Court when the case is certified as fit for appeal to the Supreme Court, or where special leave is granted under Section 112 by the Supreme Court.
 - (ii) From any judgement, decree or final order passed on appeal by a High Court or any other court of final appellate jurisdiction.
 - (iii) From any judgement, decree or final order passed by a High Court in exercise of original civil jurisdiction.

Additional Evidence in Appeal

- General rule: parties to an appeal shall not be entitled to produce additional evidence (oral or documentary).
- The appellate court has discretion to allow additional evidence in the following circumstances:
 - (i) When the lower court has refused to admit evidence which ought to have been admitted.
 - (ii) When the appellate court requires any document or any witness to enable it to pronounce judgement.
 - (iii) For any other substantial cause.

- In all such situations, the appellate court must record its reasons for admitting additional evidence.

Essential Factors in an Appellate Judgement (O.41, R.31)

- (a) The points for determination.
 - (b) The decision thereon.
 - (c) The reasons for the decision.
 - (d) Where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.
- The judgement must be signed and dated by the judge or judges.

REFERENCE, REVIEW AND REVISION

Reference to High Court

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

Example

- If in a particular matter, the District Court intends to state a case for opinion of the High Court, it may refer the same under Section 113 CPC

REVIEW & REVISION

Review

- The right of review is conferred by Section 114 and Order 47 Rule 1 of the Code.
- It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the court which passed the decree or made the order on any of the grounds mentioned in Order 47 Rule 1, namely:
 - (i) Discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
 - (ii) On account of some mistake or error apparent on the face of the record, or
 - (iii) For any other sufficient reason,
- The Court may make such order thereon as it thinks fit.

Example

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

Revision

- Section 115 deals with revision.
- The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears:
 - (i) to have exercised a jurisdiction not vested in it by law, or
 - (ii) to have failed to exercise a jurisdiction so vested, or
 - (iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
- The High Court may make such order as it thinks fit.
- Provided that the High Court shall not vary or reverse any order made or any order deciding an issue in the course of a suit or proceeding except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.
- The High Court shall not vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Question: Which of the following courts have the power of revision under Code of Civil Procedure, 1908?

Options: (A) District Court

(B) High Court

(C) Executive Magistrate

(D) Judicial Magistrate of First Class

Answer: (B)

REVISION & SUITS BY OR AGAINST A CORPORATION

Revision

A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

Example

- On discovering that the District Court erred in making a decision by exercising wrongful jurisdiction for which no further appeal lies, the High Court may order revision of such decree.

SUITS BY OR AGAINST A CORPORATION

1. Signature or Verification of Pleading

- In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by:
 - the secretary, or
 - any director, or
 - any other principal officer of the corporation

- who is able to depose to the facts of the case.
- (Order 29, Rule 1)

2. Service of Summons

- Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:
 - (a) on the secretary or any director or other principal officer of the corporation, or
 - (b) by leaving it or sending it by post addressed to the corporation at:
 - the registered office, or
 - if there is no registered office, then at the place where the corporation carries on business.
- (Order 29, Rule 2)

Question: Which of the following officer is not recognized to sign and verify any pleading on behalf of the corporation?

Options: (A) Secretary

(B) Principal Officer

(C) Director

(D) Senior Manager

Answer: (D)

SUITS BY OR AGAINST CORPORATIONS, MINORS & PERSONS OF UNSOUND MIND

Service of summons

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

- (a) on the secretary or any director or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business. (O.29, R. 2)

Power of the court to require personal attendance (o.29, r.3)

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

SUITS BY OR AGAINST MINORS AND LUNATICS

1. Definition of Minor

- A minor is a person:
 - (i) who has not completed the age of 18 years, and

- (ii) for whose person or property a guardian has been appointed by a Court, or whose property is under a Court of Wards.
- In such cases, the age of majority is completed at 21 years.

2. Institution of Suit by Minor (O.32, Rules 1 & 4)

- A suit by a minor shall be instituted in his name by a person who shall be called the next friend of the minor.
- The next friend must:
 - be of sound mind,
 - have attained majority,
 - have no interest adverse to that of the minor, and
 - must not be a defendant in the suit (in case of next friend).

3. Suit Filed Without Next Friend (O.32, R.2)

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

4. Minor as Defendant — Appointment of Guardian (O.32, R.3)

- When the defendant is a minor, the Court, on being satisfied of his minority, shall appoint a proper person to be the guardian for the suit.
- An order appointing a guardian for the suit may be obtained:
 - upon application in the name and on behalf of the minor, or
 - by the plaintiff.
- A person appointed as guardian for the suit shall continue as such throughout all proceedings arising out of the suit, including:
 - appellate proceedings,
 - revisional proceedings,
 - execution proceedings,
- unless terminated by retirement, removal, or death.
- [O.32, R.3(5)]

5. When Minor Attains Majority (O.32, Rules 12 & 13)

- When the minor plaintiff attains majority, he may choose to:
 - proceed with the suit or application, or
 - abandon it.
- If he elects to proceed:
 - he shall apply for an order discharging the next friend,
 - and for leave to proceed in his own name,
 - and the title of the suit will be corrected.
- If he elects to abandon the suit or application:
 - and if he is the sole plaintiff or sole applicant,
 - he shall apply for an order to dismiss the suit,
 - on repayment of costs incurred by the defendant or opposite party.

SUITS BY OR AGAINST PERSONS OF UNSOUND MIND (O.32, R.15)

- Order 32 Rule 15 provides that all provisions of Rules 1 to 14, applicable to minors (except Rule 2A), shall apply to:
 - persons of unsound mind, and
 - lunatics.
- It also applies when a person:
 - before or during the pendency of the suit is found to be of unsound mind, or
 - though not formally adjudged so, is found by the Court, on enquiry, to be incapable, due to mental infirmity, of protecting his interest when suing or being sued.

Case Law

Ram Chandra Arya v. Man Singh (1968 AIR 954)

- The Supreme Court held that a decree passed against a minor or lunatic without appointing a legal guardian is void, not merely voidable.
- Since Order 32 Rule 15 CPC applies the same protection to lunatics as minors, a decree passed against a lunatic without a guardian is a nullity and without jurisdiction.
- Consequently, any sale or execution proceedings based on such a decree are also void.

SUMMARY PROCEDURE (ORDER 37)

1. Order 37 provides for a summary procedure in respect of certain suits.
2. A procedure by way of summary suit applies to suits upon bill of exchange, hundis or promissory notes, or to suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.
3. The object is to prevent unreasonable obstruction by a defendant.
4. The rules for summary procedure are applicable to the following Courts:
 - (1) High Courts, City Civil Courts and Small Causes Courts;
 - (2) Other Courts: In such Courts, the High Courts may restrict the operation of Order 37 by issuing a notification in the Official Gazette.
5. The debt or liquidated demand in money payable by the defendant should arise on a written contract, or on an enactment, or on a guarantee.
6. In *Navinchandra Babulal Bhavsar vs Bachubhai Dhanabhai Shah*, AIR 1969 Guj 124, the Gujarat High Court observed that the relevant provisions show that the summary procedure is intended so that in large commercial towns certain types of litigation concerning the commercial community should be expeditiously handled and brought to an end, including the realisation of the decretal amount, if a decree is passed.

7. This procedure is intended to give impetus to commerce and industry and inspire confidence in the commercial population that their causes regarding monetary claims of liquidated amounts will be justly and quickly disposed of and their money will not remain blocked for long periods.

Institution of Summary Suits

- A summary suit may be instituted by presenting a plaint containing the following essentials:
 - (1) a specific averment that the suit is filed under this order;
 - (2) that no relief which does not fall within the ambit of this rule has been claimed;
 - (3) the inscription immediately below the number of the suit in the title that the suit is established under Order 37 of the CPC.
- Order 37 Rule 1(2) provides that the Order applies to the following classes of suits:
 - (a) suits upon bills of exchange, hundies and promissory notes;
 - (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Leave to Defend

- Order 37 Rule 3 prescribes the mode of service of summons and the procedure for leave to defend.
- The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons.
- Leave to defend may be granted unconditionally or upon such terms as the Court or Judge may think fit.
- Such leave shall not be granted where:
 1. the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or vexatious; and
 2. the part of the amount claimed by the plaintiff and admitted by the defendant to be due is deposited by him in Court.
- At the hearing of summons for judgement, the plaintiff is entitled to judgement if the defendant has not applied for leave to defend, or if such application is refused, or if the defendant fails to give required security or fails to comply with conditions imposed by the Court.
- After decree, the Court may under special circumstances set aside the decree and if necessary stay or set aside execution and may give leave to the defendant to appear and defend the suit (Rule 4 Order 37).

- The summary suit must be brought within one year from the date on which the debt becomes due and payable, while the limitation period for ordinary suits under negotiable instruments is three years.

Case Law

Uma Shankar Kamal Narain and Ors. vs. M.D. Overseas Ltd. (2007) 4 SCC 133

- This appeal was filed against the order passed by the Delhi High Court granting conditional leave to the appellants to defend in a summary suit.
- The appellants filed an application for leave to defend in the same suit.
- The Learned Single Judge of the High Court found that the grounds taken in the application for leave to defend were sham and moonshine.
- The appellants were directed to deposit the amount of Rs. 39,30,856/- to the registry of the division bench of the High Court.
- Conditional leave to defend was granted to the appellants.
- The respondent wanted liberty to withdraw the amount on deposit. The High Court refused to accede to the prayer.
- The position of law relating to summary suits was noted and highlighted by the Supreme Court as under:
 - (a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.
 - (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.
 - (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend, the conditions being as to time of trial or mode of trial but not as to payment into Court or furnishing security.
 - (d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine,
 - (e) the defendant is not entitled to leave to defend.
 - (f) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff by imposing the condition that the amount claimed should be paid into Court or otherwise secured.
- The Supreme Court directed the appellants to deposit a sum of Rs. 20,00,000/- within a period of three months in the registry of the High Court.

Southern Sales and Services and Ors. vs. Sauermilch Design and Handels GMBH: 1982 AIR 1518
According to the ratio decidendi of this case, deposit of the amount admitted in the Court is essential for granting unconditional leave to defend a suit.

B.L. Kashyap and Sons Ltd. vs. JMS Steels and Power Corporation and Ors. (18.01.2022 – SC) : (2022) 3 SCC 294

1. The Supreme Court held that leave to defend should not be treated as something to be granted only in exceptional cases.
2. The Court clarified that leave to defend shall be denied only when there is no fair or reasonable defence available to the defendant.
3. It was stated that while considering an application seeking leave to defend, it would be incorrect to proceed on the basis that denying leave is the rule or that leave to defend is to be granted only in exceptional circumstances.
4. The Court further observed that even in cases where triable issues are raised, and the defendant indicates that he has a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend, unless there exists a strong reason to deny such leave.

SUMMARY JUDGMENT (ORDER 13A – COMMERCIAL COURTS ACT, 2015)

1. One of the significant amendments brought into the CPC by the Commercial Courts Act, 2015 is the insertion of Order 13A for summary judgment.
2. Order 13A provides that disputes recognised as commercial disputes under the Act can be disposed of by the commercial court without a full-fledged trial.
3. Previously, suits having a clear outcome on merits were still required to undergo the entire CPC procedure before disposal.
4. These technicalities led to inordinate delays for the parties and clogged the entire docket.
5. The amendment is similar to summary suits under the CPC, with the primary difference that:
 - Application for summary judgment may be made for any relief in a commercial dispute;
 - Summary suits apply only to liquidated demand or fixed sum of debt.
6. Under Order XIII-A, an application for summary judgment may be made by either party after service of summons on the defendant and before framing of issues.
7. A summary judgment may be granted if the Court is satisfied that:
 - (a) The plaintiff/defendant has no real prospect of succeeding on the claim/defence; and
 - (b) There is no other compelling reason why the claim should not be disposed of before oral evidence.

SAVING OF INHERENT POWERS OF COURT – SECTION 151 CPC

- Section 151 CPC states that nothing in the Code limits or affects the inherent power of the Court to make orders necessary for the ends of justice or to prevent abuse of process.
- Though it does not confer any specific power, it is one of the most used provisions in litigations.
- Any situation not covered under the CPC may be addressed under this section.

SCOPE OF SECTION 151 – AS EXPLAINED IN K.K. Velusamy v. N. Palanisamy (2011) 11 SCC 275

- (a) Section 151 is not a substantive provision creating power or jurisdiction. It recognises the Court's discretionary inherent power to do what is "right" and undo what is "wrong" to secure the ends of justice and prevent abuse of process.
- (b) Since the Code is not exhaustive, Section 151 confirms that where the CPC does not expressly or impliedly cover a procedural aspect, the inherent power may be used if the ends of justice so require. Its breadth is coextensive with the need for its exercise.
- (c) A Court cannot, under inherent powers, do what is prohibited by law or the Code. Where the CPC expressly or impliedly covers a matter and exhausts the Court's jurisdiction, inherent powers cannot be invoked inconsistently with the Code.
- (d) Inherent powers are complementary to specific powers. They may be exercised when the matter is not covered by any specific CPC provision and when their exercise does not conflict with the Code or legislative intention.
- (e) While exercising inherent power, the Court must be doubly cautious, as there is no legislative guidance and the power depends on judicial discretion and wisdom. The absence of a specific provision does not give a *carte blanche* to grant any relief.
- (f) The power under Section 151 must be used with circumspection and care, only when absolutely necessary, when no other provision governs the matter, when *bona fides* are unquestionable, and when such exercise is required to meet the ends of justice and prevent abuse of process.

POWERS OF CIVIL COURTS AND THEIR EXERCISE BY TRIBUNALS

- Tribunals are quasi-judicial authorities established by law.
- They are generally established for speedy disposal of cases and possess expertise over particular subject matters.
- These tribunals are vested with certain powers of Civil Courts to effectively discharge their assigned functions.

EXAMPLE – NCLT AND NCLAT

The National Company Law Tribunal and National Company Law Appellate Tribunal, for discharging functions under the Companies Act and the Insolvency and Bankruptcy Code, 2016, have the same powers as a civil court under the CPC while trying a suit in respect of the following matters:

- (a) Summoning and enforcing attendance of any person and examining him on oath;
- (b) Requiring the discovery and production of documents;
- (c) Receiving evidence on affidavits;
- (d) Requisitioning any public record or document or copy thereof, subject to sections 123 and 124 of the Evidence Act;
- (e) Issuing commissions for examination of witnesses or documents;
- (f) Dismissing a representation for default or deciding it *ex parte*;
- (g) Setting aside an order of dismissal for default or any *ex parte* order;
- (h) Any other matter which may be prescribed.

MAJOR ACTS EMPOWERING TRIBUNALS WITH CIVIL COURT POWERS

1. The Companies Act, 2013
2. The Securities and Exchange Board of India Act, 1992
3. The Income-tax Act, 1961
4. The Information Technology Act, 2000
5. The Prevention of Money-Laundering Act, 2002
- The respective tribunal may exercise these powers to discharge its statutory functions.
- Tribunals must exercise due care while using such powers, ensuring that the powers are used for achieving the object of the legislation delegating them.

CASE LAWS

1. Padam Sen and Ors. v. State of Uttar Pradesh (1960, 1961 AIR 218)

- The Court held that inherent powers of the Court are not defined, and may be freely exercised at the Court's discretion, but not in conflict with or against the intention of the legislature.
- It was stated that the inherent powers are in addition to and complementary to the powers conferred by the Code.
- The Court is free to exercise them for the purposes mentioned in Section 151 CPC, so long as their exercise is not in conflict with express provisions of the Code or the intentions of the Legislature.

2. Yashpal Jain v. Sushila Devi & Others (Supreme Court, 20 October 2023)

- The Supreme Court observed that even after 41 years, the parties were still litigating regarding who should be brought on record as the legal representative of the sole plaintiff.
- The case reflects that litigants may become disillusioned due to inordinate delays in legal proceedings caused by dilatory tactics.

12 Directions for Speedy Trial of Civil Cases:

- i. District and Taluka courts must ensure proper and time-bound execution of summons under Order V Rule 2 CPC, monitored by Principal District Judges and forwarded to the High Court committee.
- ii. Written statements must be filed within the prescribed limit, preferably within 30 days, and reasons must be assigned in writing for extension under Order VIII Rule 1.
- iii. After pleadings are complete, courts must record admissions and denials under Order X and direct parties to opt for ADR under Section 89(1); appearance before ADR forum must be ensured; trial to be fixed beyond two months and proceed day-to-day if ADR fails.
- iv. If parties do not opt for ADR, issues must be framed within one week, preferably in open court.
- v. Trial dates must be fixed in consultation with advocates and trial must proceed day-to-day as far as possible.
- vi. Trial judges must maintain a case diary, listing only as many cases as can be handled in a day to avoid adjournments and inconvenience.
- vii. Counsels must be enlightened about Order XI and Order XII; Bar Associations and Bar Councils must conduct refresher courses, preferably virtual.
- viii. Trial courts must strictly comply with Order XVII Rule 1, and once trial starts, it must continue day-to-day as per the proviso to Rule 2.

- ix. Courts must ensure payment of costs to prevent unnecessary adjournments and compensate the opposite party.
- x. After completion of trial, oral arguments must be heard immediately and continuously, and judgment must be pronounced within the period under Order XX CPC.
- xi. Monthly statistics of cases pending beyond 5 years must be sent by each presiding officer to the Principal District Judge, who will forward them to the High Court review committee.
- xii. The committee constituted by the Chief Justice must meet once in two months, issue corrective measures, and monitor old cases, especially those pending over five years.

COMMERCIAL COURTS ACT, 2015

Introduction

- The Government of India introduced the *Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015* to reduce the burden on the judiciary regarding commercial disputes.
- The enactment not only unburdened the judiciary but also enabled prospective foreign investors to gain more trust over their investments in the Indian market.
- Its main emphasis is on commercial disputes, which are special in nature since they directly or indirectly affect the economy of a nation.
- To expedite the disposal of cases of large economic value or commercial nature, the Commercial Courts Act, 2015 was introduced.
- It is an Act to provide for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.
- The Act came into force on 23rd October, 2015, enabling speedy redressal of cases holding large economic value.

Commercial Courts

Section 3 — Constitution

- The State Government, after consultation with the respective High Court, may constitute Commercial Courts at District level as necessary for exercising jurisdiction and powers under this Act.
- The State Government, after consultation with the High Court, may:
 1. Specify pecuniary value, which shall not be less than three lakh rupees or such higher value. [Section 3(1A)]
 2. Extend, alter, or reduce the jurisdiction of such Court within local limits. [Section 3(2)]
 3. Appoint judges, being persons having experience in dealing with commercial disputes, to such Courts.

Jurisdiction

Section 6

- The Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction.

Section 7

- All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court.

Section 10

- In matters of international commercial arbitration under the Arbitration and Conciliation Act, 1996, cases shall be heard and disposed of by the Commercial Division where such Division has been constituted.
- In matters of arbitration other than international commercial arbitration, filed on the original side of the High Court, cases shall similarly be heard and disposed of by the Commercial Division.

Determination of Specified Value

The Specified Value of the subject-matter of a commercial dispute in a suit, appeal or application shall be determined as follows:

- Recovery of money – value should include interest accrued upto the date of filing of the suit/application.
- Movable property or right therein – value computed as the market value of the movable property on the filing date.
- Immovable property or right therein – value computed as the market value of the immovable property on the filing date.
- Other intangible rights – value computed as the estimated market value of such rights by the plaintiff on the filing date.

Pre-Institution Mediation and Settlement

- The purpose of the Act is to resolve commercial disputes without bringing them to court, through mediation.
- Before approaching a commercial court, parties are required to attempt settlement through pre-institution mediation.
- The Central Government may authorise Authorities constituted under the Legal Services Authorities Act, 1987 to conduct such mediation.

Time Period

- The mediation process must be completed within three months from the date of application.
- It may be extended for a further two months with the consent of the parties.

Award/Settlement

- The settlement or award must be in writing and signed by the parties and the mediator.
- It shall have the same status and effect as an arbitral award under Section 30(4) of the Arbitration and Conciliation Act, 1996.

Appeals

- Any person aggrieved by the judgment or order of a Commercial Court may file an appeal within sixty days.
- Appeals lie as follows:
 - From judgment of a Commercial Court below District Judge → to the Commercial Appellate Court.
 - From judgment of a Commercial Court at District Judge level or Commercial Division of High Court → to the Commercial Appellate Division of that High Court.
- All appeals must be disposed of within six months from the date of filing.

Amendments to the Code of Civil Procedure, 1908

- Section 16 of the Act provides that CPC provisions, in their application to commercial disputes of specified value, stand amended as per the Schedule.
- The Schedule amends the following provisions:
 - Section 26 – Institution of Suits
 - Section 35-A – Compensatory Costs
 - Section 35 – Costs
 - Order 5 – Issuance and Service of Summons
 - Orders 6, 7 and 8 – Pleadings
 - Order 11 – Discovery and Inspection of Documents
 - Order 18 – Examination of Witnesses
 - Order 20 – Judgment and Decree
- Certain provisions were inserted to enable the fast-track process of Commercial Courts.

CASE LAWS

1. Daimler Financial Services India Pvt. Ltd. v. Vikash Kumar & Ors. (2020, Jharkhand HC) -
 - The petitioners were a non-banking finance company; the opposite parties defaulted on a loan.
 - Arbitration took place and an award was passed against the borrowers.
 - The borrowers challenged the award before the Commercial Court, Dhanbad, which dismissed the petition for lack of pecuniary jurisdiction.
 - The Court held it had jurisdiction only for matters of ₹1 crore or above, as no State notification existed under Section 3(1-A) of the Commercial Courts Act, 2015.
 - Hence, the Commercial Court had no authority to entertain the execution petition.
2. Telangana State Tourism Development Corp. Ltd. v. A.A. Avocations Pvt. Ltd. (2022, Telangana HC) —
 - The Court held that where the specified value of a commercial dispute is ₹1 crore or more, it must be decided by a Commercial Court.

- Under Section 9 of the Arbitration and Conciliation Act, 1996, applications relating to such high-value disputes also fall within Commercial Court jurisdiction.
 - Disputes concerning immovable property used exclusively for trade/commerce with value above ₹1 crore are “commercial disputes” under Section 2(1)(c).
3. T. Arivandandam v. T.V. Satyapal (SCC 1977)
- The Court emphasized the duty of judges to curb frivolous and irresponsible litigation.
 - Presiding officers must ensure speedy adjudication, avoid unnecessary adjournments, and enforce CPC provisions strictly.
 - Directions issued include: timely service of summons, timely filing of written statements, framing of issues within one week, use of ADR under Section 89 CPC, day-to-day trials, strict compliance with Order XVII, and prompt delivery of judgments.
 - District judges must monitor and report cases pending over 5 years.
4. Eldeco Housing & Industries Ltd. v. Ashok Vidyarthi (SLP 19465/2021)
- While deciding an application under Order VII Rule 11(d) CPC, the Court cannot examine evidence.
 - Only the averments in the plaint can be looked at.
 - Issues relating to the merits of the dispute cannot be considered at this stage.
5. Vijay Prakash Jarath v. Tej Prakash Jarath (2016)
- A counterclaim can be filed only if the cause of action arises before the defendant files the written statement.
 - If the cause of action accrues after filing the written statement, no counterclaim is maintainable.
6. Raghavendra Swamy Mutt v. Uttaradi Mutt (2016)
- An appeal under Section 100 CPC can be admitted only on the basis of a substantial question of law.
 - Admission cannot be done formally as in Section 96 CPC.
 - The requirement is mandatory and fundamental.
7. Rishabh Chand Jain v. Ginesh Chandra Jain (2016)
- Dismissal of a suit on res judicata amounts to a decree, even if the Court failed to frame a specific issue.
 - Procedural irregularity does not change the nature of the order.
 - A decree is appealable under Section 96 CPC, and revision under Section 115 CPC is barred by Section 115(2).

LESSON-7

Laws relating to Crime and its Procedure

INTRODUCTION

Bharatiya Nyaya Sanhita (BNS)

- The Bharatiya Nyaya Sanhita, 2023 is a modern-day legislation that has replaced the colonial Indian Penal Code of 1860, which continued as India's main penal statute even after independence in 1947.
- The BNS 2023 was enforced from 1st July 2024, representing a transformative update to India's criminal laws by replacing the colonial-era IPC.
- It introduces modernized definitions and addresses newer forms of crime, including cyber offences and organized crime, thereby aligning the criminal justice system with contemporary social and technological realities.
- It incorporates provisions for community service as punishment, refines laws relating to terrorism and sedition, and eliminates obsolete offences.
- The BNS reflects India's commitment to justice and human rights and enhances accessibility, relevance, and efficiency of the criminal justice system while upholding constitutional rights.
- The Indian Penal Code, 1860 was a colonial enactment retained post-independence; the Bharatiya Nyaya Sanhita, 2023 now replaces it and applies to the whole of India.
- Crime is a social phenomenon—an act committed by an individual within society and arises when a State establishes rules, the violation of which constitutes crime.
- Law regulates social interests, arbitrates conflicting claims, and ensures security of persons and property, which is a principal function of the State achieved through criminal law.
- Crime being a relative concept is defined by the State; its meaning changes with time and according to societal evolution.
- There is no fixed rule for determining crime; crime is what the law declares it to be.
- A criminal offence differs from a civil wrong in that a criminal offence is a wrong against society due to its grave nature, whereas a civil wrong is against an individual.
- Serious crimes threaten the very existence of an orderly society; hence, commission of such crime is treated as an offence against society as a whole.
- Practices that are criminal, illegal, or unlawful may still be socially accepted, and society may consider certain acts reprehensible even if they are not criminal in the eyes of law.
- The criminal law cannot diverge too greatly from moral and cultural standards; governments must remain aware of societal norms when framing and amending criminal laws.
- In India, the basis of criminal and punitive provisions is laid down in the Bharatiya Nyaya Sanhita, 2023.

- The BNS does not attempt to define “crime”; however, under Section 2(24), “offence” means “a thing made punishable by BNS,” and the terms offence and crime are interchangeable.
- The BNS is the substantive criminal law defining acts constituting offences and prescribing punishments; it sets out principles of criminal law.
- The procedural law for implementing the BNS is the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023.
- The BNS contains 20 chapters and 358 sections.

Bharatiya Nagarik Suraksha Sanhita (BNSS)

- The BNSS is an Act to consolidate and amend the law relating to criminal procedure.
- It replaces the Criminal Procedure Code, 1973 as part of India’s effort to modernize and streamline the criminal justice system in accordance with contemporary needs and societal expectations.
- The shift aims to enhance efficiency of criminal processes, ensure victim-centric justice, and integrate technological advancements into investigation and judicial procedures.
- The BNSS addresses delays, redundancies, and complexities in the earlier framework while expediting trials, strengthening mechanisms for digital evidence, and improving transparency.
- It emphasizes safeguarding individual rights, fairness, and reduction of procedural bottlenecks, making the justice system more accessible and effective.
- Company Secretaries and secretarial professionals have limited involvement with the BNSS except for preventing liabilities arising from criminal offences by Directors, Managers, Secretary, or Principal Officers under corporate and industrial laws.
- However, company secretaries should remain familiar with certain relevant provisions of the Code.
- The BNSS provides the procedure for apprehending criminals, investigating cases, and conducting trials before criminal courts.
- Though mainly procedural (adjective law), it also contains certain substantive provisions—particularly in Chapters VIII, IX, X and XI.
- Its objective is to provide the machinery for determining guilt and imposing punishment on offenders under substantive law, including the Bharatiya Nyaya Sanhita (BNS).
- Both the BNSS and BNS are to be read together.
- The BNSS also provides procedural framework for offences under other statutes.

Jurisdiction of Bharatiya Nyaya Sanhita, 2023

General Concept

- Jurisdiction refers to the geographical area or subjects to which a law applies.
- Ordinarily, laws apply within the boundaries of the country making them, as no country can enforce its laws in another sovereign nation.
- Thus, territorial jurisdiction of a law usually ends at the international boundary of that country.
- However, countries may enact laws that apply to territories beyond their borders—such jurisdiction is known as extra-territorial jurisdiction.

Jurisdiction under BNS

- Under the BNS 2023, Indian criminal courts exercise jurisdiction either:
 - because a crime is committed by any person (Indian or foreigner) within Indian territory, or
 - because a crime committed outside India is triable under Indian law.
- The former is intra-territorial jurisdiction; the latter is extra-territorial jurisdiction.

Intra-Territorial Jurisdiction

- Where an offence under the BNS is committed within the territory of India, the BNS applies irrespective of the nationality of the offender.
- The jurisdiction exists because the offence occurs within Indian territory.
- Sections 1(4) and 1(5) of the BNS deal with extra-territorial jurisdiction but also clarify the full jurisdictional scope.
- The expression “any person” emphasizes that guilt is determined without discrimination based on caste, creed, nationality, rank, status, or privilege.
- The BNS applies to offences committed:
 1. Within the territory of India, as defined under Article 1 of the Constitution.
 2. Any place outside and beyond India.
 3. By any person on any ship or aircraft registered in India, wherever it may be located.
 4. By any person outside India committing an offence targeting a computer resource located in India.
- It is not a valid defence for a foreigner to claim ignorance that the act was a crime under Indian law, or that the act is not an offence in their home country.
- In *Mobarik Ali Ahmed v. State of Bombay*, 1957 AIR SC 857, the Supreme Court held that Indian laws need not be published or made known abroad to bind foreigners.
- The test for effective publication is publication within India, sufficient to notify anyone intending to enter or pass through India.

Exemption from Intra-Territorial Jurisdiction

1. Article 361(2) of the Constitution grants immunity to the President and Governors from criminal proceedings in any court during their term of office.
2. Under principles of international law, foreign sovereigns are exempt from criminal proceedings in India.
3. Ambassadors and diplomats of foreign countries with official status in India also enjoy such immunity.

Section 3 of the IPC replaced with Section 1(4) of the BNS

BNS: Section 1(4)

- Any person liable, by any law for the time being in force in India, to be tried for an offence committed beyond India, shall be dealt with according to the provisions of the BNS for any act committed beyond India in the same manner as if such act had been committed within India.

Section 4 of the IPC replaced with Section 1(5) of the BNS

BNS: Section 1(5)

The provisions of the BNS shall also apply to any offence committed by—

- (a) any citizen of India in any place without and beyond India;
- (b) any person on any ship or aircraft registered in India wherever it may be;
- (c) any person in any place without and beyond India committing an offence targeting a computer resource located in India.
 - In this section, the word “offence” includes every act committed outside India which, if committed in India, would be punishable under the BNS.

Illustration:

- A, who is a citizen of India, commits a murder in any place without and beyond India. He can be tried and convicted of murder in any place in India in which he may be found.

Changes between Section 3 of the IPC and Section 1(4) of the BNS

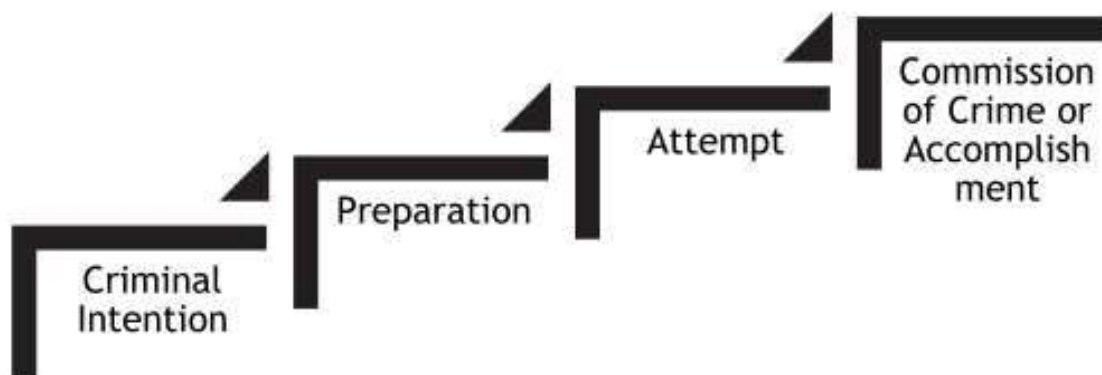
- Section is included as a subsection in the BNS without a heading.
- “Indian laws” is replaced with “law,” and the phrase “for the time being in force in India” is inserted.

Changes between Section 4 of the IPC and Section 1(5) of the BNS

- Section is included as a subsection in the BNS without a heading.
- In the illustration, “Uganda” has been replaced with “any place outside India.”

THE STAGES OF CRIME

The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, it involves four important stages, viz.



1. Criminal Intention

- Criminal intention is the first stage in the commission of an offence.
- Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose.
- Law does not as a rule punish individuals for their evil thoughts or criminal intentions.
- The criminal court does not punish a man for mere guilty intention because it is very difficult for the prosecution to prove the guilty intention of a man.
- Intention means doing any act with one's will, desire, voluntariness, malafides and for some purpose.
- In the BNS, all these varied expressions find place in various sections of the BNS.
- Intention can also be imputed under the law.

- Example: If a man drives in a rash and reckless manner resulting in an accident causing death, the reckless driver cannot plead innocence by stating that he never intended to cause death.
- It may be true strictly, but a reckless driver should know that reckless driving is likely to cause harm and even death to persons on the road.
- By virtue of the definition of the word "voluntarily" in the BNS, a reckless driver who causes death can be presumed or deemed to have intended to cause the death.

2. Preparation

- Preparation means arranging necessary measures for the commission of the intended criminal act.
- Preparation itself is not punishable as it is difficult to prove that necessary preparations were made for the commission of the offence.
- However, in certain exceptional cases, mere preparation is also punishable.
- Under the BNS, mere preparation to commit a few offences is punishable as they are considered grave offences.
- Some of them are:
 - a. Preparation to wage war against the Government (section 190).
 - b. Preparation for counterfeiting coins or Government Stamps (sections 178 and 181).
 - c. Possessing counterfeit coins, false weights or measurements, and forged documents (sections 180 and 339).
 - d. Making preparation to commit dacoity (section 310(4)).

3. Attempt

- Attempt is the third stage in the commission of a crime and is punishable.
- Attempt has been called a preliminary crime.
- Section 62 of the BNS does not define "attempt" but provides punishment for attempting to commit an offence.
- Attempt means the direct movement towards the commission of a crime after necessary preparations have been made.
- When a person wants to commit a crime:
 - He first forms an intention,
 - Then makes preparation,
 - And finally does something towards achieving the object.
- If he succeeds, he is guilty of the completed offence; otherwise, he is guilty only of attempt.
- Whether an act amounts to an attempt is a question of fact depending on the nature of the crime and the steps necessary to commit it.
- The act constituting attempt must be proximate to the intended result.
- Under the BNS, attempt provisions can be divided into four categories:
 - (i) First category:
 - Sections where commission of an offence and attempt to commit it are dealt with in the same section.
 - Punishment for both is the same.

- Examples: waging or attempting to wage war, assaulting or attempting to assault the President or Governor, sedition, a public servant accepting or attempting to accept gratification, using or attempting to use false evidence, dacoity, etc.
- (ii) Second category:
 - Offences where attempt and commission are dealt with side by side but separately.
 - Separate punishments are provided for attempts.
 - Examples: Attempt to commit offences punishable with death or imprisonment for life, including robbery, murder, etc.
- (iii) Third category:
 - Attempt to commit suicide to compel or restrain lawful power is specifically punished under section 226 of the BNS.
- (iv) Fourth category:
 - Attempts to commit offences for which no specific punishment is provided in the BNS.
 - Covered under section 62.
 - Section 62 provides that whoever attempts to commit an offence punishable with imprisonment for life or imprisonment and does any act towards its commission shall, where no express provision exists for punishment, be punished with imprisonment up to one-half of the imprisonment for life or one-half of the longest term provided for the offence, or with such fine as provided, or with both.

4. Commission of Crime or Accomplishment

- The last stage in the commission of crime is its accomplishment.
- If the accused succeeds in his attempt, the result is the commission of the crime and he will be guilty of the offence.
- If his attempt is unsuccessful, he will be guilty for an attempt only.
- If the offence is complete, the offender will be tried and punished under the specific provisions of the BNS.

TYPE OF PUNISHMENTS

Types of Punishments					
Death	Imprisonment for life	Imprisonment, which is of two descriptions, namely: (1) Rigorous, that is, with hard labour; (2) Simple;	Forfeiture of property	Fine	Community Service

1. Death

- A death sentence is the harshest punishment provided in the BNS and involves the judicial killing or taking of the life of the accused as a form of punishment.
- The Hon'ble Supreme Court in various cases has ruled that the death sentence ought to be imposed only in the 'rarest of rare cases'.

- This doctrine was propounded by the Supreme Court in *Bacchan Singh v. State of Punjab* (AIR 1980 SC 898).
- The BNS provides for capital punishment for the following offences:
 - (a) Murder
 - (b) Dacoity with murder
 - (c) Waging war against the Government of India
 - (d) Abetting mutiny actually committed
 - (e) Giving or fabricating false evidence resulting in an innocent person suffering death
 - (f) Abetment of suicide by a minor or insane person
 - (g) Attempted murder by a life convict
- The Bharatiya Nyaya Sanhita (BNS) has increased the number of offences punishable by death. Under the BNS, death penalty is also prescribed for:
 - ❖ Murder – Punishable with death or life imprisonment, and the offender may also be liable to a fine.
 - ❖ Mob lynching – Murder or grievous hurt by five or more persons on specified grounds is punishable with a minimum of seven years imprisonment to life imprisonment or death.
 - ❖ Terrorism – Attempt or commission of terrorism resulting in death is punishable with death or life imprisonment and a fine of ₹10 lakh.
 - ❖ Organized crime – Attempt or commission of organized crime resulting in death is punishable with death or life imprisonment and a fine of ₹10 lakh.
- In all such cases, when the court decides that the death penalty is the appropriate sentence considering the gravity and consequences of the offence and the absence of mitigating circumstances, the court must record special reasons for arriving at this conclusion.

2. Life Imprisonment

- Imprisonment for life means rigorous imprisonment, i.e., imprisonment till the last breath of the convict.

3. Imprisonment

- Imprisonment is of two descriptions:
 - a) Rigorous imprisonment – involving hard labour
 - b) Simple imprisonment

4. Forfeiture of Property

- Forfeiture means the divestiture of specific property without compensation as a consequence of some default or act forbidden by law.
- Courts may order forfeiture of the accused's property on certain occasions.
- Sections 154 and 155 of the BNS empower the courts to order such forfeiture.

5. Fine

- A fine is the forfeiture of money by way of penalty.
- It must be imposed individually and not collectively.

- When a court imposes a sentence including a fine, it may specify that in the event of non-payment of the fine, the convict shall undergo imprisonment in default, which is referred to as a default sentence.

6. Community Service as Punishment

- The Bharatiya Nyaya Sanhita (BNS) 2023 includes community service as a form of punishment for minor offences.

Purpose

- The BNS aims to establish a more balanced and rehabilitative criminal justice system by incorporating restorative justice.
- The objective is to promote rehabilitation and reduce burdens on the prison system.
- Community service is widely used in America for petty offences such as vandalism and petty theft.

Examples of Offences

- Community service can be imposed for offences such as petty thefts, public nuisance, false defamation complaints, and drunken misconduct in public.

How It Works

- Courts may choose community service instead of incarceration or fines.
- For example, offenders involved in theft of property valued below ₹5,000 can avoid traditional punishment by returning the stolen property and performing community service.

Offences Under BNS Where Community Service May Be Imposed

- I. Involvement of public servants in illegal trade (Sec 202 BNS)
- II. Non-appearance in response to a proclamation (Sec 209 BNS)
- III. Attempt to commit suicide to influence legal authority (Sec 226 BNS)
- IV. First conviction of petty theft involving property valued below ₹5,000, provided the property has been recovered (Sec 303 BNS)
- V. Public misconduct by a drunken person (Sec 355 BNS)
- VI. Defamation (Sec 356 BNS)

Difference between Fine and Penalty

Fine

- According to the Merriam-Webster Dictionary, a fine means “a sum imposed as punishment for an offense.”

Penalty

- According to the Merriam-Webster Dictionary, a penalty means “the suffering or the sum to be forfeited to which a person agrees to be subjected in case of non-fulfillment of stipulations.”

Analysis

- An inference may be drawn from the above definitions that punishments are imposed against offences, whereas penalties are imposed against non-compliances.

- According to section 2(38) of the General Clauses Act, 1897, *offence* means any act or omission made punishable by any law for the time being in force.
- According to the Merriam-Webster Dictionary, *non-compliance* means failure or refusal to comply with something (such as a rule or regulation): a state of not being in compliance.
- Accordingly, it can be analysed that the use of the term *fine* or *penalty* in a particular statutory provision depends upon the nature of the provision, i.e., whether the provision is criminal or civil in nature.

Example

1. Penalty for Non-Compliance – Section 12(8), Companies Act, 2013

- According to section 12(8), if any default is made in complying with the requirements of section 12, the company and every officer in default shall be liable to a penalty of one thousand rupees for every day during which the default continues, subject to a maximum of one lakh rupees.
- Here, the default is in the nature of non-compliance, therefore the provision creates a liability of penalty.

2. Fine for an Offence – Section 16(3), Companies Act, 2013

- According to section 16(3), if a company makes default in complying with any direction given under section 16(1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues, and every officer in default shall be punishable with fine not less than five thousand rupees but which may extend to one lakh rupees.
- Here, the default is in the nature of an offence, therefore the provision provides for fine as punishment.
 - In the Companies Act, 2013, where monetary penalty is prescribed for a default, generally no imprisonment is provided.
 - However, fine and imprisonment are mostly provided together.
 - Two such examples are as follows:

Section 8(11), Companies Act, 2013

- “If a company makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine not less than ten lakh rupees but which may extend to one crore rupees, and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine not less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees, or with both.”

Section 26(9), Companies Act, 2013

- “If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine not less than fifty thousand rupees but which may extend to three lakh rupees, and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three

years or with fine not less than fifty thousand rupees but which may extend to three lakh rupees, or with both.”

Additional Observation

- A similar analysis can be drawn from the SEBI Act, 1992, where imprisonment and fine are grouped together for punishments relating to offences, whereas penalties are imposed for non-compliances.

THE FUNDAMENTAL ELEMENTS OF CRIME

The basic function of criminal law is to punish the offender and to deter the incidence of crime in the society. A criminal act must contain the following elements:

Elements of Crime		
Human Being	Mens rea	Actus reus

1. Human Being

- The first requirement for the commission of a crime is that the act must be committed by a human being.
- The human being must be under a legal obligation to act in a particular manner.
- The person must be physically and mentally fit for conviction if he has not acted according to the legal obligation.
- Only a human being who is under legal obligation and capable of being punished can be the proper subject of criminal law.

2. Mens Rea

- The basic principle of criminal liability is contained in the legal maxim ‘actus non facit reum nisi mens sit rea’, meaning ‘the act alone does not amount to guilt; the act must be accompanied by a guilty mind’.
- The intention and the act must both concur to constitute a crime.
- Mens rea is defined as the mental element necessary to constitute criminal liability.
- It is the attitude of mind that accompanies and directs the conduct which results in the *actus reus*.
- The act is not judged from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the external act by applying objective standards.

Types of Mens Rea

- Intention
- Negligence
- Recklessness
- The Hon’ble Supreme Court in *Girja Nath v. State* stated that mens rea is a loose term of elastic signification and covers a wide range of mental states and conditions, the existence of which gives criminal hue to *actus reus*.
- Intention, negligence and recklessness are the important forms of mens rea.

(i) Intention

- Intention is defined as ‘the purpose or design with which an act is done’.
- Intention indicates the position of mind, the state of a person at the time of the commission of the offence, and the will of the accused to see the effects of his unlawful conduct.
- Criminal intention includes not only specific intention but also generic intention.
- *Example:* A poisons food meant for B with the intention of killing B. C eats the food instead and dies. A is liable for killing C although A never intended to kill C.

(ii) Negligence

- Negligence is the second form of mens rea.
- Negligence means not taking care where there is a duty to take care.
- It indicates a state of mind where there is absence of a desire to cause a particular consequence.
- The standard of care required by law is that of a reasonable person in identical circumstances.
- What amounts to reasonable care varies depending on the situation of each case.
- In criminal law, negligent conduct amounts to mens rea.

(iii) Recklessness

- Recklessness occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk.
- It is a total disregard for the consequences of one’s actions.
- Recklessness is also a recognised form of mens rea.

Mens Rea in the Bharatiya Nyaya Sanhita (BNS), 2023

- The term *mens rea* itself is not used in the BNS 2023, but the underlying idea is present throughout the statute.
- Generally, each offence in the BNS is defined with precision and includes the necessary mens rea expressly in the wording.
- The mens rea or evil intent of the wrong-doer is shown through the use of expressions such as intentionally, voluntarily, fraudulently, dishonestly, maliciously, knowingly, etc.

Exceptions to Mens Rea**1. Statutory Imposition**

- Where a statute imposes liability, the presence or absence of a guilty mind becomes irrelevant.
- The classical rule of “no mens rea, no crime” has been eroded in many areas, particularly economic offences and departmental penalties.
- Several laws, especially those concerning public safety and social welfare, impose absolute liability, such as:
 - Public health laws
 - Food and drug regulations
 - Licensing of shops, hotels, restaurants, and chemist establishments
- Absolute liability also applies in cases under the Motor Vehicles Act, Arms Act, and in offences against the State like waging war and sedition.

2. Difficulty in Proving Mens Rea

- Where it is difficult to prove mens rea and the penalty involves petty fines, proving guilty mind is not required.
- In such small cases, speedy disposal is necessary and the accused may be fined even without establishing mens rea.

3. Interest of Public Safety

- Strict liability is imposed in the interest of public safety.
- Whether a person causes public nuisance with or without a guilty mind, he is punished.

4. Offence Without Knowledge

- If a person violates a law even without knowing about the law, he is still considered to have committed an act prohibited by law.
- Lack of knowledge is not a defence.
- This is based on the maxim 'Ignorantia juris non excusat', meaning ignorance of the law is no excuse.

Corporate Body and Mens Rea

- With the increase in juristic persons and the expansion of their activities that increasingly affect the daily lives of ordinary people, criminal law has evolved to bring such persons within its scope.
- According to section 2(26) of the BNS, the word '*person*' includes any company, association, or body of persons, whether incorporated or not.
- Thus, companies are covered under the provisions of the Bharatiya Nyaya Sanhita.
- In almost all jurisdictions governed by the rule of law, companies can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for committing criminal offences.
- The criminal intent of the 'alter ego' of the company or body corporate—that is, the person or group of persons who guide the business of the company—is imputed to the company.
- In *State of Maharashtra v. M/s. Syndicate Transport*, AIR 1964 Bom 195, it was held that whether a corporate body should or should not be liable for a criminal act resulting from the actions of an individual depends on:
 - the nature of the offence disclosed by the complaint or charge sheet,
 - the relative position of the officer or agent in relation to the corporate body, and
 - other relevant facts and circumstances showing whether the corporate body, as such, meant or intended to commit the act.

3. Actus Reus (Act or Omission)

- The third essential element of a crime is actus reus.
- A human being and an evil intention alone are not sufficient to constitute a crime, since one cannot know the intentions of a person without an external act.
- Actus reus means an overt act or unlawful omission committed in execution of a plan accompanied by guilty intention.
- Actus reus is defined as the result of voluntary human conduct prohibited by law.
- It requires the doing of some act by the person who is to be held liable.
- An *act* means a willed movement of the body.

- A person may be held fully liable even if he has taken no part in the actual commission of the crime.
 - *Example:* If several people conspire to murder someone and only one person actually shoots the victim, every conspirator is liable.
- A person is also fully responsible if he commits an offence by using an innocent agent to carry out the crime.

COGNIZABLE OFFENCE AND NON-COGNIZABLE OFFENCE

Cognizable Offence

- According to section 2(1)(g) of the BNSS, a “*cognizable offence*” is an offence for which, and a “*cognizable case*” is a case in which, a police officer may arrest without warrant in accordance with the First Schedule or any other applicable law.

Non-Cognizable Offence

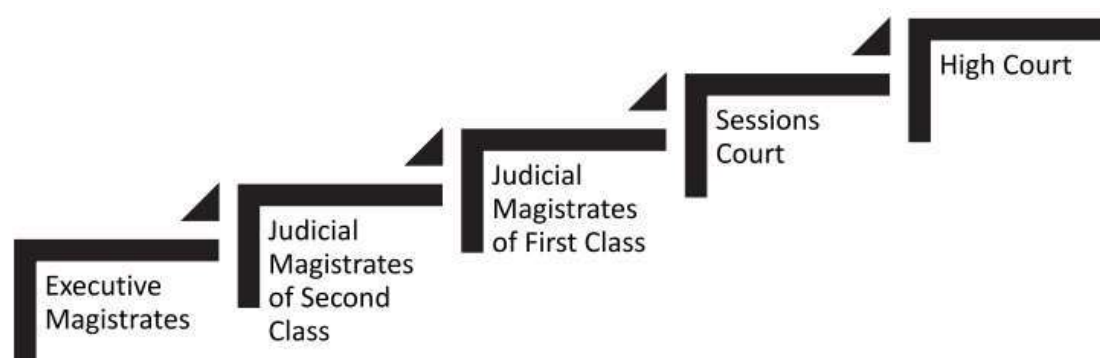
- According to section 2(1)(o) of the BNSS, a “*non-cognizable offence*” is an offence for which, and a “*non-cognizable case*” is a case in which, a police officer has no authority to arrest without a warrant.

Note

- As observed from the First Schedule,
 - Non-cognizable offences are usually bailable,
 - While cognizable offences are generally non-bailable.

CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:



1. Courts constituted under other laws

- Besides this, the Courts may also be constituted under any other law.
- The Supreme Court is also vested with powers to deal with some criminal matters.
- Article 134 confers appellate jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.

2. Changes introduced by BNSS

- Section 6 of BNSS (corresponding to Section 6 of CrPC):
 - The words “in any Metropolitan area, Metropolitan Magistrates” are excluded.

POWER OF COURTS

(Chapter III of BNSS)

Power to try offences

- Offences are divided into two categories:
 - (a) those under the Bharatiya Nyaya Sanhita; and
 - (b) those under any other law.
- According to Section 21:
 - Any offence under the Bharatiya Nyaya Sanhita, 2023 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable.
 - Any offence under any other law shall be tried by the Court mentioned in that law.
 - If not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.
- This section is a general section and is subject to the other provisions of BNSS.

Power of Courts to pass sentences

(a) Sentences which High Courts and Sessions Judges may pass

- According to Section 22 of BNSS:
 - A High Court may pass any sentence authorised by law.
 - A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law.
 - However, any sentence of death passed by such Judge shall be subject to confirmation by the High Court.

(b) Sentences which Magistrates may pass (Section 23)

- The quantum of sentence which different categories of Magistrates are empowered to impose is as follows:
 1. **Chief Judicial Magistrate (CJM)**
 - May pass any sentence authorised by law except:
 - a sentence of death, or
 - imprisonment for life, or
 - imprisonment for a term exceeding seven years.
 2. **Magistrate of the First Class**
 - May pass a sentence of imprisonment for a term not exceeding three years,
 - or fine not exceeding fifty thousand rupees,
 - or both,
 - or community service.
 3. **Magistrate of the Second Class**
 - May pass a sentence of imprisonment for a term not exceeding one year,
 - or fine not exceeding ten thousand rupees,
 - or both,
 - or community service.
 4. **Explanation regarding Community Service**

- “Community service” shall mean the work which the Court may order a convict to perform as a form of punishment that benefits the community,
- for which he shall not be entitled to any remuneration.

Changes introduced by BNSS related to Section 23

- Section 23 of BNSS (corresponds to Section 29 of CrPC):
 - Change in amount of fine:
 - “ten thousand” is replaced by “fifty thousand”,
 - and “five thousand” is replaced by “ten thousand”.
 - The explanation defines “community service”.
 - Sub-section 29(4) of CrPC is excluded.

(c) Sentence of imprisonment in default of fine (*Section 24*)

- The Court of a Magistrate may award such term of imprisonment in default of payment of fine as authorised by law.
- Provided that the term:
 - (a) is not in excess of the powers of the Magistrate under section 23;
 - (b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of fine.
- The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 23.

(d) Sentences in cases of conviction of several offences at one trial (*Section 25*)

- Section 25 relates to the quantum of punishment which the Court is authorised to impose where the accused is convicted of two or more offences at one trial.
- Under this section:
 - The Court may, subject to section 9 of the BNS (Limit of punishment of offence made up of several offences), sentence to the several punishments prescribed which the Court is competent to inflict.
 - Such punishments, when consisting of imprisonment, shall commence one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
- For the purpose of appeal by a convicted person:
 - The aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

Changes introduced by BNSS related to Section 25

- Section 25 of BNSS (corresponds to Section 31 of CrPC):
 - Sub-section (1) is reframed but retains the same essence.
 - In sub-section (2)(a), “fourteen years” is replaced by “twenty years.”

INHERENT POWERS OF THE COURT

1. Nature of Section 528 (Inherent Powers of the Court)

- Section 528 of the BNSS is one of the most important sections of the BNSS.

- It states that nothing in the BNSS shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary:
 - to give effect to any order under the BNSS, or
 - to prevent abuse of the process of any Court, or
 - otherwise to secure the ends of justice.

2. Character of the High Court's Powers

- The powers of the High Court under section 528 of the BNSS are partly administrative and partly judicial.
- Inherent powers under section 528 include powers to:
 - quash FIR,
 - quash investigation, or
 - quash any criminal proceedings pending before the High Court or any Courts subordinate to it.
- These powers are of wide magnitude and ramification.
- The Court can always take note of any miscarriage of justice and prevent the same by exercising its powers under section 528 of the BNSS.
- These powers are neither limited nor curtailed by any other provisions of the BNSS.
- However, such inherent powers are to be exercised sparingly and with caution.

3. Principles laid down by the Supreme Court in *Madhu Limaye v. State of Maharashtra*, 1978 AIR 47

The Supreme Court has held that the following principles would govern the exercise of inherent jurisdiction of the High Court:

1. Power is not to be resorted to if there is a specific provision in the Code for redress of grievances of the aggrieved party.
2. It should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice.
3. It should not be exercised against the express bar of law engrafted in any other provision of the Code.

4. Availability of Alternative Remedy

- It is well settled that the inherent powers can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute.
- If an effective alternative remedy is available, the High Court will not exercise its powers under this section, especially when the applicant may not have availed of that remedy.

ARREST OF PERSON

1. Meaning of Arrest

- The word “arrest,” when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one’s personal liberty to go where he pleases.
- The word “arrest” consists of taking into custody of another person under authority empowered by law for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

2. Circumstances in which Police may Arrest Without Warrant (Section 35)

Section 35 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant.

Any police officer may, without an order from a Magistrate and without a warrant, arrest any person:

(a) Offence committed in presence of police

- Who commits, in the presence of a police officer, a cognizable offence.

(b) Reasonable complaint, credible information, or reasonable suspicion of a cognizable offence (punishable with < 7 years or up to 7 years)

- Against whom:

- a reasonable complaint has been made, or
- credible information has been received, or
- a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine, if the following conditions are satisfied:

I. The police officer has reason to believe, on the basis of such complaint, information, or suspicion, that such person has committed the said offence.

II. The police officer is satisfied that such arrest is necessary:

- a) to prevent such person from committing any further offence; or
- b) for proper investigation of the offence; or
- c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
- d) to prevent such person from making any inducement, threat, or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
- e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured.

- The police officer shall record, while making such arrest, his reasons in writing.
- Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this subsection, record the reasons in writing for not making the arrest.

(c) Credible information of cognizable offence punishable with more than seven years or death

- Against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years, whether with or without fine, or with death sentence;
- and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

(d) Proclaimed offender

- Who has been proclaimed as an offender either under BNSS or by order of the State Government.

(e) Possession of suspected stolen property

- In whose possession anything is found which may reasonably be suspected to be stolen property

- and who may reasonably be suspected of having committed an offence with reference to such thing.

(f) Obstructing police or escaping custody

- Who obstructs a police officer while in the execution of his duty,
- or who has escaped,
- or attempts to escape, from lawful custody.

(g) Deserter

- Who is reasonably suspected of being a deserter from any of the Armed Forces of the Union.

(h) Offence committed outside India

- Who has been concerned in, or against whom a reasonable complaint has been made, or credible information received, or a reasonable suspicion exists, of his having been concerned in any act committed at any place out of India which, if committed in India, would have been punishable as an offence,
- and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in India.

(i) Breach of rules by released convict

- Who, being a released convict, commits a breach of any rule made under subsection (5) of section 394 of BNSS relating to notification of address of previously convicted offender.

(j) Requisition from another police officer

- For whose arrest any requisition, whether written or oral, has been received from another police officer,
- provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made,
- and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Changes introduced by BNSS

Section 35 of BNSS (Section 41 of CrPC)

- A new subsection 7 is added:
 - “No arrest shall be made without prior permission of an officer not below the rank of Deputy Superintendent of Police in case of an offence which is punishable for imprisonment of less than three years and such person is infirm or is above sixty years of age.”

Certain measures to be followed in the exercise of power under Section 35

- Section 35(3) says that the police officer shall, in all cases where the arrest of a person is not required under section 35(1), issue a notice directing the person:
 - against whom a reasonable complaint has been made, or
 - credible information has been received, or
 - a reasonable suspicion exists that he has committed a cognizable offence,
 - to appear before him or at such other place as may be specified in the notice.
- Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

- Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.
- However, where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

Procedure of Arrest

Section 36

- Every police officer while making an arrest shall –
 - (a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;
 - (b) prepare a memorandum of arrest which shall be –
 - (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;
 - (ii) countersigned by the person arrested; and
 - (c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend or any other person named by him to be informed of his arrest.

Section 38

- When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

Supreme Court Observations – Arnesh Kumar v. State of Bihar (2014) 8 SCC 273

- The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result.
- Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it.
- Power of arrest is one of the lucrative sources of police corruption.
- The attitude to arrest first and then proceed with the rest is despicable.
- It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.
- The Supreme Court has directed that accused should not be arrested in routine manner and all the pre-conditions must be satisfied.
- The judgement applies to crimes punishable with upto 7 years of imprisonment.

Arrest on refusal to give name and residence (Section 39)

- When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence:
 - refuses on demand of such officer to give his name and residence, or
 - gives a name or residence which such officer has reason to believe to be false,

- he may be arrested by such officer in order that his name or residence may be ascertained.
- When the true name and residence of such person have been ascertained, he shall be released on a bond or bail bond to appear before a Magistrate if so required.
- If such person is not resident in India, the bail bond shall be secured by a surety or sureties resident in India.
- If the true name and residence of such person is not ascertained within twenty-four hours from the time of arrest or if he fails to execute the bond or bail bond or furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Arrest by private person (Section 40)

- Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender.
- Without unnecessary delay, but within six hours from such arrest, he shall make over or cause to be made over any person so arrested to a police officer.
- In the absence of a police officer, he shall take such person or cause him to be taken in custody to the nearest police station.

Changes introduced by BNSS

- Section 40 of BNSS (Section 43 of CrPC):
 - “Without unnecessary delay” is further specified by “but within six hours from such arrest.”
 - In subsection (2), “re-arrest” is replaced by “take him in custody.”

Arrest by Magistrate (Section 41)

- When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender.
- He may thereafter, subject to provisions relating to bail, commit the offender to custody.
- Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent to issue a warrant.

Arrest how made (Section 43)

- In making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
- Where a woman is to be arrested, unless circumstances indicate the contrary, her submission to custody on an oral intimation of arrest shall be presumed.
- Unless circumstances require otherwise or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.
- If any person forcibly resists the endeavour to arrest him or attempts to evade arrest, such police officer or other person may use all means necessary to effect the arrest.
- The police officer may, keeping in view the nature and gravity of the offence, use handcuff while making the arrest of:

- a habitual or repeat offender, or
- a person who escaped from custody, or
- a person who has committed offence of organised crime, terrorist act, drug related crime, illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency notes, human trafficking, sexual offence against children, or offence against the State.
- Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life.
- Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise.
- Where exceptional circumstances exist, the woman police officer shall, by written report, obtain prior permission of the Magistrate of the first class within whose jurisdiction the offence is committed or the arrest is to be made.

Changes introduced by BNSS

- Section 43 of BNSS (Section 46 of CrPC):
 - A new subsection (3) is added regarding the handcuff of a habitual or repeat offender or accused who has committed certain offences mentioned.

Other Provisions

- Section 44 is an enabling provision providing for search of place entered by person sought to be arrested.
- Section 45 authorises a police officer to pursue the offender whom he is authorised to arrest without warrant into any place in India for the purpose of effecting his arrest.

Section 78 – Production of Arrested Person

- The police officer or other person executing a warrant of arrest shall, subject to the provisions of section 73 as to security, without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.
- Such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Article 22(2) of the Constitution of India

- Provides the provision for producing the arrested person before the Magistrate within 24 hours.

Application of Section 78

- When a person is arrested under a warrant, Section 78 becomes applicable.
- When he is arrested without a warrant, he can be kept in custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 187 order his detention.

Section 187 – Detention by Magistrate

- The Magistrate to whom an accused person is forwarded under section 187 may, irrespective of whether he has or has no jurisdiction to try the case:
 - After taking into consideration whether such person has not been released on bail or his bail has been cancelled,

- Authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit,
- For a term not exceeding fifteen days in the whole, or in parts,
- At any time during the initial forty days or sixty days out of the detention period of sixty days or ninety days, as the case may be, as provided in section 187(3).
- If he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Section 59 – Reporting of Arrests Without Warrant

- Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Section 60 – Discharge of Arrested Person

- No person who has been arrested by a police officer shall be discharged except on his bond, or bail bond, or under the special order of a Magistrate.

Section 61 – Pursuit of Escaped Persons

- If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.
- The provisions of section 44 shall apply to arrests under this section although the person making such arrest is not acting under a warrant and is not a police officer having authority to arrest.

Section 62 – Arrests to be in Accordance with Law

- No arrest shall be made except in accordance with the provisions of BNSS or any other law for the time being in force providing for arrest.

SUMMONS AND WARRANTS

General Processes to Compel Appearance

1. Summons
2. Warrants

Summons

Section 63 – Form of Summons

- Every summons issued by a Court under BNSS shall be:
 - In writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court; or
 - In an encrypted or any other form of electronic communication and shall bear the image of the seal of the Court or digital signature.

Section 64 – Service of Summons

- Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

Section 66 – Service Where Person Cannot Be Found

- Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family residing with him.
- The person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Changes introduced by BNSS

- Section 66 of BNSS (Section 64 of CrPC):
 - The word “male” is excluded to make the provision gender neutral.

Section 65 – Service of Summons on Corporate Bodies, Firms, and Societies

- Service of a summons on a company or corporation may be effected by:
 - Serving it on the Director, Manager, Secretary or other officer of the company or corporation, or
 - By letter sent by registered post addressed to the Director, Manager, Secretary or other officer of the company or corporation in India,
 - In which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.
- “Company” means a body corporate, and “corporation” means an incorporated company or other body corporate registered under the Companies Act, 2013 or a society registered under the Societies Registration Act, 1860.
- Service of a summons on a firm or other association of individuals may be effected by:
 - Serving it on any partner of such firm or association, or
 - By letter sent by registered post addressed to such partner,
 - In which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Changes introduced by BNSS

- Section 65 of BNSS (Section 63 of CrPC):
 - In subsection (1), Director and Manager is added.
 - New subsection (2) regarding service of summons on any partner of a firm or other association of individuals.

Section 67 – Procedure When Service Cannot Be Effected / Substituted Service

- If service cannot by the exercise of due diligence be effected as provided in section 64, section 65 or section 66,
 - The serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides.
- The Court, after making such inquiries as it thinks fit, may either:
 - Declare that the summons has been duly served, or

- Order fresh service in such manner as it considers proper.

Section 68 – Summons to Government Servants

- Where the person summoned is in the active service of the Government,
 - The Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed.
 - Such head shall cause the summons to be served in the manner provided by section 64 and shall return it to the Court under his signature with the required endorsement.
 - Such signature shall be evidence of due service.

Section 69 – Service Outside Local Jurisdiction

- When a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction,
 - It shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served.

Section 71 – Service of Summons on Witness

- A Court issuing a summons to a witness may, in addition to and simultaneously with the issue of such summons,
 - Direct a copy of the summons to be served by electronic communication or by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.
- When an acknowledgement purporting to be signed by the witness, or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received, or on proof of delivery of summons under section 70(3) by electronic communication to the satisfaction of the Court,
 - The Court issuing summons may deem that the summons has been duly served.

PROCLAMATION AND ATTACHMENT

Where a warrant remains unexecuted, the Code of Procedure Code, 1973 provides for two remedies:



Section 84 – Proclamation for Person Absconding

- If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so

that such warrant cannot be executed, the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time.

- The specified time shall be not less than thirty days from the date of publishing such proclamation.

Section 85 – Attachment of Property of Proclaimed Person

- The Court issuing a proclamation under section 84 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person.
- Where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued:
 - a) is about to dispose of the whole or any part of his property, or
 - b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,
 the Court may order the attachment of property simultaneously with the issue of the proclamation.
- The object of attaching property is not to punish him but to compel his appearance.

SUMMONS TO PRODUCE

- Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under the BNSS 2023.
- This can be compelled to be produced by issuing summons (Sections 94 and 95) or a warrant (Sections 96 to 101)

SEARCH WARRANT

Search Warrants may be issued in the following circumstances
(Section 96)

Where any Court has reason to believe that a person to whom a summons order under section 94 or a requisition under of section 95 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition; or

such document or thing is not known to the Court to be in the possession of any person; or

the Court considers that the purposes of any inquiry, trial or other proceeding under this BNSS will be served by a general search or inspection,

Restrictions on Issue of Warrant

- Such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority by a Magistrate other than a District Magistrate or Chief Judicial Magistrate.
- Such warrant shall also not be issued so as to affect Sections 129 and 130 of the BSA 2023 or the Bankers' Book Evidence Act, 1891.

Search of Place Suspected to Contain Stolen Property, Forged Documents, etc. (Section 97)

- According to section 97, if a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that:
 - any place is used for the deposit or sale of stolen property, or
 - for the deposit, sale or production of any objectionable article to which this section applies, or
 - that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable –
 - a) to enter, with such assistance as may be required, such place;
 - b) to search the same in the manner specified in the warrant;
 - c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies;
 - d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety;
 - e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

Objectionable articles to which Section 97 applies

- a) counterfeit coin;
- b) pieces of metal made in contravention of the Coinage Act, 2011, or brought into India in contravention of any notification for the time being in force issued under section 11 of the Customs Act, 1962;
- c) counterfeit currency note; counterfeit stamps;
- d) forged documents;
- e) false seals;
- f) obscene objects referred to in section 294 of the Bharatiya Nyaya Sanhita, 2023;
- g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f).

Search for persons wrongfully confined

- In terms of Section 100, any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class who has reasons to believe that any person is confined under such

circumstances that the confinement amounts to an offence, may issue a search warrant for the search of the person so confined.

- The person, if found, shall be immediately produced before the Magistrate for making such orders as in the circumstances of the case he thinks proper.

Recording of search and seizure through audio-video electronic means

- According to Section 105, the process of conducting search of a place or taking possession of any property, article or thing under Chapter VII or under section 185, including:
 - preparation of the list of all things seized in the course of such search and seizure, and
 - signing of such list by witnesses, shall be recorded through any audio-video electronic means, preferably mobile phone.
- The police officer shall without delay forward such recording to the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of the first class.

SUMMARY TRIALS

- Summary trial is a speedy trial by dispensing with formalities or delay in proceedings.
- By summary cases is meant a case which can be tried and disposed of at once.
- Generally, this will apply to such offences not punishable with imprisonment for a term exceeding two years.

Section 283(1) of the BNSS

- Section 283(1) sets out the provisions for summary trials.
- It states that, notwithstanding anything contained in BNSS –
 - (a) any Chief Judicial Magistrate;
 - (b) Magistrate of the first class, shall try in a summary way all or any of the following offences:
 - i. theft, under sub-section (2) of section 303, section 305 or section 306 of the Bharatiya Nyaya Sanhita, 2023, where the value of the property stolen does not exceed twenty thousand rupees;
 - ii. receiving or retaining stolen property, under sub-section (2) of section 317 of the Bharatiya Nyaya Sanhita, 2023, where the value of the property does not exceed twenty thousand rupees;
 - iii. assisting in the concealment or disposal of stolen property under sub-section (5) of section 317 of the Bharatiya Nyaya Sanhita, 2023, where the value of such property does not exceed twenty thousand rupees.
 - iv. offences under sub-sections (2) and (3) of section 331 of the Bharatiya Nyaya Sanhita, 2023;
 - v. insult with intent to provoke a breach of the peace, under section 352, and criminal intimidation, under sub-sections (2) and (3) of section 351 of the Bharatiya Nyaya Sanhita, 2023;
 - vi. abetment of any of the foregoing offences;
 - vii. an attempt to commit any of the foregoing offences, when such attempt is an offence;
 - viii. any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871.

Power of Magistrate to Try Other Offences Summarily

- The Magistrate may, after giving the accused a reasonable opportunity of being heard, and for reasons to be recorded in writing, try in a summary way all or any of the offences not punishable with death or imprisonment for life or imprisonment for a term exceeding three years.
- However, no appeal shall lie against the decision of a Magistrate to try a case in a summary way under section 283(2).

Conversion of Summary Trial into Regular Trial

- When, in the course of a summary trial, it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall:
 - recall any witnesses who may have been examined, and
 - proceed to re-hear the case in the manner provided by BNSS.

Section 285 — Procedure in Summary Trials

- In trials under Chapter XXII, the procedure specified in BNSS for the trial of summons-case shall be followed except as hereinafter mentioned.
- No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXII.

Section 287 — Recording of Evidence and Judgment in Summary Trials

- In every case tried summarily in which the accused does not plead guilty, the Magistrate shall:
 - record the substance of the evidence, and
 - record a judgment containing a brief statement of the reasons for the finding.

COMPOUNDING OF OFFENCES (SECTION 359 BNSS)

- Section 359 enumerates the provisions related to compounding of offences.
- Compounding means settlement of offence committed by a person.
- Such settlement must be with the consent of the court of law.
- There may be times when parties to a suit do not want to continue further proceedings in court and they want to settle it out of court amicably; in such cases, compounding comes into picture.
- In such case, future proceedings do not take place in the court.

Compoundable offence and who can compound

Few examples: The offences punishable under the sections of the Bharatiya Nyaya Sanhita, 2023 specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table

Offence	Section of the Bharatiya Nyaya Sanhita, 2023 applicable	Person by whom offence may be compounded
Voluntarily causing hurt.	115(2)	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	126(2), 127(2)	The person restrained or confined.

Offence	Section of the Bharatiya Nyaya Sanhita, 2023 applicable	Person by whom offence may be compounded
Assault or use of criminal force.	131, 133, 136	The person assaulted or to whom criminal force is used.
Theft.	303(2)	The owner of the property stolen.

Few examples: The offences punishable under the sections of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023) specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:

Offence	Section of the Bharatiya Nyaya Sanhita applicable	Person by whom offence may be compounded
Voluntarily causing grievous hurt.	117(2)	The person to whom hurt is caused.
Assault or criminal force in attempting wrongfully to confine a person.	135	The person assaulted or to whom the force was used.
Theft, by clerk or servant of property in possession of master.	306	The owner of the property stolen.
Criminal breach of trust.	316(2)	The owner of the property in respect of which breach of trust has been committed.

BAIL (Section 478 BNSS)

- According to section 478, when any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail.
- However, such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail bond from such person, discharge him on his executing a bond for his appearance as hereinafter provided.
- Where a person is unable to give bail bond within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the above purpose.
- Nothing in section 478 shall be deemed to affect the provisions of section 135(3) or section 492.
- Notwithstanding anything in section 478(1), where a person has failed to comply with the conditions of the bond or bail bond as regards the time and place of attendance, the Court may refuse to release him on bail when, on a subsequent occasion in the same case, he appears before the Court or is brought in custody, and any such refusal shall be without

prejudice to the powers of the Court to call upon any person bound by such bond or bail bond to pay the penalty thereof under section 491.

Direction for Grant of Bail to Person Apprehending Arrest (Anticipatory Bail — Section 482 BNSS)

- According to section 482, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
- When the High Court or the Court of Session makes a direction under section 482(1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including –
 - i. a condition that the person shall make himself available for interrogation by a police officer as and when required;
 - ii. a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
 - iii. a condition that the person shall not leave India without the previous permission of the Court;
 - iv. such other condition as may be imposed under sub-section (3) of section 480, as if the bail were granted under that section.
- If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail.
- If a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under section 482(1).
- Nothing in section 482 shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and section 70(2) of the Bharatiya Nyaya Sanhita, 2023.

Section 493 — Fresh Security When Surety Dies or Becomes Insolvent

- When any surety to a bail bond under BNSS becomes insolvent or dies, or when any bond is forfeited under section 491, the Court by whose order such bond was taken, or a Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order.
- If such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

General Concept

- In general, there is no limitation in filing complaints under BNSS, but delay may hurdle investigation.

- The Limitation Act, 1963 provides period of limitation for appeals and revision applications.
- Chapter XXXVIII has been introduced in BNSS prescribing limitation period for taking cognizance of certain offences (Sections 513 to 519).

Section 514 — Period of Limitation

- Except as otherwise provided in BNSS, no Court shall take cognizance of an offence of the category specified below after expiry of the period of limitation.
- The period of limitation shall be –
 - (a) six months, if the offence is punishable with fine only;
 - (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
 - (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
- For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe or most severe punishment.
- For computing the period of limitation, the relevant date shall be the date of filing complaint under section 223 or the date of recording information under section 173.

Section 515 — Commencement of the Period of Limitation

- The period of limitation, in relation to an offender, shall commence –
 - (a) on the date of the offence; or
 - (b) where the commission of the offence was not known to the person aggrieved or to any police officer, the first day on which such offence comes to the knowledge of such person or police officer, whichever is earlier; or
 - (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender becomes known to the person aggrieved or to the police officer investigating the offence, whichever is earlier.
- In computing the said period, the day from which such period is to be computed shall be excluded.

Section 516 — Exclusion of Time in Certain Cases

The following periods shall be excluded:

- (a) the period during which another prosecution relating to the same facts was diligently prosecuted in good faith;
- (b) the period of continuance of a stay order or injunction granted against the institution of prosecution (from grant to withdrawal);
- (c) where notice of prosecution has been given, the period of such notice;
- (d) where previous sanction or consent is necessary, the time required for obtaining such sanction or consent, including date of application and date of receipt of the order;
- (e) the period during which the offender is absent from India or is in territory outside India under Central Government administration;
- (f) the period during which the offender is absconding or concealing himself.

- If limitation expires on a day when the Court is closed, cognizance may be taken on the day the Court re-opens (Section 517).

Continuing Offences (Section 518)

- Continuing offence means an offence which is committed for a very long period.
- It is not clearly defined in the Bharatiya Nyaya Sanhita or Bharatiya Nagarik Suraksha Sanhita; whether an offence is continuing depends on its nature.
- An offence which continues again and again falls in the category of continuing offence.
- In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues.

Case Laws

1. *Udai Shankar Awasthi v. State of U.P.* (2013)

- The Supreme Court observed that the expression “continuing offence” is not defined in the Cr.P.C.
- It stated that the term does not have a fixed or precise connotation.
- Therefore, no universal formula can be laid down for determining what constitutes a continuing offence.

2. *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath* (1991)

- The Supreme Court held that whether an offence is a “continuing offence” depends on:
 - the language of the statute creating the offence,
 - the nature of the offence, and
 - the purpose for which the act has been made an offence.
- Thus, each statute must be examined individually.

3. *Balakrishna Savalram Pujari Waghmare & Ors. v. Shree Dnyaneshwar Maharaj Sansthan & Ors.*, AIR 1959 SC 798

- The Court explained that a continuing offence is an act that creates a continuing source of injury.
- The doer remains responsible as long as the injury continues.
- If the wrongful act causes a complete injury at one point in time, it is not a continuing wrong—even if the damage continues.
- A continuing wrong exists only if the wrongful act itself continues to cause ongoing injury.

4. *State of Bihar v. Deokaran Nenshi & Anr.*, AIR 1973 SC 908

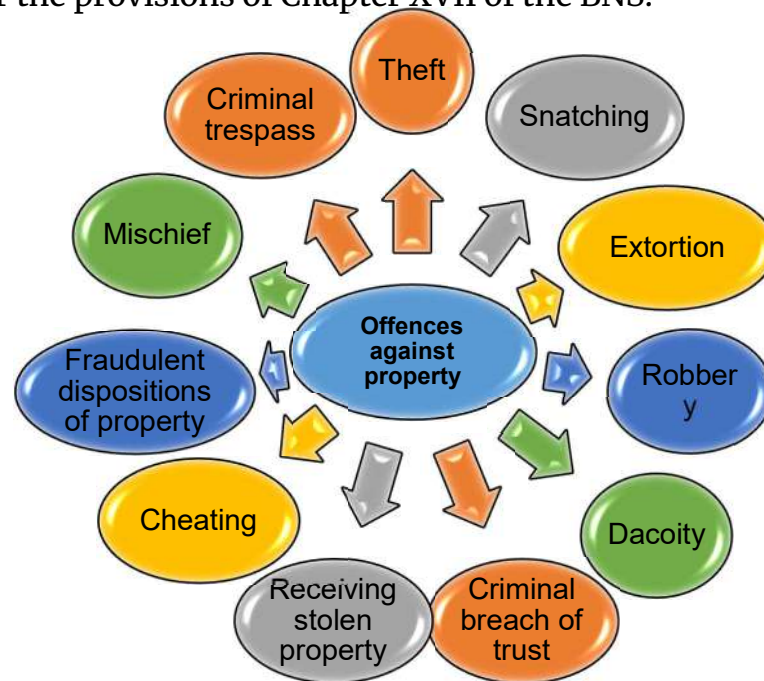
- The Court held that a continuing offence is one that is capable of continuance.
- It differs from an offence committed once and for all.
- It usually arises from failure to obey or comply with a rule or requirement.
- Liability continues until compliance is achieved.
- Each day or occasion of non-compliance constitutes a fresh offence.
- The key distinction is:
 - One-time offence: completed by a single act or omission.
 - Continuing offence: persists over time and repeats until compliance.

Extension of Period of Limitation (Section 519)

- The Court may take cognizance of an offence even after the expiry of the prescribed period of limitation.
- This can be done if the Court is satisfied that:
 - a. the delay is properly explained, or
 - b. it is necessary to do so in the interests of justice.

OFFENCES AGAINST PROPERTY

- Chapter XVII (Sections 303 to 334) of the Bharatiya Nyaya Sanhita (BNS) provides the provisions and law relating to offences against property.
- Property is classified into two kinds, namely:
 - movable property, and
 - immovable property.
- Any offence committed in relation to either movable or immovable property is punishable under the provisions of Chapter XVII of the BNS.



Theft (Section 303)

Definition

- Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Essential elements of theft

1. There should be an intention to dishonestly take the property.
2. The property should be movable property.
3. The property should be taken out of the possession of a person without that person's consent.

4. The property should be moved in order to take that property.

Explanations

Explanation 1

- A thing, so long as it is attached to the earth and not being movable property, is not the subject of theft.
- It becomes capable of being the subject of theft as soon as it is severed from the earth.
- *Example:* Wood of the tree.

Explanation 2

- A moving effected by the same act which affects the severance may be a theft.
- *Example:* Opening the tap for the purpose of taking the expensive liquid kept thereunder.

Explanation 3

- A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it.

Explanation 4

- A person who by any means causes an animal to move is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5

- The consent mentioned in this section may be express or implied, and may be given either by the person in possession or by any person having for that purpose authority either express or implied.

Situations which constitute theft

1. Cutting down a tree:
 - A cuts down a tree on Z's ground with the intention of dishonestly taking the tree out of Z's possession without Z's consent.
 - As soon as A has severed the tree in order to such taking, he has committed theft.
2. Inducing a dog to follow:
 - A puts a bait for dogs in his pocket and thus induces Z's dog to follow it.
 - If A's intention is dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog begins to follow A.

Situations which do not constitute theft

1. Warehouse keeper selling a plate:
 - Z entrusts his plate to A, a warehouse keeper, while going on a journey.
 - A carries the plate to a goldsmith and sells it.
 - The plate was not in Z's possession; therefore it could not be taken out of Z's possession.
 - A has not committed theft, though he may have committed criminal breach of trust.
2. Finding a ring on the highroad:
 - A finds a ring lying on the highroad, not in the possession of any person.
 - A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

Punishment for theft (Section 303(2))

- Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
- In the case of a second or subsequent conviction, the offender shall be punished with rigorous imprisonment for a term not less than one year but which may extend to five years, and with fine.

Special punishment provision

- In cases where the value of the stolen property is less than five thousand rupees, and the person is convicted for the first time, then:
 - Upon return of the value of the property or restoration of the stolen property,
 - The person shall be punished with community service.

Additional note

- There are different punishments for theft depending upon the situation.

Description	Punishment
Theft in a dwelling house, or means of transportation or place of worship, etc.	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Theft by clerk or servant of property in possession of master	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Theft after preparation made for causing death, hurt or restraint in order to committing of theft	shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Snatching (Section 304)

- A new sub-offence from Theft has been defined in the BNS, namely “Snatching.”
- Theft is considered snatching if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any movable property.
- Whoever commits snatching shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Extortion (Section 308)

- Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person:
 - any property, or
 - valuable security, or
 - anything signed or sealed which may be converted into a valuable security, commits extortion.

Essential elements of extortion

1. There should be an intention to put any person in fear of any injury.

2. By that fear of injury, the person so put in fear is dishonestly induced to deliver any property, or valuable security, or anything signed or sealed which may be converted into a valuable security.

Situations which constitute extortion

1. Threat regarding wrongful confinement of child:
 - A threatens Z that he will keep Z's child in wrongful confinement unless Z signs and delivers to A a promissory note binding Z to pay certain monies to A.
 - Z signs and delivers the note.
 - A has committed extortion.
2. Threat to plough up field:
 - A threatens to send club-men to plough up Z's field unless Z signs and delivers to B a bond binding Z under a penalty to deliver certain produce to B.
 - A thereby induces Z to sign and deliver the bond.
 - A has committed extortion.

Punishment of Extortion

Description	Punishment
Whoever commits extortion	shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.
Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury	shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence	shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Case Law

Jadunandan Singh v. Emperor (AIR 1941 Pat 129)

- Accused assaulted two persons and forcibly took their thumb impressions on blank papers.
- Court held that forcibly taking a thumb impression does not amount to extortion, as there is no inducement to deliver the papers.
- It is not theft, since the papers were not taken from the victims' possession.
- The act amounts to criminal force or assault, not extortion.

Distinction between Extortion and Theft

- i. Extortion is done by wrongfully getting the consent of the owner, while there is no presence of consent in the case of theft.
- ii. Both movable and immovable property may be the subject of extortion, whereas theft is limited to movable property only because of its nature.

Robbery (Section 309)

- As per Section 309 of BNS, in all robbery there is either theft or extortion.

When Theft Becomes Robbery

- Theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person:
 - death, or
 - hurt, or
 - wrongful restraint, or
 - fear of instant death, or
 - fear of instant hurt, or
 - fear of instant wrongful restraint.

Example:

- If during committing of theft, the offender voluntarily causes or attempts to cause death, hurt, wrongful restraint, or fear of these, he commits robbery.

When Extortion Becomes Robbery

- Extortion is robbery if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of:
 - instant death, or
 - instant hurt, or
 - instant wrongful restraint, and by so putting in fear induces the person so put in fear then and there to deliver up the thing extorted.

Example:

- If during committing of extortion, the offender is present before the victim and puts that person in fear of instant death, instant hurt, or instant wrongful restraint, he commits robbery.
- The offender is said to be present if he is sufficiently near to put the person in fear of instant death, instant hurt, or instant wrongful restraint.

Situations which Constitute Robbery

A holds Z down and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here A has committed theft and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Situation which Does Not Constitute Robbery

A obtains property from Z by saying: "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees."

- This is extortion and punishable as such.
- It is not robbery unless Z is put in fear of the instant death of his child.

Punishment for Robbery

- According to section 309(4), whoever commits robbery shall be punished with rigorous imprisonment up to ten years and shall also be liable to fine; and if the robbery is committed on the highway between sunset and sunrise, the imprisonment may extend to fourteen years.
- According to section 309, whoever attempts to commit robbery shall be punished with rigorous imprisonment up to seven years and shall also be liable to fine.
- According to section 309(6), if any person, in committing or attempting to commit robbery, voluntarily causes hurt, such person and any other person jointly concerned shall be punished with imprisonment for life or rigorous imprisonment up to ten years, and shall also be liable to fine.

Dacoity (Section 310)

- When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding is said to commit dacoity.

Essential Elements of Dacoity

1. There should be at least five persons by active participation or aiding.
2. They must commit robbery or its attempt.
3. Every person whether committing or aiding is said to commit dacoity.

Case Law

In *Emperor v. Lashkar* (1921 2 Lah. 275), a gang of five dacoits, one of them armed with a gun, raided the house of X. After looting, they ran away with the booty and shot a villager. It was held that the murder committed while carrying away the stolen property was murder in the commission of dacoity, making every offender liable for the murder.

1. Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
2. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which shall not be less than ten years, and shall also be liable to fine.

3. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
4. Whoever is one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.
5. Whoever belongs to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
6. However, there are different punishment for dacoity and/or depending upon situation, which may be understood with the help of below.

Description	Punishment
Robbery, or dacoity, with attempt to cause death or grievous hurt	shall be punished shall not be less than seven years.
Attempt to commit robbery or dacoity when armed with deadly weapon	shall be punished shall not be less than seven years
Punishment for belonging to gang of robbers, etc.	shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Criminal misappropriation of property (Section 314 and Section 315)

Dishonest misappropriation of property

- The definition of criminal misappropriation has not been provided by the provisions.
- The section directly states that whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which shall not be less than six months but which may extend to two years and with fine.

Illustrations

- a. A takes property belonging to Z out of Z's possession, in good faith believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.
- b. A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.
- c. A and B, being joint owners of a horse. A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1:

A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2:

- A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.
- What are reasonable means or what is a reasonable time in such a case, is a question of fact.
- It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustration

A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

A finds a letter on the road, containing a bank-note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

Essential ingredients of Dishonest Misappropriation of Property:

- Dishonestly is an essential ingredient of the offence and BNS provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that 'dishonestly'.
- Misappropriation means the intentional, illegal use of the property or funds of another person for one's own use or other unauthorized purpose.
- There are two things necessary before an offence under section 314 can be established:
 - (i) that the property must be misappropriated or converted to the use of the accused, and
 - (ii) that he must misappropriate or convert it dishonestly.

Case Laws

- Bhagiram Dome v. Abar Dome (1888) 15 Cal 388, 400:

Criminal misappropriation occurs even when possession was initially obtained innocently, but later—due to a change of intention or discovery of new facts—the retaining of the property becomes wrongful and fraudulent.

- Mohammad Ali v. State (2006 CrLJ 1368 MP):

Fifteen bundles of electric wire were seized, but no one—including the electricity department—claimed they were stolen. Evidence showed the wire was bought from a scrap seller. Absence of

a purchase receipt did not prove guilt. The framing of charges was quashed and the accused was not held guilty under Section 403 IPC.

- U. Dhar v. State of Jharkhand (2003) 2 SCC 219:

A dispute between a contractor and sub-contractor over unpaid dues was held to be a civil matter. Money paid by the principal to the contractor did not belong to the sub-contractor, so no misappropriation occurred. The criminal complaint was quashed.

Dishonest Misappropriation of Property Possessed by Deceased Person at the Time of His Death (Section 315)

- Whoever dishonestly misappropriates or converts to his own use any property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.
- If the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration:

- Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.
- The offence under this section consists in the pillaging of property during the interval which elapses between the time when the possessor of the property dies and the time when it comes into the possession of some person or officer authorized to take charge of it.

Criminal Breach of Trust

- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.
- Explanation 1:
 - A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or not, who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him.
 - If he makes default in the payment of such contribution to the said Fund in violation of the said law, he shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.
- Explanation 2:

- A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation under the Employees' State Insurance Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted.
- If he makes default in the payment of such contribution to the said Fund in violation of the said Act, he shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Illustrations:

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

- The gist of the offence of criminal breach of trust as defined under section 316 of the Bharatiya Nyaya Sanhita, 2023 is 'dishonest misappropriation' or 'conversion to own use' another person's property.

Essential Ingredients of Criminal Breach of Trust:

- (i) The accused must be entrusted with the property or with dominion over it.
- (ii) The person so entrusted must use that property.
- (iii) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation of:
 - any direction of law prescribing the mode in which such trust is to be discharged, or
 - any legal contract made touching the discharge of such trust.

Case Laws

1. V.R. Dalal v. Yugendra Naranji Thakkar, 2008 (15) SCC 625

- The Supreme Court held that *entrustment* is the first essential ingredient of criminal breach of trust.
- If entrustment is missing, criminal breach of trust is not made out.
- Breach of trust may be a civil wrong, but when *mens rea* is present, it becomes a criminal liability.
- The term "*direction of law*" under Section 405 includes not just statutes but also directions, instruments, and circulars issued by competent authorities.

2. Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628

- The appellant alleged that her *stridhan* was entrusted to her in-laws, who dishonestly misappropriated it.
- She presented a clear and specific case of entrustment and misappropriation.
- The Court held the accused liable and ruled that her complaint should not be quashed.

3. Onkar Nath Mishra v. State (NCT of Delhi), 2008 CrLJ 1391 (SC)

- The Supreme Court stated that criminal breach of trust involves two parts:
 - (i) creation of an obligation regarding property under the accused's control;
 - (ii) dishonest misappropriation or dealing with that property in violation of that obligation.
- 4. *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.*, 2008 (13) SCC 678
 - The Court held that a *cheque* is “property.”
 - If it is misappropriated or used for a purpose other than the one for which it was handed over, a case under Section 406 IPC may arise.
- 5. *S.K. Alagh v. State of U.P.*, 2008 (5) SCC 662
 - Demand drafts were issued in favour of a company for supply of goods, but neither goods were supplied nor money returned.
 - The Managing Director cannot be held liable under Section 406 IPC.
 - Without a statutory provision, a director or employer cannot be vicariously liable for offences committed by the company.

Analysis of the Cases

1. From the analysis of all the cases, it may be concluded that for an offence to fall under this section, all the four requirements are essential to be fulfilled.
2. The person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them or to put him in the position of a trustee.
3. The accused must be in such a position where he could exercise his control over the property, i.e., dominion over the property.
4. The term ‘property’ includes both movable as well as immovable property within its ambit.
5. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Punishments for Criminal Breach of Trust

1. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.
2. Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
3. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
4. Whoever, being entrusted with property or dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished

with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Case Laws

1. Bagga Singh v. State of Punjab

The appellant, a taxation clerk, collected arrears of tax but failed to deposit the money for about five months. He claimed to have handed the amount to the cashier, but the cashier denied receiving it and was acquitted. The court held that mere acquittal of the cashier did not prove that the appellant had discharged his duty. The appellant was held liable under Section 409 IPC.

2. Bachchu Singh v. State of Haryana, AIR 1999 SC 2285

The appellant, a Gram Sachiv, collected ₹648 as house tax from thirty villagers, issued receipts, but did not remit the amount. Being a public servant and having dishonestly misappropriated the money, his conviction under Section 409 IPC was upheld.

3. Girish Saini v. State of Rajasthan

A public servant in charge of a store failed to deposit or make entries of stationery meant for official use. Entrustment was proven, and he could not rely on the claim of a misplaced register, as he failed to show evidence of maintaining two registers. He was held guilty of criminal breach of trust.

Receiving Stolen Property (Section 317)

Meaning of Stolen Property

- Property whose possession has been transferred by theft, extortion, robbery, or cheating is designated as *stolen property*.
- Property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed is also designated as stolen property.
- It is immaterial whether the transfer, misappropriation, or breach of trust occurred within or outside India.
- If such property subsequently comes into the possession of a person legally entitled to the possession of it, the property ceases to be stolen property.

Punishment for Receiving Stolen Property

- Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe it to be stolen property, shall be punished with:
 - Imprisonment of either description up to three years, or
 - Fine, or
 - Both.

Receiving Property Stolen in Dacoity

- Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe that the possession of such property was transferred by commission of dacoity, OR

- Whoever dishonestly receives property from a person known or believed to belong to a gang of dacoits, knowing or having reason to believe the property to be stolen, shall be punished with:
 - Imprisonment for life, or
 - Rigorous imprisonment up to ten years, and
 - Liable to fine.

Habitual Dealing in Stolen Property

- Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property shall be punished with:
 - Imprisonment for life, or
 - Imprisonment of either description up to ten years, and
 - Liable to fine.

Assisting in Concealing Stolen Property

- Whoever voluntarily assists in concealing, disposing of, or making away with property which he knows or has reason to believe to be stolen property shall be punished with:
 - Imprisonment of either description up to three years, or
 - Fine, or
 - Both

Cheating (Sections 318 and 319)

General Concept

- Sections 318 to 319 deal with the offence of cheating.
- In property-related offences, the accused generally gets possession of the thing.
- In cheating, the accused obtains both possession and the property in it.

Definition under Section 318

- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived:
 - to deliver any property to any person, or
 - to consent that any person shall retain any property,
 OR
- intentionally induces that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission:
 - causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to cheat.

Explanation

- Dishonest concealment of facts is a *deception* within the meaning of this section.

Illustrations

1. False claim of being in Civil Service

- A falsely pretends to be in the Civil Service, deceives Z, and dishonestly induces Z to give him goods on credit which he does not intend to pay for.

→ *A cheats.*

2. Counterfeit mark on an article

- A puts a counterfeit mark on an article, deceives Z into believing it was made by a famous manufacturer, and dishonestly induces Z to buy it.

→ *A cheats.*

3. False sample

- A shows Z a false sample of an article, deceives Z into believing the article matches the sample, and dishonestly induces Z to buy it.

→ *A cheats.*

4. Dishonoured bill

- A gives a bill for payment drawn on a house where he keeps no money, expecting dishonour, and dishonestly induces Z to deliver an article intending not to pay.

→ *A cheats.*

Main Ingredients of Cheating

1. Deception of any person.
2. Inducement caused by deception, which may be:
 - Fraudulently or dishonestly inducing the person:
 - (i) to deliver any property to any person; or
 - (ii) to consent that any person shall retain any property;
 - OR
 - Intentionally inducing the person to do or omit to do something:
 - which he would not do or omit without such deception, and
 - which causes or is likely to cause damage or harm to him in body, mind, reputation, or property.

Case Laws (Cheating)

Iridium India Telecom Ltd. v. Motorola Incorporated and Ors., (2005) 2 SCC 145

- The Supreme Court held that deception is a necessary ingredient under both parts of the section.
- The complainant must prove that inducement was caused by deception exercised by the accused.
- It was further held that non-disclosure of relevant information amounts to *misrepresentation of facts* which leads to deception.

M.N. Ojha and others v. Alok Kumar Srivastav and another, (2009) 9 SCC 682

- The Supreme Court held that where the intention of the accused is to wrongfully retain excise duty which the State is empowered by law to recover from a person who removed non-duty-paid tobacco from one bonded warehouse to another, → the accused are held guilty of cheating.

T.R. Arya v. State of Punjab, 1987 CrLJ 222

- It was held that negligence in duty without dishonest intention cannot amount to cheating.
- A bank employee who, through negligence while comparing signatures, passes a cheque causing loss to the bank, → cannot be held guilty of cheating as dishonest intention is absent.

Punishments for Cheating

1. Whoever cheats

- shall be punished with imprisonment of either description
 - for a term which may extend to three years,
 - or with fine,
 - or with both.
2. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss
 - to a person whose interest in the transaction to which the cheating relates
 - he was bound by law or by a legal contract to protect,
 - shall be punished with imprisonment of either description
 - for a term which may extend to five years,
 - or with fine,
 - or with both.
 3. Whoever cheats and thereby dishonestly induces the person deceived
 - to deliver any property to any person,
 - or to make, alter or destroy the whole or any part of a valuable security,
 - or anything signed or sealed and capable of being converted into a valuable security,
 - shall be punished with imprisonment of either description
 - for a term which may extend to seven years,
 - and shall also be liable to fine.

Case Laws

1. Kuriachan Chacko v. State of Kerala, (2004) 12 SCC 269

In a money-circulation scheme which was a mathematical impossibility, the promoters knew it was unworkable and made false representations to induce people to part with money. The Supreme Court held that it could be assumed and presumed that the accused had committed the offence of cheating under Section 420 IPC.

2. Mohd. Ibrahim v. State of Bihar, (2009) 3 SCC (Cri) 929

The accused executed false sale deeds, but he had a bona fide belief that the property belonged to him and the purchaser also believed the same. It was held that the accused was not guilty of cheating as the essential ingredients of cheating were not present.

3. Shruti Enterprises v. State of Bihar, 2006 CrLJ 1961

It was held that mere breach of contract does not give rise to criminal prosecution under Section 420 unless fraudulent or dishonest intention is shown at the beginning of the transaction. If dishonest intention at the time of agreement is proved, criminal liability arises; but if the representation was merely not fulfilled later, the remedy is civil for damages.

Cheating by Personation (Section 319)

- A person is said to cheat by personation if he cheats by pretending to be some other person.
- It is also cheating by personation if he knowingly substitutes one person for another.
- It is further cheating by personation if he represents that he or any other person is a person other than he or such other person really is.

- The offence is committed whether the individual personated is a real person or an imaginary person.
- Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Illustrations:

- (1) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
 (2) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY (SECTIONS 320 TO 323)

Dishonest or Fraudulent Removal or Concealment of Property to Prevent Distribution Among Creditors (Section 320)

- Whoever dishonestly or fraudulently removes, conceals or delivers to any person any property, shall be liable under this section.
- Whoever transfers or causes to be transferred to any person, without adequate consideration, any property, shall be liable under this section.
- The act must be done intending thereby to prevent the distribution of that property according to law among his creditors or the creditors of any other person.
- Liability also arises if the person knows it to be likely that he will thereby prevent such distribution.
- Punishment: imprisonment of either description for a term which shall not be less than six months but which may extend to two years, or with fine, or with both.

Example:

- A is the debtor and B is the creditor. A has to pay INR 1 crore to B. A has certain movable and immovable property. A does not want to pay back INR 1 crore to B. A transfers the properties to X just to prevent the distribution of his properties to B. A is liable under section 320.

Case Law

- In Ramautar Chaukhany v. Hari Ram Todi & Anr., 1982 CrLJ 2266, the Guwahati High Court held that an offence under this section requires the following essential ingredients:
 1. The accused must have removed, concealed or delivered the property, or transferred it or caused it to be transferred to someone.
 2. Such transfer must be without adequate consideration.
 3. The accused must have intended to prevent, or known that he was likely to prevent, the distribution of that property according to law among his creditors or the creditors of another person.
 4. The accused must have acted dishonestly and fraudulently.
- The Court held that this section specifically refers to frauds connected with insolvency.
- The offence consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors.
- The section applies to movable as well as immovable properties.

- The property of a debtor cannot be distributed according to law except after the provisions of the relevant enactments have been complied with.

Dishonestly or Fraudulently Preventing Debt Being Available for Creditors (Section 321)

- Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Example:

- A is the debtor and B is the creditor.
- A has to pay Rs. 1 crore to B, but A does not have any money.
- X is a person who has to pay Rs. 1 crore to A. If X pays the amount to A, then A can pay back the money to B.
- But A does not want to make the payment to B and informs X not to pay any amount to A.
- This is clearly a fraudulent intention and A is liable under section 321.
- This section, like the preceding section 320, is intended to prevent the defrauding of creditors by masking property.
- The expression 'debt' has not been defined in the BNS or in the General Clauses Act, but there are judicial pronouncements on the same.

Case Laws

- Commissioner of Wealth Tax v. G.D. Naidu, AIR 1966 Mad 74
 - Court laid down the essential requisites of a *debt*:
- 1. It must be ascertained or ascertainable.
- 2. It must be an absolute liability, either present or future.
- 3. There must be an obligation already accrued and subsisting.
 - All debts are liabilities, but all liabilities are not debts.
- Mangoo Singh v. Election Tribunal, AIR 1957 SC 871
 - The Supreme Court held that the word 'demand' usually means more than what is due; it refers to something demanded, called for, or asked for.
 - However, depending on the context, 'demand' may also include arrears or dues.

Dishonest or Fraudulent Execution of Deed of Transfer Containing False Statement of Consideration (Section 322)

- Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
- Example:
While making an agreement of lease, the actual amount should be entered as INR 5 crore

but parties made the lease agreement for only INR 4 crore just to avoid stamp duty and other taxes. The parties are liable under section 322.

- This section deals with fraudulent and fictitious conveyances and transfers.
- The essential ingredient of an offence under section 423 is that the sale deed or a deed subjecting a property to a charge must contain a false statement relating to the consideration or relating to the person for whose use or benefit it is intended to operate.
- Though dishonest execution of a benami deed is covered under this section, the section stands superseded by The Prohibition of Benami Properties Transactions Act, 1988 because the latter covers a wider field, encompassing the field covered by this section.

Dishonest or Fraudulent Removal or Concealment of Property (Section 323)

- Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

OFFENCES RELATING TO DOCUMENTS AND PROPERTY MARKS

Forgery

According to section 336, whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Punishment for Forgery

Description	Punishment
Whoever commits forgery	shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating	shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Whoever commits forgery, intending that the document or electronic record forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose	shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Further, the provisions relating to forgery in different circumstances has inter alia also been provided under 337 to 341 of BNS.

Case Laws

- Ramchandran v. State, AIR 2010 SC 1922

The Supreme Court held that for an offence of forgery to exist, the document must be made with dishonest or fraudulent intention. A person acts fraudulently only when the act is done with intent to defraud.

- **Parminder Kaur v. State of UP**

The Supreme Court held that mere alteration of a document does not amount to forgery. The alteration must be made for some gain or with a specific objective to constitute a forged document.

- **Balbir Kaur v. State of Punjab, 2011 CrLJ 1546 (P&H)**

The accused submitted a certificate for employment as an ETT teacher, alleged to be forged because the school was not recognized during the stated period. The court held that the certificate did not claim the school was recognized; it only mentioned teaching experience. Therefore, prosecution was unjustified and the direction to prosecute was quashed.

Offences Relating To Property Mark (Section 345)

- A property mark means a mark used for denoting that movable property belongs to a particular person.
- Whoever marks any movable property or goods, or any case, package or receptacle containing movable property or goods, or uses any such receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.
- Whoever uses any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

DEFAMATION

Definition

- Whoever, by words spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said to defame that person, except in the cases hereinafter excepted.

Explanations

- Explanation 1: It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or near relatives.
- Explanation 2: It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.
- Explanation 3: An imputation in the form of an alternative or expressed ironically may amount to defamation.

- Explanation 4: No imputation is said to harm a person's reputation unless it lowers, in the estimation of others, the moral or intellectual character of that person, or lowers the character in respect of caste or calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome or disgraceful state.

Illustrations

- (a) A says – “Z is an honest man; he never stole B's watch”; intending it to be believed that Z did steal B's watch. This is defamation unless it falls within an exception.
- (b) A, asked who stole B's watch, points to Z intending it to be believed that Z stole B's watch. This is defamation unless excepted.
- (c) A draws a picture of Z running away with B's watch intending it to be believed that Z stole it. This is defamation unless excepted.

EXCEPTIONS

Exception 1

- It is not defamation to impute anything true concerning a person if it is for the public good that the imputation be made or published. Whether it is for public good is a question of fact.

Exception 2

- It is not defamation to express in good faith any opinion regarding the conduct of a public servant in discharge of public functions, or respecting his character as far as it appears in such conduct.

Exception 3

- It is not defamation to express in good faith any opinion respecting the conduct of any person touching any public question, and respecting his character so far as it appears in that conduct.
- Illustration: A expressing in good faith an opinion on Z's conduct in petitioning Government on a public question, signing a requisition for a meeting, presiding or attending such meeting, forming or joining a public society, or canvassing for a candidate.

Exception 4

- It is not defamation to publish a substantially true report of Court proceedings or their result.
- Explanation: A Magistrate or officer holding an inquiry in open Court preliminary to a trial is a Court for this section.

Exception 5

- It is not defamation to express in good faith any opinion respecting the merits of a decided case, civil or criminal, or the conduct of a person as party, witness, or agent therein, or the character appearing from such conduct.

Illustrations:

- (a) A says Z's evidence is contradictory and he must be stupid or dishonest; this is within exception if said in good faith as it relates only to his conduct as a witness.
- (b) A says Z has no veracity because A knows him to be a man without veracity; not within exception.

Exception 6

- It is not defamation to express in good faith any opinion on the merits of a performance submitted by its author to public judgment, or the character appearing in such performance.
- Explanation & Illustrations:
 - Publishing a book, making a public speech, or acting/singing publicly submits the performance to public judgment.
 - A comments that Z's book is foolish or indecent and therefore Z must be weak or impure-minded—within exception if in good faith and limited to what appears in the book.
 - But saying Z is a libertine because the book is foolish is not within exception.

Exception 7

- It is not defamation for a person having lawful authority over another to pass in good faith censure on conduct related to that authority.
- Illustration: A judge censuring a witness; head of department censuring subordinates; parent or schoolmaster censuring a child; master censuring servant; banker censuring cashier—within exception if in good faith.

Exception 8

- It is not defamation to prefer in good faith an accusation against a person to someone having lawful authority over that person.
- Illustration: Complaining to a Magistrate, employer, or parent in good faith.

Exception 9

- It is not defamation to make an imputation in good faith for protection of interests of oneself, another, or for public good.

Illustrations:

- a. A shopkeeper advising B not to sell to Z without ready money due to lack of honesty—within exception if in good faith.
- b. A Magistrate making a report casting an imputation on Z's character—within exception if in good faith.

Exception 10

- It is not defamation to convey a caution in good faith to one person against another for that person's or public good.

Punishment For Defamation (Section 356)

- Section 356(2): Whoever defames another shall be punished with simple imprisonment up to two years, or with fine, or with both, or with community service.
- Section 356(3): Whoever prints or engraves defamatory matter knowing or having reason to believe it is defamatory shall be punished with simple imprisonment up to two years, or with fine, or with both.
- Section 356(4): Whoever sells or offers for sale any printed or engraved substance containing defamatory matter knowing it to be such shall be punished with simple imprisonment up to two years, or with fine, or with both.

Kinds Of Defamation

- Libel: Defamatory statement in permanent and visible form (writing, printing, pictures).

- Slander: Defamatory statement in spoken words or transitory forms (gestures, significant sounds).
- The term “publish” is wide; publication means communicating the defamatory matter to any person other than the person defamed.

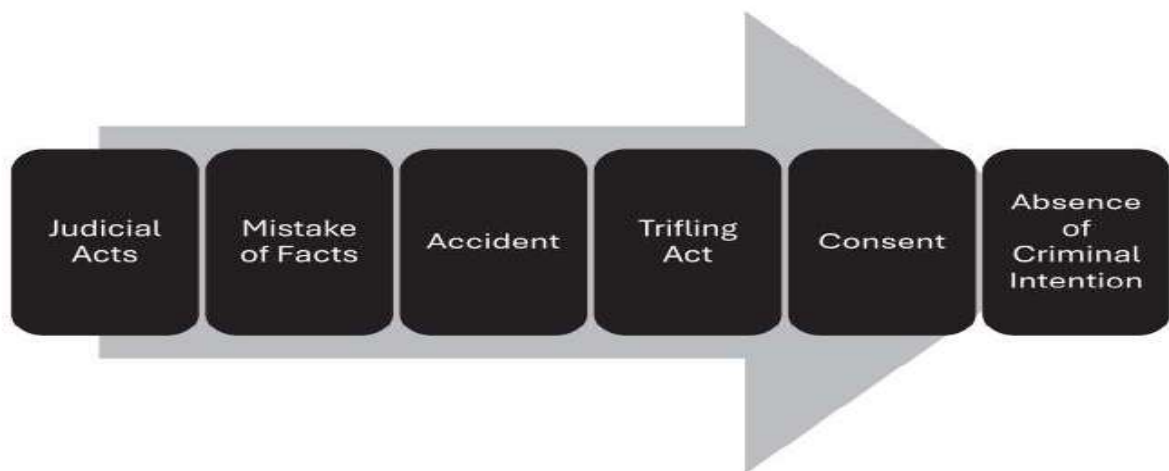
Case Law

Sankaran v. Ramkrishna Pillai, AIR 1960 Ker 141

- The defamatory matter was printed in Malayalam.
- The accused did not know the Malayalam language.
- Since he could not understand the content, mens rea (guilty intention) was absent.
- Therefore, he was not held guilty of defamation.

GENERAL EXCEPTIONS

- The Bharatiya Nyaya Sanhita, 2023 (BNS) provides for general exceptions for a person accused of committing any offence under the BNS to plead in his defense.
- General defences or exceptions are contained in sections 14 to 44 of the BNS (Chapter III).
- In general exceptions to criminal liability, there will be absence of mens rea (guilty mind) on the part of the wrong-doer.
- If there is any general defense of the accused in a criminal case, the burden of proving lies on him under section 108 of the Bhartiya Sakshya Adhiniyam 2023.
- The exceptions strictly speaking come within the following six categories.



1. Act done by a person bound, or by mistake of fact believing himself bound, by law (Section 14)

- Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by a mistake of law, in good faith believes himself to be, bound by law to do it.
- The mistake or ignorance must be of fact, and not of law.
- Mistake of fact is based on the maxim *ignorantia facti excusat; ignorantia juris non excusat*.

2. Act of Judge when acting judicially (Section 15)

- Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

3. Act done pursuant to judgment or order of Court (Section 16)

- Nothing done in pursuance of, or warranted by, the judgment or order of a Court, while such judgment or order remains in force, is an offence.
- This applies even if the Court lacked jurisdiction, provided the person believed in good faith that the Court had such jurisdiction.
- “Court of Justice” is replaced with “Court” in the BNS.
- Section 15 protects judges; Section 16 extends protection to ministerial staff executing court orders.

4. Act done by a person justified, or by mistake of fact believing himself justified, by law (Section 17)

- Nothing is an offence which is done by any person who is justified by law, or who by reason of mistake of fact in good faith believes himself to be justified by law, in doing it.

5. Accident in doing a lawful act (Section 18)

- Nothing is an offence which is done by accident or misfortune, without criminal intention or knowledge, while doing a lawful act in a lawful manner by lawful means and with proper care and caution.

6. Act likely to cause harm, but done without criminal intent, and to prevent other harm (Section 19)

- Nothing is an offence merely because it is likely to cause harm, if it is done without criminal intent and in good faith to prevent or avoid other harm to person or property.
- Whether such harm justified the act is a question of fact.

7. Act of a child under seven years (Section 20)

- Nothing is an offence which is done by a child under seven years of age.

8. Act of a child above seven and under twelve of immature understanding (Section 21)

- Nothing is an offence which is done by a child between seven and twelve years who has not attained sufficient maturity to judge the nature and consequences of his conduct.

9. Act of a person of unsound mind (Section 22)

- Nothing is an offence which is done by a person who, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law.

10. Act of person incapable of judgment due to intoxication caused against his will (Section 23)

- Nothing is an offence which is done by a person incapable of knowing the nature of the act due to intoxication, provided the intoxication was administered without his knowledge or against his will.

11. Offence requiring particular intent or knowledge by one intoxicated (Section 24)

- When an act requires particular intent or knowledge, a person acting in a state of intoxication is liable as if he had the same knowledge as if he were not intoxicated, unless the intoxicant was administered without his knowledge or against his will.

12. Act not intended or known to cause death or grievous hurt, done by consent (Section 25)

- Nothing not intended or known to cause death or grievous hurt is an offence if the person above 18 consents, expressly or impliedly, to suffer such harm or risk such harm.
- Based on *volenti non fit injuria*.
- Illustration: A and Z fencing for amusement.

13. Act not intended to cause death, done with consent in good faith for person's benefit (Section 26)

- Nothing not intended to cause death is an offence if done in good faith for a person's benefit with his consent, express or implied.

14. Act in good faith for benefit of child or unsound person, by or with consent of guardian (Section 27)

- Nothing done in good faith for benefit of a person under 12 or a person of unsound mind, with guardian's consent, is an offence.
- Does not extend to:
 - (a) intentional causing of death or attempting to cause death
 - (b) acts known likely to cause death except to prevent death/grievous hurt or cure disease
 - (c) voluntary causing of grievous hurt except for prevention or cure
 - (d) abetment of offences not covered.

15. Consent under fear or misconception (Section 28)

- Consent is invalid if:
 - (a) given under fear of injury or misconception of fact known to the doer
 - (b) given by one unable to understand due to unsoundness or intoxication
 - (c) given by a person under twelve years, unless context shows otherwise.

16. Exclusion of acts that are offences independently of harm (Section 29)

- Exceptions under Sections 25–27 do not apply to acts that are offences regardless of harm.
- Illustration: Causing miscarriage (except in good faith to save life).

17. Act done in good faith for benefit of person without consent (Section 30)

- Nothing is an offence for harm caused to a person for whose benefit the act is done in good faith without consent, if consent cannot be obtained in time or person is incapable and has no guardian.
- Does not extend to:
 - (a) intentional causing or attempt to cause death

- (b) acts known likely to cause death, except for preventing death/grievous hurt or curing disease
- (c) voluntary causing of hurt except for preventing death or hurt
- (d) abetment of offences not covered.

18. Communication made in good faith (Section 31)

- No communication made in good faith is an offence by reason of harm to the person to whom it is made, if for that person's benefit.

19. Act compelled by threats (Section 32)

- Except murder and offences against the State punishable with death, nothing is an offence when done under threats causing reasonable apprehension of instant death.
- Not applicable if person voluntarily placed himself in such situation.
- Explanation 1: Joining dacoits voluntarily does not grant protection.
- Explanation 2: A smith forced by dacoits under threat of instant death is protected.

20. Act causing slight harm

- Nothing is an offence if the harm caused is so slight that no person of ordinary sense and temper would complain.

RIGHT OF PRIVATE DEFENCE (Sections 34–44)

1. Things done in private defence (Section 34)

- Nothing is an offence which is done in the exercise of the right of private defence.

2. Right of private defence of body and property (Section 35)

- Every person has right to defend:
 - (a) his own body or the body of any other person
 - (b) property of himself or any other person against theft, robbery, mischief, criminal trespass, or attempts thereof.

3. Right of private defence against acts of unsound person, etc. (Section 36)

- Right of private defence exists even when the assailant is a child, intoxicated, of unsound mind, or acting under misconception.

4. Acts against which no right of private defence (Section 37)

- No right of defence against:
 - (a) acts by public servants acting in good faith, not causing reasonable apprehension of death or grievous hurt
 - (b) acts done by direction of public servants acting in good faith
 - (c) cases where there is time to seek protection of authorities.
- Private defence cannot inflict more harm than necessary.

5. When right of private defence of body extends to causing death (Section 38)

- Right extends to causing death in cases of:
 - (a) assault reasonably causing apprehension of death
 - (b) apprehension of grievous hurt

- (c) intention to commit rape
- (d) intention to gratify unnatural lust
- (e) intention to kidnap or abduct
- (f) wrongful confinement preventing recourse to authorities
- (g) act of throwing or administering acid causing apprehension of grievous hurt.

6. When right extends to causing harm other than death (Section 39)

- If offence is not listed under Section 38, right extends only to causing harm other than death.

7. Commencement/continuance of right of private defence of body (Section 40)

- Begins with reasonable apprehension of danger.
- Continues as long as the apprehension continues.

8. Right of private defence of property extending to causing death (Section 41)

- Applies in cases of
 - (a) robbery
 - (b) house-breaking after sunset and before sunrise
 - (c) mischief by fire or explosive on dwelling or property storage
 - (d) theft, mischief or trespass causing reasonable apprehension of death or grievous hurt.

9. When right of property extends to causing harm other than death (Section 42)

- Applies if the offence is theft, mischief, or criminal trespass not covered under Section 41.

10. Commencement/continuance of right of property (Section 43)

- Commences with apprehension of danger.
- Continues:
 - (a) for theft: until offender retreats or authorities assist or property is recovered
 - (b) for robbery: as long as offender causes/attempts death, hurt, restraint
 - (c) for criminal trespass or mischief: as long as offender continues
 - (d) for house-breaking after sunset: as long as house-trespass continues.

11. Private defence against deadly assault when risk to innocent exists (Section 44)

- Right extends even if risk to an innocent person cannot be avoided when defending against an assault causing reasonable apprehension of death.

LESSON-8

Law Relating to Evidence

Law are not invented. They grow out of circumstances.

– Azarias

REGULATORY FRAMEWORK

- The Bharatiya Sakshya Adhiniyam 2023

INTRODUCTION

- The Law of Evidence may be defined as a system of rules for ascertaining controversial questions of fact in judicial inquiries.
- This system of ascertaining the facts, which are the essential elements of a right or liability, is the primary and most difficult function of the Court.
- The process is regulated by a set of rules and principles known as the Law of Evidence.
- The Bharatiya Sakshya Adhiniyam 2023 is an Act to consolidate and provide for general rules and principles of evidence for a fair trial.

JUDICIAL PROCEEDINGS

- The Bharatiya Sakshya Adhiniyam, 2023 does not define the term “judicial proceedings”, but it is inclusively defined under Section 2(1)(m) of the Bharatiya Nagarik Suraksha Sanhita, 2023 as:
 - “any proceeding in the course of which evidence is or may be legally taken on oath.”
- The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.
- Evidence under Section 2 of the Bharatiya Sakshya Adhiniyam, 2023 may be:
 1. Oral or personal: All statements which the Court permits or requires to be made before it by witnesses.
 2. Documentary: Documents produced for the inspection of the court, adduced to prove a certain fact (principal fact) in issue.
- There must be an open and visible connection between the principal fact and the evidential facts.
- Evidential facts are those which form part of the same transaction, though not in issue, place, or at different times and places.

Effect of Evidence in Civil and Criminal Proceedings

- In general, the rules of evidence are the same in civil and criminal proceedings, but there is a strong and marked difference as to the effect of evidence.
- In civil proceedings:
 - A mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of a decision.
- In criminal proceedings (especially for felony or treason):
 - A much higher degree of assurance is required.
 - The persuasion of guilt must amount to a moral certainty beyond all reasonable doubt.
- Summary:
 - Civil cases → “mere preponderance of probability” sufficient.
 - Criminal cases → “beyond all reasonable doubt” required for decision.

SCHEME OF THE ADHINIYAM

The Act is divided into four parts

Part I: PRELIMINARY Chapter I - Preliminary	Part II: RELEVANCY OF FACTS Chapter II: Relevancy of Facts	Part III: ON PROOF Chapter III: FACTS WHICH NEED NOT BE PROVED Chapter IV: OF ORAL EVIDENCE Chapter V: OF DOCUMENTARY EVIDENCE Chapter VI: OF THE EXCLUSION OF ORAL EVIDENCE BY DOCUMENTARY EVIDENCE	Part IV: PRODUCTION AND EFFECT OF EVIDENCE Chapter VII: OF THE BURDEN OF PROOF Chapter VIII: ESTOPPEL Chapter IX: OF WITNESSES Chapter X: OF EXAMINATION OF WITNESSES Chapter XI: OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE Chapter XII: Repeal and Savings

Relevancy of Facts

- Sections 3 to 50 of the Bharatiya Sakshya Adhiniyam (BSA) deal with relevancy of facts.
- A fact is also known as Factum Probandi, i.e., a fact that proves.
- According to Section 2(1)(f), “fact” means and includes:
 1. Any thing, state of things, or relation of things capable of being perceived by the senses.
 2. Any mental condition of which any person is conscious.
- Classification of Facts:
 - Physical facts
 - Psychological facts

Illustrations of Facts

1. That there are certain objects arranged in a certain order in a certain place, is a fact. (*Physical fact*)
2. That a person heard or saw something, is a fact. (*Physical fact*)
3. That a person said certain words, is a fact. (*Physical fact*)
4. That a person holds a certain opinion, has a certain intention, acts in good faith or fraudulently, uses a particular word in a particular sense, or is conscious of a particular sensation, is a fact. (*Psychological fact*)
- **Changes in BSA:**
 - Word “man” is replaced by “person” in illustrations.
 - Illustration (e): “That a man has a certain reputation, is a fact” is no longer part of BSA.

Evidence of Facts

- Evidence may be given of facts in issue and relevant facts.
- According to Section 3 of BSA:
 - Evidence may be given in any suit or proceeding of the existence or non-existence of:
 1. Every fact in issue
 2. Other relevant facts as declared by law
 - Evidence cannot be given of any other facts.
- Explanation to Section 3:
 - Section 3 does not enable any person to give evidence of a fact which he is disentitled to prove by any law relating to civil procedure.

Illustrations under Section 3

1. Criminal Case Example:
 - A is tried for the murder of B by beating with a club with intention to cause death.
 - Facts in issue:
 - A’s beating B with the club
 - A’s causing B’s death by such beating
 - A’s intention to cause B’s death
2. Civil Case Example:
 - A suitor does not bring a bond relied upon at the first hearing.
 - Section 3 does not enable him to produce the bond or prove its contents later except in accordance with the Code of Civil Procedure, 1908.

FEW IMPORTANT TERMS

Topic	Pointwise Details
Relevant Fact	Section 2(1)(k) of BSA: A fact is said to be relevant to another when it is connected with the other in any of the ways referred to in provisions of this Adhiniyam relating to relevancy of facts.
Provisions on Connected Facts	Sections 4 to 14 provide the provisions relating to closely connected facts.
Logical Relevancy vs Legal Relevancy	• A fact is logically relevant to another when it bears a causal relation with the other to render probable the existence or non-existence of the latter. • All logically relevant facts are not necessarily legally relevant. • Relevancy under BSA is a question of law, not pure logic. • Every legally relevant fact is logically relevant, but not all logically relevant facts are legally relevant. • Judges may exclude facts if logically relevant facts appear too remote or immaterial.
Legal Relevancy vs Admissibility	• Relevancy and admissibility are not co-extensive or interchangeable. • A fact may be legally relevant but cannot be admitted due to public policy or other reasons. • Some facts receivable under Chapter 10 may not be relevant under Chapter 2 (which defines relevancy). • Thus, a fact can be relevant but not admissible.
Facts in Issue	• Section 2(1)(g) of BSA: "Facts in issue" means any fact from which, either by itself or with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any suit or proceeding necessarily follows. • Explanation: Whenever a Court records an issue of fact under civil procedure law, the fact asserted or denied in answer to such issue is a fact in issue.
Illustration of Facts in Issue	A is accused of the murder of B. Facts in issue may include: 1. A caused B's death. 2. A intended to cause B's death. 3. A received grave and sudden provocation from B. 4. A, at the time, was unsound of mind and incapable of knowing the nature of the act.
Factum Probandum and Factum Probans	• Fact in issue: principal fact to be proved (factum probandum). • Relevant fact: evidentiary fact from which the principal fact follows (factum probans). • Facts constituting rights or liabilities are called facts in issue. • Determining facts in issue depends on substantive law defining rights and liabilities.
Facts in Issue vs Issues of Fact (Civil Procedure)	• Under Civil Procedure Code, Courts frame issues on all disputed facts necessary for the case; these are called issues of fact. • Subject matter of an issue of fact is always a fact in issue.

- Contextual difference: 'Issue of fact' (Civil Procedure Code), 'Fact in issue' (Evidence Act).
- Distinction between facts in issue and relevant facts is fundamental.

CLASSIFICATION OF RELEVANT FACTS

Principles of Sections relating to relevancy of facts are mere rules of logic

Classification of relevant facts	
Details	Sections
Closely connected facts	Sections 4 to 14
Admissions	Sections 15 to 25
Statements by persons who cannot be called as witnesses	Sections 26 to 27
Statements made under special circumstances	Sections 28 to 32
How much of a statement is to be proved	Section 33
Judgments of Courts when relevant	Sections 34 to 38
Opinions of third persons, when relevant	Sections 39 to 45
Character when relevant	Sections 46 to 50

FUNDAMENTAL RULES

Fundamental Rules of Evidences

1. No facts other than those having rational probative value should be admitted in evidence

2. All facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

Presumption under Section 2(1)(h) of BSA

- Whenever it is provided by this Adhiniyam that the Court may presume a fact, it may either:
 1. Regard such fact as proved, unless and until it is disproved; or
 2. Call for proof of it.
- Examples:
 - Section 88: Presumption as to certified copies of foreign judicial records

- Section 89: Presumption as to books, maps, and charts
- Section 90: Presumption as to electronic messages
- Section 92: Presumption as to documents thirty years old

Presumption under Section 2(1)(l) of BSA

- Whenever it is directed by this Adhiniyam that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
- Examples:
 - Section 78: Presumption as to genuineness of certified copies
 - Section 79: Presumption as to documents produced as record of evidence
 - Section 80: Presumption as to Gazettes, newspapers, and other documents
 - Presumption as to maps or plans made by authority of Government

Definition of Presumption:

- Presumption is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills).
- Presumption is either of a fact or law.
- These presumptions which are inference are always rebuttable.
- Presumption of law is either conclusive or rebuttable.

Conclusive Proof:

- The Adhiniyam provides that when one fact is declared to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved.
- The Court shall not allow evidence to be given for the purpose of disproving it.

CLOSELY CONNECTED FACTS

Section	Provision / Description	Illustrations / Examples
Section 4 – Facts forming part of same transaction	Facts which, though not in issue, are connected with a fact in issue or relevant fact as to form part of the same transaction, are relevant, whether they occurred at same or different times/places.	(a) A accused of murdering B by beating him. Words or acts by A, B, or bystanders shortly before or after the beating are relevant. (b) A accused of waging war against Govt. of India; occurrences like property destruction, troop attacks, jail breaking are relevant, even if A not present. (c) A sues B for libel in a letter. Other letters on the subject forming part of the

correspondence are relevant.

(d) Delivery of goods to intermediate persons is relevant in a delivery dispute.

Section 5 – Facts which are occasion, cause or effect of facts in issue/relevant facts Facts which are the occasion, cause, effect, or state of things under which facts in issue occurred, or afforded opportunity for them, are relevant. A robbed B. Facts showing B went to a fair with money shortly before the robbery are relevant.

Section 6 – Motive, preparation, and previous/subsequent conduct Facts showing motive or preparation for a fact in issue or relevant fact are relevant. Conduct of parties or agents influencing or influenced by facts in issue/relevant facts is relevant, whether previous or subsequent. Statements accompanying acts may also be relevant. a. B denies making bond to A. Fact that B needed money at that time is relevant. b. A owes B money. A asked C for loan; D said to C in A's presence "don't trust A, he owes B"; A's reaction is relevant. — Motive = reason for action; preparation = relevant for showing act was done.

Section 7 – Facts necessary to explain or introduce fact in issue/relevant facts Facts needed to explain or introduce a fact in issue/relevant fact, support/rebut inferences, establish identity, fix time/place, or show relations of parties, are relevant. a. To prove a will, A's property/family state at that time is relevant. b. C leaves A's service because B offered better terms; statement is relevant as explanatory of C's conduct.

Section 8 – Things said/done by conspirator in reference to common design Facts by any conspirator regarding common intention, after intention first entertained, are relevant against all conspirators for proving conspiracy or participation. A joins conspiracy to wage war. B procures arms, C collects money, D recruits, E publishes writings, F transmits money, H writes letter – all relevant to prove conspiracy and A's complicity.

Section 9 – When facts not otherwise relevant become relevant Facts become relevant if: 1) inconsistent with a fact in issue/relevant fact; 2) they make existence/non-existence of fact in issue/relevant fact highly probable or improbable. A allegedly committed crime in Chennai. Fact that A was in Ladakh at that time is relevant.

Section 10 – Facts enabling Court to determine amount in suits for damages	Any fact which helps Court determine the amount of damages is relevant.	—
Section 11 – Facts relevant when right or custom is in question	Facts relevant: (a) transactions creating, claiming, modifying, recognizing, asserting, denying, or inconsistent with right/custom; (b) instances claiming, recognizing, exercising, disputing, or departing from right/custom.	—
Section 12 – Facts showing state of mind, or body/bodily feeling	Facts showing intention, knowledge, good faith, negligence, ill-will, bodily state/feeling are relevant when in issue/relevant. Previous conviction of accused is also relevant.	A misrepresents C as solvent; neighbours' belief in C's solvency shows good faith.
Section 13 – Facts bearing on question whether act was accidental or intentional	Facts showing act as part of series of similar occurrences are relevant to show non-accidental nature.	A delivers counterfeit currency to B. Fact that A delivered similar currency to C, D, E soon before/after shows delivery to B was not accidental.
Section 14 – Existence of course of business when relevant	Existence of business practice, according to which act would naturally occur, is relevant.	(a) Dispatch of letter: Ordinary practice of posting letters and letter placed in post is relevant. (b) Receipt of letter: Letter posted in due course and not returned via Return Letter Office is relevant.

ADMISSIONS AND CONFESSIONS

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are:

(I) Admissions and Confessions (Sections 15–25)

Admissions

1. Definition (Section 15):

- An admission is a statement (oral, documentary, or electronic) suggesting any inference as to a fact in issue or relevant fact.
- Whether a statement is an admission depends on:

- Who made it (Sections 16–18).
 - The circumstances under which it was made.
 - Admissions can be verbal, written, or contained in documents such as maps, bills, receipts, letters, books, etc.
 - Ordinary dictionary meaning of “statement” applies: “something that is stated.”
2. Who can make admissions:
 - A party, an agent, or predecessor-in-interest of a party.
 - A person having joint proprietary or pecuniary interest in the subject matter (Section 16).
 - By reference (Section 18).
 3. Effect of admissions:
 - Best evidence against the party making it unless untrue or made under non-binding circumstances.
 - Government admission is relevant but non-conclusive unless acted upon to the detriment of the party.
 4. Characteristics of admissible admissions:
 - Must be clear, precise, not vague or ambiguous.
 5. Case law:
 - *Basant Singh v. Janky Singh* (1967) 1 SCR 1:
 - Section 15 applies equally to admissions in pleadings and other statements.
 - Statements in a plaint are admissible but not conclusive; Court may accept some and reject others.
 6. Additional notes:
 - Admissions must be self-harming to be relevant.
 - Admissions by conduct are covered under Section 6, not Sections 15–18.
 - Oral admissions regarding electronic records are not relevant unless genuineness of the record is in question (Section 20).

Confessions

1. Definition:
 - Confessions are a special form of admissions.
 - All confessions are admissions, but not all admissions are confessions.
2. Admissibility (Sections 22–24):
 - A confession is relevant as an admission unless:
 - Made to a person in authority by inducement, threat, coercion, or promise;
 - Made to a Police Officer in custody without a Magistrate present.
3. Changes in BSA:
 - Section 22: “Coercion” added; Sections 28–29 of IEA included as provisos.
 - Section 23(2): Minor textual changes.

- Section 24: New Explanation II added – absconding accused considered in joint trial.
- 4. Effect of confession:
 - Confession is evidence against its maker and co-accused in a joint trial (Section 24).
 - Confession in front of magistrate admissible against maker and co-accused.
- 5. Case law:
 - *Pakala Narayanaswami v. Emperor* (1929 PC 47):
 - Self-exculpatory statements cannot amount to confession.
 - Confession must admit the offence or substantially all facts constituting the offence.
- 6. Incriminating facts vs confession:
 - Admission of an incriminating fact alone is not a confession (e.g., ownership of murder weapon).
- 7. Conditions under Section 22(1) for irrelevance due to inducement, threat, coercion, or promise:
 - (i) Statement is a confession.
 - (ii) Made by accused.
 - (iii) Made to person in authority.
 - (iv) Caused by inducement, threat, coercion, or promise from person in authority.
 - (v) Must refer to the charge against accused.
 - (vi) Must be sufficient to give accused reasonable grounds to gain advantage or avoid evil of temporal nature.
- 8. Court's approach:
 - Not necessary to prove inducement, threat, coercion, or promise;
 - Sufficient if doubt arises regarding voluntariness.
 - Burden on accused to create doubt.
 - Voluntary, truthful confession is strong proof of guilt.

Confessions vs. Admissions

- 1. General comparison:
 - A confession is received in evidence for the same reason as an admission and must be considered as a whole.
 - Admissions: Can occur in civil or criminal proceedings.
 - Confessions: Only occur in criminal proceedings.
 - Voluntariness:
 - Admission need not be voluntary to be relevant, though it may affect weight.
 - Confession must be voluntary to be relevant.
 - Who can make:
 - Admissions can be made by agent or even a stranger.

- Confession must be made by the accused himself.
- Confession of a co-accused is generally not relevant but may be considered under Section 24 in special circumstances.
- 2. Classification of confessions:
 - Judicial confession:
 - Made before a Court or recorded by a Magistrate under Section 183 of BNSS 2023.
 - Prescribed procedure includes warning the accused that:
 - He need not make the confession.
 - If made, it will be used against him.
 - Extra-judicial confession:
 - Made to police or any person other than judges or magistrates.
 - If voluntary, it can be relied upon along with other evidence.
 - Must be proved like any other fact.
 - Weight depends on the truthfulness of the witness.

Case law

Ram Khilari v. State of Rajasthan AIR 1999 SC 1002:

- Extra-judicial confession made before a reliable witness, even a close relative, can justify conviction.

Vinayak Shivajirao Pol v. State of Maharashtra, 1998 (1) Scale 159:

- Extra-judicial confession by a responsible, unbiased witness can be sufficient without corroboration.
- Minor discrepancies or technical errors are not fatal if confession is unambiguous and trustworthy.

Illustrations of admissions:

1. A collects rents for B. C admits owing rent to B; relevant against A if he denies it.
2. A tells B to ask C about a horse; C's statement is an admission.
3. Dispute over genuineness of a deed: A or B may prove statements by the other, not by themselves.
4. Ship captain A keeps a business log showing ship was on course; admissible as third-party record if he were dead.
5. Letter by A dated and post-marked at Chennai; date admissible as third-party record.
6. A accused of receiving stolen goods proves he refused to sell below value; explanatory conduct admissible.
7. A possessed suspected counterfeit currency and had it examined; statement of examination admissible.
8. A and B jointly tried for C's murder; A's confession implicating both may be considered against B.

9. A on trial for C's murder; B's statement implicating both cannot be considered if B is not jointly tried.

II. Statements by persons who cannot be called as witnesses

Statements (written or verbal) of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without unreasonable delay or expense, are relevant in the following cases:

1. Statements relating to cause of death:

- Statement by a person as to the cause of his death, or any circumstances of the transaction resulting in his death, in cases where the cause of death comes into question.
- Relevant whether or not the person was under expectation of death at the time, and irrespective of the nature of proceedings.

2. Statement relating to course of business:

- Statements made in the ordinary course of business.
- Includes entries or memoranda in books kept in ordinary course of business or professional duty.
- Includes acknowledgement of receipt of money, goods, securities, or property.
- Includes documents used in commerce written or signed by him.
- Includes date of letters or other documents usually dated, written, or signed by him.

3. Statement against interest:

- When statement is against pecuniary or proprietary interest of the person making it.
- When statement, if true, would expose him to criminal prosecution or suit for damages.

4. Statement relating to opinion as to existence of public right, custom, or matter of public/general interest:

- Statement gives opinion of person as to existence of public right, custom, or matter of public/general interest.
- Person must have been likely to be aware of its existence.
- Statement must be made before any controversy regarding such right, custom, or matter had arisen.

5. Statement relating to existence of any relationship:

- Statement relates to existence of relationship by blood, marriage, or adoption.
- Person making the statement must have special means of knowledge.
- Statement must be made before question in dispute was raised.

6. Statement relating to existence of relationship with deceased:

- Statement relates to existence of relationship by blood, marriage, or adoption between deceased persons.
- Statement may be made in wills, deeds, family pedigrees, tombstones, family portraits, or similar usual records.

- Statement must be made before the question in dispute was raised.

7. Statement in any deed, will, or other document relating to right or custom:

- Statement contained in deed, will, or document relating to transactions specified in clause (a) of section 11.
- Includes transactions by which the right or custom was created, claimed, modified, recognised, asserted, denied, or inconsistent with its existence.

8. Statement relating to expression of feelings or impressions:

- Statement made by a number of persons expressing feelings or impressions relevant to the matter in question.

Illustrations

- (a) Whether A was murdered by B; or died from injuries in a transaction in which she was raped; or whether actionable wrong was committed: Statements by A as to cause of death, murder, rape, or actionable wrong are relevant.
- (b) Date of A's birth: Entry in diary of deceased surgeon kept in ordinary course of business stating he delivered A's mother on a given day is relevant.
- (c) Whether A was in Nagpur on a given day: Statement in diary of deceased solicitor, stating he attended A in Nagpur for business, is relevant.
- (d) Whether a ship sailed from Mumbai harbour on a given day: Letter by deceased member of merchant firm stating ship sailed is relevant.
- (e) Whether rent was paid to A for certain land: Letter from deceased agent to A stating rent received and held on A's account is relevant.
- (f) Whether A and B were legally married: Statement of deceased clergyman that he married them under circumstances making celebration a crime is relevant.
- (g) Whether A, who cannot be found, wrote a letter on a certain day: Letter written by him dated that day is relevant.
- (h) Cause of wreck of ship: Protest made by captain whose attendance cannot be procured is relevant.
- (i) Whether a given road is a public way: Statement by deceased headman that road was public is relevant.
- (j) Price of grain on a certain day in a particular market: Statement of deceased business person in ordinary course of business is relevant.
- (k) Whether A, who is dead, was father of B: Statement by A that B was his son is relevant.
- (l) Date of birth of A: Letter from deceased father to friend announcing A's birth is relevant.
- (m) Whether and when A and B were married: Entry in memorandum book by C, deceased father of B, of his daughter's marriage with A is relevant.
- (n) Libel expressed in painted caricature: Remarks of crowd of spectators on similarity and libellous character may be proved.

III. Statements made under special circumstances

Statements become relevant due to being made under special circumstances as follows:

1. Entries in books of account:

- Entries in books of account, including those in electronic form, regularly kept in the course of business are relevant whenever they refer to a matter under Court inquiry.
 - Such statements alone shall not be sufficient evidence to charge any person with liability.
2. Entries in public or official books/records:
- Entry in any public or official book, register, record, or electronic record stating a fact in issue or relevant fact.
 - Made by a public servant in discharge of official duty, or by any other person performing a duty specially enjoined by law.
 - Such entry is itself a relevant fact.
3. Statements in maps, charts, or plans:
- Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale.
 - Statements in maps or plans made under authority of Central or State Government as to matters usually represented or stated in such maps, charts, or plans are relevant.
4. Statements in recitals of Acts or Government notifications:
- When Court forms opinion as to existence of any fact of public nature, statement in recital contained in Central or State Act.
 - Statement in Central or State Government notification in Official Gazette, or in printed or electronic/digital form purporting to be such Gazette, is relevant.
5. Statements as to law of any country:
- When Court forms opinion as to law of any country, statement of such law contained in a book purporting to be printed or published under authority of that Government is relevant.
 - Any report of a ruling of Courts of such country contained in a book, including electronic or digital form, purporting to report such rulings, is relevant.
6. Extent of evidence to be given (Section 33):
- When a statement forms part of a longer statement, conversation, isolated document, document in a book, electronic record, or series of letters/papers:
 - Evidence shall be given only of so much and no more as Court considers necessary.
 - This is to understand the nature and effect of the statement and the circumstances under which it was made.

OPINION OF THIRD PERSONS

Generally, opinion of third persons is irrelevant. However, it is relevant in the following cases:

1. Opinions of experts (Section 39):

- When Court has to form an opinion on:

- A point of foreign law, science, art, or any other field.
- Identity of handwriting or finger impressions.
- Opinions of persons specially skilled in such fields are relevant; such persons are called experts.
- Illustration: Question whether a document was written by A. Opinions of experts on whether two documents were written by the same person are relevant.
- Opinion of Examiner of Electronic Evidence under section 79A of IT Act, 2000, is relevant when opinion relates to electronic/digital information.

2. Facts bearing upon opinions of experts (Section 40):

- Acts, not otherwise relevant, are relevant if they support or contradict opinions of experts.
- Illustration: Whether obstruction to a harbour is caused by a sea-wall. Facts about other harbours without sea-walls also being obstructed are relevant.

3. Opinion as to handwriting and signature, when relevant (Section 41):

- When Court has to form opinion on person who wrote or signed a document, opinion of any person acquainted with that handwriting is relevant.
- A person is acquainted with handwriting if:
 - He has seen the person write, or
 - Received documents from that person in response to his own documents, or
 - Documents purporting to be by that person are habitually submitted to him in ordinary business.

4. Opinion as to existence of general custom or right, when relevant (Section 42):

- When Court forms opinion on existence of general custom or right, opinions of persons likely to know of its existence are relevant.
- “General custom or right” includes customs/rights common to a considerable class of persons.

5. Opinion as to usages, tenets, etc., when relevant (Section 43):

- When Court forms opinion on:
 - Usages and tenets of any body of men or family.
 - Constitution and governance of any religious or charitable foundation.
 - Meaning of words/terms used in particular districts or by particular classes of people.
- Opinions of persons having special means of knowledge thereon are relevant.

6. Opinion on relationship, when relevant (Section 44):

- When Court forms opinion on relationship of one person to another, opinion expressed by conduct of a person with special means of knowledge is relevant.
- Exception: Such opinion alone is not sufficient to prove marriage in proceedings under Divorce Act, 1869, or prosecutions under sections 82 and 84 of BNSS 2023.

7. Grounds of opinion, when relevant (Section 45):

- Whenever opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN (PRIVILEGED COMMUNICATIONS)

Some facts, though relevant, cannot be given in evidence. These are called privileged communications under Sections 127 to 134 of BSA.

Types of Privileged Communications:

1. Evidence of a Judge or Magistrate (Section 127)
2. Communications during marriage (Section 128)
3. Evidence as to Affairs of State (Section 129)
4. Official communications (Section 130)
5. Source of information of a Magistrate, Police officer or Revenue officer as to commission of an offence or crime (Section 131)
6. Professional communication between client and advocate (Sections 132(1) & (2) and 134)

Key Points:

- Section 132(1) & (2) changes:
 - Words “barrister, attorney, pleader or vakil” → “advocate”
 - Word “employment” → “service”
- A witness, though compellable, is privileged in respect of certain matters; he is not bound to answer questions within these limits.
- Privileges are based on public policy.

1. Evidence of Judges and Magistrates (Section 127)

- No Judge or Magistrate shall be compelled, except by special order of a subordinate Court, to answer questions about:
 - His own conduct in Court
 - Anything that came to his knowledge in Court as Judge or Magistrate
- May be examined on other matters occurring in his presence while acting as Judge or Magistrate.

2. Communications during Marriage (Section 128)

- Communications between husband and wife during marriage are privileged; disclosure cannot be enforced.
- Based on principle of domestic peace and confidence.
- Section contains two parts:
 1. Privilege of the witness
 2. Privilege of the husband or wife of the witness

3. Evidence as to Affairs of State (Section 129)

- Applies to evidence derived from unpublished official records relating to affairs of State.
- No one can give such evidence without permission of the head of the department, who may give or withhold permission.

4. Professional Communications (Sections 132 & 134)

- Protects communications between advocate and client in professional confidence.
- Client cannot be compelled; advocate cannot disclose without client's consent.
- Covers oral and documentary communications passing during professional employment.
- Neither advocate, interpreter, clerk, nor employees can disclose communications or document contents learned during professional employment.
- Section 134:
 - Confidential communication cannot be disclosed, unless witness offers himself.
 - Court may compel disclosure only to explain evidence given, no others.
- Changes in Section 132:
 - Words "barrister, attorney, pleader or vakil" → "advocate"
 - Word "servant" → "employee"

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

Oral Evidence

1. Rule regarding oral evidence (Section 54):
 - All facts, except the contents of documents, may be proved by oral evidence.
 - Contents of documents may be proved either by primary or secondary evidence (Section 55).
2. Two broad rules regarding oral evidence:
 - (i) All facts except the contents of documents may be proved by oral evidence.
 - (ii) Oral evidence must in all cases be "direct".
3. Meaning of oral evidence (Section 125):
 - Statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry.
 - If a witness is unable to speak, he may give evidence in any manner which he can make intelligible, e.g., writing or signs.
4. Direct Evidence (Section 55):
 - Oral evidence is used in the sense of "original evidence", distinguished from hearsay.
 - Oral evidence must always be direct:
 - If a fact could be seen, it must be the evidence of a witness who saw it.
 - If a fact could be heard, it must be the evidence of a witness who heard it.
 - If a fact could be perceived by any other sense, it must be the evidence of a witness who perceived it by that sense.
 - If a fact refers to an opinion or its grounds, it must be the evidence of the person who holds that opinion on those grounds.

5. Exceptions for experts:

- Opinions of experts in treatises commonly offered for sale, and the grounds of such opinions, may be proved by production of such treatises if:
 - The author is dead,
 - Cannot be found,
 - Has become incapable of giving evidence, or
 - Cannot be called without unreasonable delay or expense.

6. Material objects:

- If oral evidence refers to the existence or condition of any material thing other than a document, the Court may require production of such material thing for inspection.

Documentary Evidence

1. Definition of document (Section 2(1)(d)):

- Any matter expressed, described or otherwise recorded upon any substance by letters, figures, marks, or any other means, intended to be used or which may be used for recording that matter.
- Includes electronic and digital records.

2. Rule for proof of contents of documents (Section 56):

- Contents of documents may be proved either by primary or secondary evidence.

3. Classification of documentary evidence:

- Primary evidence
- Secondary evidence

Primary Evidence

1. Meaning (Section 57):

- “Primary evidence” means the document itself produced for the inspection of the Court.

2. Principle:

- Rule requiring primary evidence of documents is based on the best evidence principle.
- If inferior evidence is produced where better might be given, the latter would tell against the withholder.

Secondary Evidence

1. Meaning (Section 58):

- “Secondary evidence” includes:
 - (i) Certified copies given under the provisions after Section 58.
 - (ii) Copies made from the original by mechanical processes ensuring accuracy, and copies compared with such copies.
 - (iii) Copies made from or compared with the original.

- (iv) Counterparts of documents as against parties who did not execute them.
- (v) Oral accounts of the contents of a document given by a person who has seen it.
- (vi) Oral admissions.
- (vii) Written admissions.
- (viii) Evidence of a person who has examined numerous accounts or documents which cannot conveniently be examined in Court, and who is skilled in their examination.

2. Illustrations:

- (a) Photograph of an original is secondary evidence if the photographed thing was the original.
- (b) Copy compared with a copy of a letter made by a copying machine is secondary evidence if the copying machine copy was made from the original.
- (c) Copy transcribed from a copy and afterwards compared with the original is secondary evidence; copy not so compared is not secondary evidence.
- (d) Oral account of a copy compared with the original, or oral account of a photograph or machine-copy, is not secondary evidence.

3. Cases in which secondary evidence may be given (Section 60):

Secondary evidence may be given when:

- a. Original is shown or appears to be in the possession or power:
 - (i) Of the person against whom it is sought to be proved, or
 - (ii) Of any person out of reach or not subject to Court process, or
 - (iii) Of any person legally bound to produce it, and after notice under Section 64, such person does not produce it.
- b. Original's existence, condition, or contents are admitted in writing by the person against whom it is proved.
- c. Original is destroyed, lost, or cannot be produced in reasonable time due to reasons not arising from default or neglect.
- d. Original is of such nature as not to be easily movable.
- e. Original is a public document (Section 74).
- f. Original is a document for which a certified copy is permitted by law.
- g. Originals consist of numerous accounts or documents which cannot conveniently be examined, and the fact to be proved is the general result of the collection.

4. Explanation:

- i. For clauses (a), (c), (d): any secondary evidence of contents is admissible.
- ii. Clause (b): written admission is admissible.
- iii. Clauses (e) or (f): certified copy only, no other secondary evidence, is admissible.
- iv. Clause (g): Evidence may be given as to general result by a skilled examiner.

5. Electronic Records:

- o Contents of electronic records may be proved in accordance with Sections 62 and 63.

- Section 63: Any computer output meeting conditions in the section is deemed a document and admissible without further proof.

6. Direct and Circumstantial Evidence:

- Under Section 55, “direct evidence” includes circumstantial evidence of things that could be seen, heard, or felt.
- Court must consider overall view of circumstances and not act on circumstantial evidence in isolation.

Aspect	Primary Evidence	Secondary Evidence
Meaning	The document itself produced for the inspection of the Court (Section 57)	Includes copies, oral accounts, admissions, or other evidence of the contents of a document (Section 58)
Principle	Based on the best evidence principle; the best evidence must be produced if available	Produced when primary evidence is unavailable, lost, destroyed, or impractical to produce
Form	Original document itself	Certified copies, mechanical copies, copies compared with originals, counterparts, oral accounts, oral admissions, written admissions, evidence by skilled examiners of numerous documents
Examples/Illustrations	N/A – document itself is produced	Photograph of original, copy made by copying machine, copy transcribed and compared with original, oral accounts of document, written admissions
When Admissible	Always, if available	(Section 60) When: (a) Original in possession of opposite party or person not reachable or legally bound to produce it (b) Contents admitted in writing (c) Original destroyed, lost, or cannot be produced (d) Original not easily movable (e) Original is public document (f) Certified copy permitted by law (g) Originals are numerous documents and fact to be proved is general result
Limitation/Explanation	No limitation if document is produced	Clause-specific: 1. Clauses (a, c, d): Any secondary evidence admissible 2. Clause (b): Written admission only 3. Clauses (e, f): Certified copy only 4. Clause (g): Evidence by skilled examiner on general result

PRESUMPTION

- Definition: Presumptions are rules deduced from human knowledge and experience, based on the connection, relation, and coincidence of facts and circumstances.
- Nature:
 - A presumption is not evidence itself.
 - It creates a prima facie case in favour of the party for whom it exists.
 - It is a rule of law directing the court or jury to draw a particular inference unless the inference is disproved.

Category	Meaning / Description	Sanhita Terms	Reference /	English Equivalent	Law
Presumptions of Law	Rule of law that a particular inference shall be drawn by a court from particular circumstances.	“Shall presume” (rebuttable), “Conclusive proof” (irrebuttable)		Rebuttable and Irrebuttable presumptions of law	
Presumptions of Fact	Rule of law that a fact, otherwise doubtful, may be inferred from a fact which is proved.	“May presume”		Presumptions of fact	
Mixed Presumptions	Inferences that combine elements of presumptions of law and presumptions of fact.	—		—	

ESTOPPEL

- When we see a man knocked down by a speeding car and a few yards away there is a car going, there is a presumption of fact that the car has knocked down the man.
- General rule of estoppel (Section 121): When a person, by his declaration, act, or omission, intentionally causes or permits another to believe a thing to be true and act upon such belief, he or his representative cannot deny the truth of that thing in any suit or proceeding.
- Exception: There is no estoppel against the Statute; where the statute prescribes a particular way of doing something, it must be followed as prescribed.
- Other relevant sections:
 - Section 122: Estoppel of tenant or licensee of person in possession.
 - Section 123: Estoppel of acceptor of bill of exchange, bailee, or licensee.

Principle of Estoppel

- Estoppel is based on the maxim ‘allegans contraria non est audiendus’ i.e., a person alleging contrary facts should not be heard.
- Principle covers one kind of facts: a man cannot approbate and reprobate, cannot blow hot and cold, or say one thing at one time and later say differently.

- Doctrine of estoppel is based on the principle that it would be inequitable and unjust if a person, by a representation or conduct amounting to a representation, induces another to act, and later denies or repudiates the effect of that representation, causing loss or injury to the person who acted on it (Sorat Chunder v. Gopal Chunder).
- Nature of estoppel:
 - It is a rule of evidence, not a cause of action.
 - Estoppel by record results from the judgment of a competent Court.
 - Mohori Bibee v. Dharmodas Ghosh (1930): Estoppel does not apply where the statement is made to a person who knows the real facts and is not misled. The main element is the effect of representation in inducing another to act.

Illustrative Case:

Biju Patnaik University of Tech. Orissa v. Sairam College, AIR 2010 (Orissa):

- A private university allowed 67 students to appear in a special examination and declared their results.
- University later withheld degree certificates citing the need for further exams.
- Held: Once results are declared, the university is estopped from withholding degree certificates.

Different kinds of Estoppel



ELECTRONIC EVIDENCE (E-EVIDENCE)

- The contents of electronic records may be proved in accordance with the provisions of section 63 of BSA.

Admissibility of electronic records

- According to section 63, notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is:
 - printed on paper,

- stored, recorded or copied in optical or magnetic media, or
- stored in semiconductor memory,
- produced by a computer or any communication device, or
- otherwise stored, recorded or copied in any electronic form (computer output) shall be deemed to be a document if the conditions mentioned in this section are satisfied in relation to the information and computer in question.
- Such computer output shall be admissible in any proceedings, without further proof or production of the original, as evidence of the contents of the original or of any fact stated therein of which direct evidence would be admissible.

Conditions for computer output (Section 63(2))

- (a) The computer output containing the information was produced by the computer or communication device during the period over which the computer or communication device was used regularly to create, store or process information for any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device.
- (b) During the said period, information of the kind contained in the electronic record, or from which the information is derived, was regularly fed into the computer or communication device in the ordinary course of the said activities.
- (c) Throughout the material part of the said period, the computer or communication device was operating properly; or if not, then the periods when it was not operating properly or was out of operation did not affect the electronic record or accuracy of its contents.
- (d) The information contained in the electronic record reproduces or is derived from information fed into the computer or communication device in the ordinary course of the said activities.

Treatment of activity regularly carried on over a period by means of one or more computers or communication devices

- Where over any period, the function of creating, storing, or processing information for any activity regularly carried on was regularly performed by one or more computers or communication devices, whether:
 - (a) in standalone mode; or
 - (b) on a computer system; or
 - (c) on a computer network; or
 - (d) on a computer resource enabling information creation or processing and storage;
 - or
 - (e) through an intermediary,
- all computers or communication devices used for that purpose during that period shall be treated as constituting a single computer or communication device, and references in this section to a computer or communication device shall be construed accordingly.

Submission of certificate along with the electronic record

- In any proceeding where it is desired to give a statement in evidence under this section, a certificate shall be submitted along with the electronic record at each instance for admission, specifying:
 - (a) Identifying the electronic record and describing the manner in which it was produced.
 - (b) Giving particulars of any device involved in the production to show that the electronic record was produced by a computer or communication device referred to in clauses (a) to (e) of subsection (3).
 - (c) Dealing with any matters to which the conditions in subsection (2) relate.
- The certificate must purport to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate).
- A person signing the certificate shall be evidence of any matter stated in the certificate.
- For this purpose, it is sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

Electronic signature (Section 66)

- Except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record, the fact that such electronic signature is the electronic signature of the subscriber must be proved.

LESSON-10

Law relating to Limitation

REGULATORY FRAMEWORK

- The Limitation Act, 1963

INTRODUCTION – LAW RELATING TO LIMITATION

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications. The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment. The Act extends to whole of India.

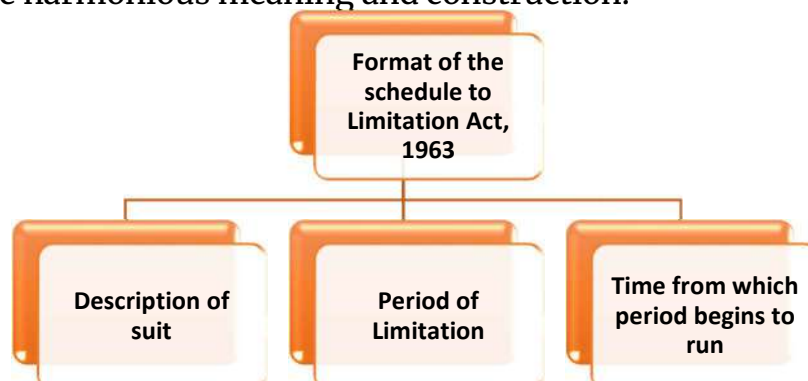
Case Law

- Law of Limitation: This law sets a time limit within which you can go to court to enforce your rights or claim.
- Key Point: Once this time expires, you cannot take the matter to court. The court will reject it because it's "time-barred."
- Important Distinction: The right itself does not disappear. You still have the right, but you just can't enforce it in court.
- Example from the case (Bombay Dying & Mfg. Co. Ltd. v. State of Bombay):
 - If someone owes you money and the period of limitation has expired, you can still accept the payment from them outside the court.
 - It's not illegal to settle a claim even after the limitation period has expired; you just can't force them to pay through a lawsuit.

Limitation bars court enforcement, but not the right itself.

COMPUTATION OF THE PERIOD OF LIMITATION FOR DIFFERENT TYPES OF SUITS

- The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions.
- The Limitation Act prescribes the period of limitation in Articles in Schedule to the Act. In the Articles of the Schedule to the Limitation Act, Columns 1, 2, and 3 must be read together to give harmonious meaning and construction.



BAR OF LIMITATION

- Any suit, appeal, or application filed beyond the prescribed period of limitation must not be proceeded with by the Court.
- The Court must consider limitation even if the defendant does not raise it.
- The Court can take notice of limitation on its own without waiting for a party to raise it.
- Whether a suit is barred by limitation is decided based on facts as they existed on the date of filing the plaint.
- Purpose- Section 3 is vital for the effectiveness of the Limitation Act.
- Jurisdiction not affected- Section 3 does not deprive the Court of jurisdiction. Therefore, even if a suit is time-barred, the Court's decision to allow it is not invalid.
- Effect on decree- A decree passed in a suit filed after the limitation period is not a nullity.

Case Law

1. Noharlal Verma vs. District Cooperative Central Bank Limited, Jagdalpur (SC), 2008

Key Point:

- If the law sets a specific limitation period, no special order or concession can extend it.
- Once the time limit expires, the authority cannot entertain the application on merits.
- In short: The limitation period is strict; authorities have no power to bypass it.

2. S.M. Ghogbhai vs. Schedulers Logistics India Pvt. Ltd. (NCLAT, 2022)

Context: Section 9 of the Insolvency and Bankruptcy Code, 2016 (filing claim against a defaulting company).

Facts:

- The appellant filed a Section 9 application after a long delay.
- The invoices for which payment was claimed were more than 3 years old.

Ruling:

- Limitation under Section 9 is governed by Article 137 of the Limitation Act, 1963, which starts counting from the day the right to apply arises (i.e., when the payment became due and was not made).
- Since the invoices were over 3 years old, the claim was time-barred, and the Tribunal correctly rejected it.

In short:

- You must file Section 9 applications within 3 years of the default.
- Late applications cannot be entertained, even if the claim is valid.
- ✅ Simple takeaway for both cases:
- Limitation periods are strict.
- Courts/authorities cannot ignore or extend them.
- Rights may exist, but enforcement after limitation expires is not allowed in court or tribunal.

EXTENSION OF TIME IN CERTAIN CASES

Doctrine of sufficient cause

- Purpose of Section 5:
 - Allows extension of the prescribed period for filing appeals or applications if sufficient cause is shown for the delay.
- Scope of Section 5:

- Applies to appeals and applications (except applications under Order XXI of CPC, 1908).
- Does not apply to suits; the Court cannot admit a time-barred suit even for sufficient cause.
- Meaning of “sufficient cause”:
 - Not defined in the Limitation Act; depends on circumstances of each case.
 - Must be a cause beyond the control of the party.
 - Misleading orders, practices, or judgments by the High Court may be considered a sufficient cause.
- Condition for applicability:
 - The prescribed period must have expired.
 - “Prescribed period” means any period prescribed by law for the time being in force.
- Court’s discretion:
 - Court may admit an appeal or application after expiry of limitation if satisfied with the explanation for delay.
- Reason for non-applicability to suits:
 - Limitation period for most suits ranges from 3 to 12 years, whereas for appeals and applications, it does not exceed 6 months.
- Important restriction:
 - Section 5 cannot be used to extend limitation for suits.

Case Law

Ramlal v. Rewa Coal Fields Ltd., AIR 1962 SC 361

1. Day-by-day explanation required:

- Once the period of limitation expires, the appellant must explain the delay for each day.
- If the appellant fails to explain even a single day, it is considered that there is no sufficient cause.

2. Discretion of the Court:

- The Court has the discretion to extend the period of limitation even if sufficient cause is shown.
- This discretion must be exercised judicially, not arbitrarily.

3. Key takeaway:

- Delay must be fully justified day by day, and the Court carefully decides whether to condone it based on the explanation.

What is sufficient cause and what is not may be explained by the following observations:

- Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause under Section 5;
- In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be bona fide;
- Wrong advice given by advocate can give rise to sufficient cause in certain cases;
- Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;

- Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
- Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.
- Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay (Collector and Authorised Chief Settlement Commissioner v. Darshan Singh and others, AIR 1999 Raj. 84).
- Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause [Mahendra Yadav v. Ratna Devi & others, AIR 2006 (NOC) 339 Pat].

The quasi-judicial tribunals, labour courts or executive authorities have no power to extend the period under this Section.

- The test of “sufficient cause” is purely individualistic, not objective.
- No two cases can be treated alike; each case is unique.
- The Limitation Act does not define “sufficient cause”, leaving discretion to the Court.
- There are no fixed or exhaustive categories of sufficient cause.
- Courts decide each case based on its own circumstances.

Supreme Court rulings (R B Ramlingam v. R B Bhvansewari, G. Ramegowda v. Special Land Acquisition Officer) emphasize:

- “Sufficient cause” should be given a liberal construction.
- Delays in appeals should generally be condoned in the interest of justice.
- Condonation is allowed where there is no gross negligence, deliberate inaction, or lack of bona fides by the applicant.

Example

The limitation period of the suit was 3 years. On the last day, X was hospitalized and could not file the suit. He recovered within next 2 days. Can he be allowed to file a suit under section 5 after showing sufficient cause?

No, section 5 is applicable for applications and appeals.

Case Laws

1. B.K. Educational Services Pvt. Ltd. v. Parag Gupta & Associates (2019) 11 SCC 633 Issue: **Whether the Limitation Act, 1963 applies to Section 7 & 9 IBC applications from inception (01.12.2016).**

Supreme Court Holding:

- Limitation Act applies retrospectively to IBC applications.
- Article 137 applies: right to sue accrues on default; claims older than 3 years are barred unless Section 5 applies.
- Section 5 allows condonation of delay if sufficient cause is shown.

2. Pathapati Subba Reddy v. Special Deputy Collector (08.04.2024)

Principles:

- Limitation law ends the remedy after a fixed period; right itself is not extinguished.
- Section 3 is strict; Section 5 is liberal for condoning delay.

- Court may refuse condonation even if sufficient cause is shown, e.g., due to negligence, inordinate delay, lack of diligence.
- Merits of the case are irrelevant in condonation applications.
- High Court refusal to condone 5659-day delay was justified due to negligence, acceptance of previous decision, and lack of due diligence.

3. Ajay Dabra v. Pyare Ram & Ors (2023)

Issue: Condonation of 254-day delay under Section 5 Limitation Act.

Supreme Court Holding:

- Delay due to insufficient court fee was not sufficient cause, especially since the appellant was affluent and could have filed the appeal even with deficient fee and corrected later.
- High Court rightly dismissed the Section 5 application.

Key Takeaways Across Cases:

- Limitation Act applies to IBC applications retrospectively.
- Section 3 is strict; Section 5 allows condonation only for sufficient cause.
- Court exercises discretion; merits are irrelevant in delay condonation.
- Negligence, lack of diligence, or avoidable delays may justify refusal.
- Affluence or ability to comply with procedural requirements affects sufficiency of cause.

Persons under legal disability

- Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time.
- Section 7 supplements Section 6.
- Section 8 controls these sections, which serves as an exception to Sections 6 and 7.
- The combined effect of Sections 6 and 8 is that where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled to a fresh period of limitation from the attainment of his majority.
- In no case shall the period extended by Section 6, by virtue of Section 8, exceed three years from cessation of disability, i.e., attainment of majority.
- Sections 6, 7 and 8 must be read together.
- Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of three years after the cessation of disability.
- Section 8 applies to all suits except suits to enforce rights of pre-emption.
- The period of three years under Section 6 has to be counted from the date of cessation of minority or disability, not from the date of attainment of majority.
- Both Sections 6 and 7 go together.
- Section 7 is an extension of Section 6, where the point of time at which the existence of disability is to be recognised is “the time from which the period of limitation is to be reckoned.”
- Section 7 is only an application of the principle in Section 6 to a joint-right inherited by a group of persons, some or all of whom are under disability.
- The disability of all except one does not prevent the running of time if the discharge can be given without the concurrence of the other.
- Otherwise, the time will run only when the disability is removed.

- To apply Section 7, disability must exist when the right to apply accrued, i.e., at the time from which period of limitation is to be reckoned.
- Section 8 provides that in cases where the application of Section 6 or 7 results in an extension of the period prescribed by Schedule, that extension is not to be more than three years after the cessation of the disability.

Example- The limitation period for filling a suit is 12 years. When the limitation period commenced X was minor of age 10 years. He will not get 12 years after cessation of minority. He will get only 3 years due to bar of section 8 of the Limitation Act.

Example

Disabilities are being a minor or insane, or an idiot.

Section 7 deals with the situation where there is joint entitlement of filling a suit or application.

It give rise to two situation:

- When Discharge may be given by any other person without concurrence: In this situation, time will run against them all.
- When discharge cannot be given by any other person without concurrence: In this situation, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased

CONTINUOUS RUNNING OF TIME

- According to Section 9 of the Act, once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it.
- Exception: where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.
- The rule of this Section is based on the English dictum: "Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event."
- When any of the statutes of limitation has begun to run, no subsequent disability or inability will stop this running.
- The applicability of Section 9 is limited to suits and applications only.
- Section 9 does not apply to appeals unless the case falls within any of the exceptions provided in the Act itself.
- For applicability of Section 9, it is essential that the cause of action or the right to move the application must continue to exist and be subsisting on the date on which a particular application is made.
- If a right itself has been taken away by some subsequent event, no question of bar of limitation will arise, as the starting point of limitation for that application is deemed not to have commenced.
- Time runs when the cause of action accrues.
- True test to determine when a cause of action has accrued: ascertain the time when the plaintiff could have maintained his action to a successful result first.
- If there is an infringement of a right at a particular time, the whole cause of action is said to have arisen then and there.
- Section 9 contemplates only cases where the cause of action continues to exist.

- Section 10 excludes suits against trustees and their representatives from the purview of the Act.
- To invoke Section 10, the property must be vested in a trustee or trustees for a specific purpose.

COMPUTATION OF PERIOD OF LIMITATION

Exclusion of certain days or exclusion of time in legal proceedings

Sr. No.	Computation of Period of Limitation	Section Reference
(i)	Computation of period of limitation for a suit, appeal or application: The day which is to be excluded in computing period of limitation is the day from which the period of limitation is to be reckoned. In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.	Section 12(1)
(ii)	Computation of period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgement: The day on which the judgement complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.	Section 12(2)
(iii)	Computation of period for an application made for leave to appeal from a decree or order: The time requisite for obtaining a copy of the judgement shall also be excluded.	Section 12(3)
(iv)	Computation of Limitation period for an application to set aside an award: The time required for obtaining a copy of the award shall be excluded.	Section 12(4)
Note	The time required for getting copies of certain decisions, mentioned under Section 12 is also to be excluded in computing the period of limitation as per Sub-sections (2), (3) and (4). However, the time taken by the Court to prepare the decree or order before an application for a copy is made shall not be excluded in computing the time for obtaining a copy of a decree or an order.	Explanation to Section 12

Case Law

Udayan China Bhai v. R.C. Bali, AIR 1977 SC 2319

- The term “time requisite for obtaining a copy” means the time reasonably required to obtain it.

- The Supreme Court held that the time between the pronouncement of the judgment and the signing/preparation of the decree cannot be excluded while computing limitation under Section 12(2).

Section 13 – Exclusion of time during which leave to sue or appeal as a pauper is applied for

- In computing the period of limitation for any suit or appeal where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded.
- The court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.

Section 14 – Exclusion of time bona fide taken in a court without jurisdiction

- Relief is given when the period of limitation is over because another civil proceeding relating to the matter in issue had been initiated in a court unable to entertain it, due to lack of jurisdiction or similar cause.
- Conditions for applicability:
 - The plaintiff or applicant was prosecuting another civil proceeding against the defendant with due diligence in the above-said court.
 - The previous suit or application related to the same matter in issue.
 - The plaintiff or applicant prosecuted in good faith in that court.
 - The court was unable to entertain the suit or application on account of defect of jurisdiction or other like cause.

Case Law

Purni Devi & Anr. v. Babu Ram & Anr., Supreme Court, 02.04.2024

Facts:

- Original suit for possession filed on 01.06.1984; decreed in favor of Plaintiff on 10.12.1986.
- Defendants appealed; first and second appeals dismissed; decree attained finality on 09.11.2000.
- Execution application filed on 18.12.2000 rejected on 29.01.2005 due to lack of proper jurisdiction.
- Fresh execution application filed on 03.10.2005 dismissed as barred by limitation (28.11.2007).

Issue:

- Whether time spent pursuing a remedy in a wrong forum can be excluded from the period of limitation.

Decision / Principles:

- Section 14 allows exclusion of time spent bona fide in a court without jurisdiction if:
- Both proceedings are civil and by the same party.
- Prior proceeding prosecuted with due diligence and in good faith.
- Failure due to defect of jurisdiction or similar cause.
- Both proceedings relate to the same matter in issue.
- Both proceedings are in a court.

- Time diligently spent in the wrong forum is to be excluded in computing limitation.
- In this case, all conditions of Section 14 were satisfied; time spent in wrong forum was excluded.

Conclusion:

- Supreme Court allowed exclusion of time spent pursuing remedy in a court without jurisdiction when computing limitation.

Exclusion of Time in Certain Cases (Sections 15–17):

- Section 15(1): Time during which a suit or application for execution of a decree is stayed by an injunction or order, including the day it was issued and withdrawn, shall be excluded.
- Section 15(2): Time required to obtain government sanction, consent, or a notice period in suits shall be excluded.
- Section 15(3): In suits/applications by a receiver, interim receiver, or liquidator, the period from institution of proceedings to three months after their appointment shall be excluded.
- Section 15(4): Time during which proceedings to set aside a sale have been prosecuted shall be excluded in a suit for possession by a purchaser in execution of a decree.
- Section 15(5): Time during which the defendant is absent from India or territories administered by the Central Government shall be excluded.
- Sections 16(1) & (2): If a person dies before the right to institute a suit accrues, limitation is computed from when a legal representative capable of instituting the suit exists. Same applies if the defendant dies.
- Section 16(3): The rule in Section 16 does not apply to suits for enforcing pre-emption rights or for possession of immovable property or a hereditary office.
- Section 17:
 - Limitation period for suits based on fraud or mistake does not run until the plaintiff discovers the fraud/mistake or could have discovered it with reasonable diligence.
 - In case of a concealed document, limitation begins when the plaintiff first has the means to produce or compel production.
 - If a judgment-debtor prevents execution of a decree by fraud or force, the court may extend the execution period on application by the judgment creditor within one year of discovery of fraud or cessation of force.

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION

Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation.

The following requirements should be present for a valid acknowledgement as per Section 18:

Such acknowledgement must be in respect of any property or right

Must be an admission or acknowledgement

Made before the expiry of period of limitation

In writing and signed by the party against whom such property or rights is claimed

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

Case Laws

1. **Laxmi Pat Surana vs. Union Bank of India (26.03.2021 – SC, AIR 2021 SC 1707):**
 - A fresh period of limitation starts from the date of acknowledgment of debt by the principal borrower.
 - Supreme Court held that the application under Section 7 of the Code filed on 13.02.2019 was within limitation, as acknowledgment was made on 08.12.2018.
2. **Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal (15.04.2021 – SC, AIR 2021 SC 5249):**
 - a. Examined whether a balance sheet entry by a corporate debtor constitutes acknowledgment under Section 18 of the Limitation Act.
 - b. Supreme Court held that entries may amount to acknowledgment, but it depends on the facts and clarity of the entry; each case must be examined individually to determine if limitation is extended.

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY

- Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by:
 - The person liable to pay the debt or legacy, or
 - His agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.
- Proviso:
 - Save in the case of payment of interest made before 1st January, 1928, an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.
- Explanation appended to Section 19:
 - Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment.
 - 'Debt' does not include money payable under a decree or order of a court for the purpose of this Section.
- A fresh period of limitation becomes available to the creditor when part-payment of debt is made by the debtor before the expiration of the period of limitation.

COMPUTATION OF TIME MENTIONED IN INSTRUMENTS

All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian Calendar. (Section 24).

ACQUISITION OF OWNERSHIP BY POSSESSION (Section 25)

- Section 25 applies to acquisition of easements.
- Rights covered include:

- Access and use of light or air
- Right of way
- Watercourse
- Use of water
- Any other easement
- Conditions for acquisition:
 - The easement must have been peacefully enjoyed without interruption.
 - For 20 years if the property is private; 30 years if the property belongs to the Government.
- The 20-year period must end within two years before the institution of the suit.

Case Law

Ravinder Kaur Grewal vs. Manjit Kaur (2019 SC)

Issue: Whether a person claiming title by adverse possession can file a suit under Article 65 of the Limitation Act, 1963 for:

- Declaration of title
- Permanent injunction to protect possession
 - Restoration of possession in case of illegal dispossession
- Court's Holding:
 - There is no bar under the Limitation Act, 1963 to file such a suit.
 - Once title by adverse possession is acquired, it can be used as a sword by Plaintiff and a shield by Defendant.
 - A Plaintiff can file a suit for restoration of possession if dispossessed
 - The plea of adverse possession is valid under Article 65 for suing against infringement of rights.

LIMITATION AND WRITS UNDER THE CONSTITUTION

- i. Limitation is dealt with in Entry 13, List III of the Constitution of India.
- ii. Legislature may enact statutes prescribing limitation without violating fundamental rights, either shortening or extending time, provided reasonable time is allowed for enforcement of existing rights.
- iii. Statute of Limitation is not unconstitutional as it applies to rights of action in the future; it acts as a shield, not a weapon of offence.
- iv. The State cannot hinder an aggrieved person from approaching the Supreme Court under Article 32.
- v. Legislative action curbing enforcement of Fundamental Rights may be questioned under Article 13(2) (Tilokchand Motichand v. H.P. Munshi, AIR 1970 SC 898).
- vi. The Limitation Act does not explicitly apply to proceedings under Article 32 or 226.
- vii. Courts act by analogy with the statute of limitation and may refuse relief if delay exceeds statutory period (State of M.P. v. Bhai Lal Bhai, AIR 1964 SC 1006).
- viii. Where a writ petition corresponds to an ordinary suit whose remedy is subject to statutory limitation, courts adopt similar limitation in writ jurisdiction unless special circumstances exist.

- ix. If a right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right enforceable under Article 32.
- x. If only the remedy is extinguished by limitation, courts may refuse stale claims on grounds of public policy (Tilokchand Motichand v. H.P. Munshi, AIR 1970 SC 898).

THE SCHEDULE

(Periods of Limitation)

[Sections 2(j) and 3]

First Division - SUITS PART I – SUITS RELATING TO ACCOUNTS

S. No.	Description of Suit	Period of Limitation	Time from which Period Begins to Run
1	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last time admitted or proved is entered in the account, such year to be computed as in the account.
2	Against a factor for an account.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
3	By a principal against his agent for movable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
4	Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
5	For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.

PART II — SUITS RELATING TO CONTRACTS

S. No.	Description of Suit	Period of Limitation	Time from which Period Begins to Run
6	For a seaman's wages.	Three years	The end of the voyage during which the wages are earned.
7	For wages in the case of any other person.	Three years	When the wages accrue due.
8	For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	Three years	When the food or drink is delivered.
9	For the price of lodging.	Three years	When the price becomes payable.

10	Against a carrier for compensation for losing or injuring goods.	Three years	When the loss or injury occurs.
11	Against a carrier for compensation for non-delivery of, or delay in delivering goods.	Three years	When the goods ought to be delivered.
12	For the hire of animals, vehicles, boats or household furniture.	Three years	When the hire becomes payable.
13	For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
14	For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of delivery of the goods.
15	For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.
16	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.
17	For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale.
18	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
19	For money payable for money lent.	Three years	When the loan is made.
20	Like suit when the lender has given a cheque for the money.	Three years	When the cheque is paid.
21	For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
22	For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable.	Three years	When the demand is made.

23	For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
24	For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years	When the money is received.
25	For money payable for interest upon money due from the defendant to the plaintiff.	Three years	When the interest becomes due.
26	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
28	On a single bond, where a day is specified for payment.	Three years	The day so specified.
29	On a single bond, where no such day is specified.	Three years	The date of executing the bond.
30	On a bond subject to a condition.	Three years	When the condition is broken.
31	On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due.
32	On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years	When the bill is presented.
33	On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place.
34	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
35	On a bill of exchange or promissory note payable on demand and not accompanied	Three years	The date of the bill or note.

	by any writing restraining or postponing the right to sue.		
36	On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
37	On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.
38	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.
39	On a dishonoured foreign bill where protest has been made and notice given.	Three years	When the notice is given.
40	By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	Three years	The date of the refusal to accept.
41	By the acceptor of an accommodation-bill against the drawer.	Three years	When the acceptor pays the amount of the bill.
42	By a surety against the principal debtor.	Three years	When the surety pays the creditor.
43	By a surety against a co-surety.	Three years	When the surety pays anything in excess of his own share.
44(a)	On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased or where the claim on the policy is denied, either partly or wholly, the date of such denial.
44(b)	On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
45	By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.

46	Under the Indian Succession Act, 1925, Section 360 or Section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years	The date of the payment or distribution.
47	For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.
48	For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	Three years	The date of the payment in excess of the plaintiff's own share.
49	By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.
50	By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years	The date of the payment.
51	For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
52	For arrears of rent.	Three years	When the arrears become due.
53	By a vendor of immovable property for personal payment of unpaid purchase-money.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
54	For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.
55	For compensation for the breach of any contract, express	Three years	When the contract is broken or (where there are successive breaches) when the the breach in respect of

	or implied not herein specially provided for.		which the suit is instituted occurs or (where the breach is continuing) when it ceases.

PART III — SUITS RELATING TO DECLARATIONS

56	To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
57	To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years	When the alleged adoption becomes known to the plaintiff.
58	To obtain any other declaration.	Three years	When the right to sue first accrues.

PART IV — SUITS RELATING TO DECREES AND INSTRUMENTS

59	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
60(a)	To set aside a transfer of property made by the guardian of a ward – by the ward who has attained majority.	Three years	When the ward attains majority.
60(b)(i)	By the ward's legal representative — when the ward dies within three years from the date of attaining majority.	Three years	When the ward attains majority.
60(b)(ii)	By the ward's legal representative — when the ward dies before attaining majority.	Three years	When the ward dies.

PART V — SUITS RELATING TO IMMOVABLE PROPERTY

61(a)	By a mortgagor to redeem or recover possession of immovable property mortgaged.	Thirty years	When the right to redeem or to recover possession accrues.
61(b)	By a mortgagor to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
61(c)	By a mortgagor to recover surplus collection received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.

62	To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.
63(a)	By a mortgagee for foreclosure.	Thirty years	When the money secured by the mortgage becomes due.
63(b)	By a mortgagee for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.
64	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession has been dispossessed.	Twelve years	The date of dispossession.
65	For possession of immovable property or any interest therein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.
66	For possession of immovable property when the plaintiff has become entitled to possession by reason of forfeiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
67	By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.

PART VI — SUITS RELATING TO MOVABLE PROPERTY

68	For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to the possession first learns in whose possession it is.
69	For other specific movable property.	Three years	When the property is wrongfully taken.
70	To recover movable property deposited or pawned from a depository or pawnee.	Three years	The date of refusal after demand.
71	To recover movable property deposited or pawned, and afterwards bought from the depository or pawnee for valuable consideration.	Three years	When the sale becomes known to the plaintiff.

PART VII — SUITS RELATING TO TORT

72	For compensation for doing or omitting to do an act alleged to be in pursuance of any enactment.	One year	When the act or omission takes place.
73	For compensation for false imprisonment.	One year	When the imprisonment ends.

74	For compensation for malicious prosecution.	One year	When the plaintiff is acquitted or prosecution is otherwise terminated.
75	For compensation for libel.	One year	When the libel is published.
76	For compensation for slander.	One year	When the words are spoken, or if not actionable in themselves, when the special damage results.
77	For compensation for loss of service occasioned by seduction of the plaintiff's servant or daughter.	One year	When the loss occurs.
78	For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
79	For compensation for illegal, irregular or excessive distress.	One year	The date of the distress.
80	For compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
81	By executors, administrators or representatives under the Legal Representatives' Suits Act, 1855.	One year	The date of the death of the person wronged.
82	By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed.
83	Under the Legal Representatives' Suits Act, 1855, against an executor, administrator or any other representative.	Two years	When the wrong complained of is done.
84	Against one who having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion first becomes known.
85	For compensation for obstructing a way or a water-course.	Three years	The date of the obstruction.
86	For compensation for diverting a water-course.	Three years	The date of the diversion.
87	For compensation for trespass upon immovable property.	Three years	The date of the trespass.
88	For compensation for infringing copyright or any other exclusive privilege.	Three years	The date of the infringement.
89	To restrain waste.	Three years	When the waste begins.

90	For compensation for injury caused by an injunction wrongfully obtained.	Three years	When the injunction ceases.
91(a)	For compensation for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to possession first learns in whose possession it is.
91(b)	For compensation for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
92	To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93	To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
94	To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95	To set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
96	By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later.
97	To enforce a right of pre-emption whether the right is founded on law	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole

	or general usage or on special contract.		or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession, when the instrument of sale is registered.
98	By a person against whom an order referred to in Rule 63 or Rule 103 of Order XXI of the Code of Civil Procedure, 1908 or an order under Section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order.	One year	The date of the final order.
99	To set aside a sale by a Civil or Revenue Court or a sale for arrears of Government revenue or for any demand recoverable as such arrears.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
100	To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order of an officer of Government in his official capacity.	One year	The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be.
101	Upon a judgement including a foreign judgement, or a recognisance.	Three years	The date of the judgement or recognisance.
102	For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity and has knowledge of the conveyance.
103	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The date of the trustee's death or if the loss has not then resulted, the date of the loss.
104	To establish a periodically recurring right.	Three years	When the plaintiff is first refused the enjoyment of the right.
105	By a Hindu for arrears of maintenance.	Three years	When the arrears are payable.
106	For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate against an executor or administrator or some other person legally charged with the duty of distributing the estate.	Twelve years	When the legacy or share becomes payable or deliverable.

107	For possession of a hereditary office.	Twelve years	When the defendant takes possession of the office adversely to the plaintiff.
108	Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who if the female died at the date of instituting the suit, would be entitled to possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years	The date of the alienation.
109	By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.
110	By a person excluded from a joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.
111	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.
112	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu & Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.

PART X — SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD

13.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

Second Division — Appeals

114	Appeal from an order of Acquittal — (a) under Sub-section (1) or Sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898.	Ninety days	The date of the order appealed from.
	(b) under Sub-section (3) of Section 417 of that Code.	Thirty days	The date of the grant of special leave.

115	Under the Code of Criminal Procedure, 1898 — (a) from a sentence of death passed by a Court of Session or by a High Court in exercise of its Original Criminal Jurisdiction.	Thirty days	The date of the sentence.
	(b) from any other sentence or any order not being an order of acquittal — (i) to the High Court.	Sixty days	The date of the sentence or order.
	(ii) to any other Court.	Thirty days	The date of the sentence or order.
116	Under the Code of Civil Procedure, 1908 — (a) to a High Court from any decree or order.	Ninety days	The date of the decree or order.
	(b) to any other Court from any decree or order.	Thirty days	The date of the decree or order.
117	From a decree or order of any High Court to the same Court.	Thirty days	The date of the decree or order.

Third Division — Applications

118	For leave to appear and defend a suit under summary procedure.	Ten days	When the summons is served.
119	Under the Arbitration Act, 1940 — (a) for the filing in Court of an award.	Thirty days	The date of service of the notice of the making of the award.
	(b) for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of service of the notice of the filing of the award.
120	Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.
121	Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatement.
122	To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.	Thirty days	The date of dismissal.
123	To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. Explanation: For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908, shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.
124	For a review of judgement by a Court other than the Supreme Court.	Thirty days	The date of the decree or order.

125	To record an adjustment or satisfaction of a decree.	Thirty days	When the payment or adjustment is made.
126	For the payment of the amount of a decree by instalments.	Thirty days	The date of the decree.
127	To set aside a sale in execution of a decree, including any such application by a judgement-debtor.	Sixty days	The date of the sale.
128	For possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree.	Thirty days	The date of the dispossession.
129	For possession after removing resistance or obstruction to delivery of possession of immovable property decree or sold in execution of a decree.	Thirty days	The date of resistance or obstruction.
130	For leave to appeal as a Pauper — (a) to the High Court.	Sixty days	The date of decree appealed from.
	(b) to any other Court.	Thirty days	The date of decree appealed from.
131	To any Court for the exercise of its powers of revision under the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973.	Ninety days	The date of the decree or order or sentence sought to be revised.
132	To the High Court for a certificate of fitness to appeal to the Supreme Court under Clause (1) of Article 132, Article 133 or Sub-clause (c) of Clause (1) of Article 134 of the Constitution or under any other law for the time being in force.	Sixty days	The date of the decree, order or sentence.
133	To the Supreme Court for special leave to appeal — (a) in a case involving death sentence.	Sixty days	The date of the judgement, final order or sentence.
	(b) in a case where leave to appeal was refused by the High Court.	Sixty days	The date of the order of refusal.
	(c) in any other case.	Ninety days	The date of the judgement or order.
134	For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.
135	For the enforcement of a decree granting a mandatory injunction.	Three years	The date of the decree or where a date is fixed for performance, such date.
136	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court. Proviso: An application for enforcement or execution of a	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs

	decree granting a perpetual injunction shall not be subject to any period of limitation.		any payment of money or delivery of property to be made at a certain date or recurring periods, when default in making payment or delivery occurs.
137	Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

Case Law

A. Valliammai vs. K.P. Murali & Others (Supreme Court, 11 Sept 2023)

The Supreme Court interpreted Article 54 of the Limitation Act, 1963, which sets a three-year limitation period for filing a suit for specific performance:

- If a date is fixed for performance: the limitation period starts from that date.
- If no date is fixed: it starts from the date when the plaintiff has notice of refusal by the defendant to perform the contract.

Court's Observation:

The Court referred to *Pachanan Dhara v. Monmatha Nath Maity* (2006) 5 SCC 340, and clarified:

- To decide which part of Article 54 applies, the court must see whether a specific date was fixed for performance.
- If a date was fixed, the suit must be filed within three years from that date (unless delay is legally justified).
- If no date was fixed, the limitation begins when the plaintiff learns that the defendant refused to perform the contract.

In Short: The case reiterates that the starting point of limitation in specific performance suits depends on whether or not a date for performance is fixed in the agreement.

CLASSIFICATION OF PERIOD OF LIMITATION

Depending upon the duration, period of limitation for different purposes may be classified as follows:

- **Period of 30 years:** The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits:
 - Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
 - Suits by mortgagee for foreclosure;
 - Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.
- **Period of 12 years:** A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.
- **Period of 3 years:** A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

- **Period varying between 1 to 3 years:** The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.
- **Period in days varying between 90 to 10 days:** The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons.
 - For appeals against a sentence of death passed by a court of session or a High Court in the exercise of its original jurisdiction the limitation period is 30 days.
 - For appeal against any sentence other than a sentence of death or any other not being an order of acquittal, the period of 60 days for the appeal to High Court and 30 days for appeal to any other Court is prescribed.
 - Period of leave to appeal as a pauper from the date of the decree is 60 days when application for leave to appeal is made to the High Court and 30 days to any other Court.

LESSON-11

Law relating to Arbitration, Mediation and Conciliation

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996
- Alternate Dispute Resolution Rules
- The Mediation Act, 2023

INTRODUCTION

- The history of the law of arbitration in India commences with the (erstwhile Civil Procedure Code) Act VIII of 1859 which codified the procedure of Civil Courts.
- Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit, while Sections 326 and 327 dealt with arbitration without the intervention of the Court.
- These provisions were in operation when the Indian Contract Act, 1872, came into force, which permitted settlement of disputes by arbitration under Section 28 thereof.
- Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely Act X of 1877 and Act XIV of 1882, but not much change was brought about by the law relating to arbitration proceedings.
- In the year 1899, an Indian Act entitled the Arbitration Act of 1899 came to be passed.
- The 1899 Act was based on the model of the English Act of 1899.
- The 1899 Act applied to cases where, if the subject matter submitted to arbitration was the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town.
- Then came the Code of Civil Procedure of 1908.
- Schedule II to the 1908 Code contained provisions relating to the law of arbitration which extended to the other parts of British India.
- The Civil Justice Committee in 1925 recommended several changes in the arbitration law.
- On the basis of the Committee's recommendations, the Indian Legislature passed the Arbitration Act of 1940.
- The 1940 Act, as indicated by its preamble, was a consolidating and amending Act and was an exhaustive code insofar as the law relating to arbitration is concerned.
- Arbitration could be without the intervention of a Court, with the intervention of a Court where there was no suit pending, or arbitration in a suit.

- With the passage of time, the 1940 Act became outmoded, and there was a need expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment to make it more responsive to contemporary requirements and to render Indian economic reforms more effective.
- Besides arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition.
- The settlement agreement reached between the parties as a result of such mechanisms should have the same status and effect as an arbitral award on agreed terms.

Arbitration and Conciliation Act, 1996

- The Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend laws relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards, and to provide a law relating to conciliation and related matters.
- The Act is based on the UNCITRAL Model Law on International Commercial Arbitration.
- The Act aims to streamline the arbitration process and facilitate conciliation in business matters.
- The Act recognises the autonomy of parties in the conduct of arbitral proceedings.
- It reduces the scope of judicial review of arbitral awards and minimizes the supervisory role of Courts.
- The autonomy of the arbitral tribunal is strengthened by empowering it to decide on its own jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.
- Over time, difficulties in the applicability of the 1996 Act were noticed.
- Judicial interpretations in some cases resulted in delays in arbitration proceedings and increased Court interference, defeating the object of the Act.
- To overcome these difficulties, the Arbitration and Conciliation (Amendment) Act, 2015 was passed.
- The 2015 Amendment aimed to facilitate and encourage Alternative Dispute Resolution mechanisms, especially arbitration, for user-friendly, cost-effective, and expeditious settlement of disputes.
- India committed to improving its legal framework to avoid delays in disposal of cases.
- Promotion of institutional arbitration was identified as critical for strengthening arbitration in India.
- Although arbitral institutions existed in India, parties preferred ad hoc arbitration or institutions located abroad.
- To identify roadblocks in institutional arbitration and improve the arbitration landscape, the Central Government constituted a High Level Committee under Justice B. N. Srikrishna.
- The High Level Committee submitted its report on 30th July 2017.
- The Committee recommended establishing an independent body for grading arbitral institutions and accrediting arbitrators.

- It also recommended amendments to minimize the need to approach Courts for appointment of arbitrators.
- After examining the recommendations, the Government decided to amend the Arbitration and Conciliation Act, 1996.
- Accordingly, the Arbitration and Conciliation (Amendment) Act, 2019 was passed by Parliament.
- A recent amendment was made to Section 36 of the Act in 2021.
- The amendment provides that if the Court is satisfied that a prima facie case exists showing:
 - (a) the arbitration agreement or the contract forming the basis of the award, or
 - (b) the making of the award, was induced or affected by fraud or corruption,
 then the Court shall stay the award unconditionally pending disposal of a challenge under Section 34.
- An Explanation was added clarifying that this proviso applies to all court cases related to arbitral proceedings, irrespective of whether the arbitral or court proceedings commenced before or after the Arbitration and Conciliation (Amendment) Act, 2015.

Type of Arbitration	Description
1. Ad hoc Arbitration	• Not administered by any formal institution. • Number of arbitrators, their selection method, and procedures are decided by the parties. • All procedural aspects are determined by the parties.
2. Domestic Arbitration	• Disputes are governed by Indian laws. • Cause of action arises entirely in India.
3. International Arbitration	• At least one party is: (i) An individual who is a national or habitual resident of a country other than India; (ii) A body corporate incorporated outside India; (iii) An association or body of individuals managed/controlled from outside India; (iv) A foreign government.
4. Institutional Arbitration	• Arbitration is administered by an established arbitration institution.

Essentials of Arbitral Process

1. Seat of Arbitration – The parties are free to select any location as the arbitration's seat.
2. Venue of Arbitration – The Venue or location, for the sessions of the arbitral proceedings may be decided by the parties.
3. Arbitral Institution – The parties may select the arbitral institution for conducting the proceedings. The rules of such arbitration institution will apply to proceedings.
4. Law – The parties may by agreement choose any law .
5. Language – The parties may also agree on the language of the arbitration proceedings.

6. Number of arbitrators – The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, Failing the determination, the arbitral tribunal shall consist of a sole arbitrator.

7. Cost – The Court or arbitral tribunal have the discretion to determine the cost which includes the decision as to:

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid

Cases that do not fall under purview of arbitration

- Most civil rights disputes with damages as the remedy are referred to arbitration.
- Section 2(3) of the Act provides that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

IMPORTANT DEFINITIONS

Topic	Points
Arbitration	Section 2(1)(a) of the Act defines the term “arbitration” as to mean any arbitration whether or not administered by a permanent arbitral institution.
Arbitrator (Definition & Requirements)	• The term “arbitrator” is not defined in the Arbitration and Conciliation Act. • “Arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. • It is not enough that the parties appoint an arbitrator; the person appointed must • also give his consent to act as an arbitrator. • His appointment is not complete till he has accepted the reference. • The arbitrator must be absolutely disinterested and impartial. • He is an extra-judicial tribunal whose decision is binding on the parties.
Disqualification & Disclosure	• Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. • Such disqualification applies only in the case of a concealed interest. • Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.
Appointment of Arbitrators	• The parties may appoint whomsoever they please to arbitrate on their dispute. • Usually the parties themselves appoint the arbitrator or arbitrators.

	• In certain cases, the Court can appoint an arbitrator or umpire. • The parties to an arbitration agreement may agree that any reference thereunder shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.
Arbitral Institution	means an arbitral institution designated by the Supreme Court or a High Court under this Act. [Section 2(1)(ca)]
Arbitral Tribunal	means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)]
Court	• In arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes. • In international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. [Section 2(1)(e)]
International Commercial Arbitration	• An individual who is a national of, or habitually resident in, any country other than India. • A body corporate which is incorporated in any country other than India. • An association or a body of individuals whose central management and control is exercised in any country other than India. • The Government of a foreign country. [Section 2(1)(f)]
Legal Representative	• Legal representative means a person who in law represents the estate of a deceased person. • Legal representative includes any person who intermeddles with the estate of the deceased. • Where a party acts in a representative character, legal representative includes the person on whom the estate devolves on the death of the party so acting. [Section 2(1)(g)]
Party	means a party to an arbitration agreement. [Section 2(1)(h)]
Arbitration Agreement	• means an agreement referred to in Section 7. [Section 2(1)(b)] • Agreement to submit disputes (arisen or future) relating to a defined legal relationship, contractual or not. • May be an arbitration clause or a separate agreement. • Must be in writing. • In writing if contained in: ○ document signed by the parties; ○ exchange of letters/telecommunication including electronic means; or

- statements of claim and defence where agreement is alleged and not denied.
- Reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference makes the clause part of the contract.

Specimen ADR Clause

- Parties agree that any controversy, dispute, or difference concerning construction, meaning, violation, termination, validity, or nullity, including the scope of any clause or part thereof, or respective rights or liabilities, shall first be attempted to be resolved by discussion or mediation.
- If the parties fail to resolve the dispute amicably within 7 (seven) days of commencement of discussions, conciliation, or mediation, then upon expiry of 15 (fifteen) days, any party may refer the dispute to arbitration.
- Arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modifications or re-enactments thereof in force.
- The language to be used in mediation and arbitration shall be English.
- In arbitration, the sole arbitrator shall be appointed by mutual consent of the parties as per the provisions of the Arbitration and Conciliation Act, 1996.
- The seat or legal place of arbitration shall be New Delhi, India.
- The cost of arbitration proceedings shall be shared equally by both parties.

Case Law

NBCC (India) Ltd. vs. Zillion Infra Projects Pvt. Ltd., 2024 INSC 218

Supreme Court, 19.03.2024

- Key Point: Referring to another contract does not automatically apply its arbitration clause; specific incorporation is needed.
- Facts: Dispute arose over a weir construction contract; Zillion Infra sought arbitration, NBCC did not respond, High Court appointed arbitrator.
- Issue: Does a mere reference in the L.O.I. invoke the other contract's arbitration clause?
- Decision: Mere reference is insufficient; Clause 7 of L.O.I. required disputes to be resolved only through Delhi civil courts.
- Takeaway: Arbitration clauses must be specifically incorporated to apply; references alone do not suffice.

POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

1. Section 8(1):

- If a judicial authority is approached in a matter that is subject to an arbitration agreement, it must refer the parties to arbitration if a party applies before submitting their first statement on the substance of the dispute.

- The court will refer to arbitration unless it finds that no valid arbitration agreement exists prima facie.
- This applies regardless of any judgment, decree, or order from the Supreme Court or any other Court.

2. Section 8(2):

- The application under sub-section (1) must be accompanied by the original arbitration agreement or a duly certified copy.
- If the applicant does not have the original or certified copy, and it is with the other party, they may:
 - Submit a copy of the agreement, and
 - File a petition requesting the Court to call upon the other party to produce the original or certified copy.

3. Section 8(3):

- Even if an application under sub-section (1) is pending before the Court, arbitration may still commence or continue, and an arbitral award may be made.

Example

A party to the arbitration agreement applies to the judicial authority to refer for arbitration. The application is filed before first statement on the substance of the dispute. There was a decree of High Court providing the guidelines restricting the limitation period to 15 Days from the date of receiving information regarding the suit for referring the dispute. The applicant parties applies it with a copy of agreement which is neither original nor certified copy.

Can judicial authority refer the parties to arbitration?

Solution: Judicial authority shall notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration, and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

INTERIM MEASURES BY COURT

• Section 9(1):

- A party may apply to a Court before, during, or after arbitral proceedings (but before enforcement of the award under Section 36) for:
 - i. Appointment of a guardian for a minor or person of unsound mind for arbitration purposes.
 - ii. Interim measures of protection, including:

- a. Preservation, interim custody, or sale of goods that are the subject-matter of the arbitration agreement.
 - b. Securing the amount in dispute in arbitration.
 - c. Detention, preservation, or inspection of property or things related to the dispute, including:
 - Authorising entry upon land/buildings in possession of any party.
 - Taking samples, making observations, or conducting experiments necessary to obtain full information or evidence.
 - d. Interim injunctions or appointment of a receiver.
 - e. Any other interim protection the Court considers just and convenient.
- The Court has all powers as it has in regular proceedings to grant these measures.

- **Section 9(2):**

- If a Court grants an interim measure before arbitral proceedings start, arbitration must commence within 90 days of the order, or within such extended time as the Court allows.

- **Section 9(3):**

- Once the arbitral tribunal is constituted, the Court cannot entertain an application under Section 9(1) unless it finds circumstances exist where the remedy under Section 17 would be ineffective.

NUMBER OF ARBITRATORS

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Example

A & B intends to commence arbitration proceedings. They should try to appoint odd number of arbitrators, i.e., 1, 3, 5, 7 and so on.

Appointment of Arbitrators

Nationality of Arbitrator	• According to Section 11(1) of the Act, a person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
Procedure for appointment of	• Section 11(2) provides that subject to Section 11(6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
General Procedure for appointment of Arbitrators	• Section 11(3) states that failing any agreement referred to in Section 11(2) above, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

Designation of Arbitral Institution	According to Section 11(3A) of the Act, the Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of the Act.
Failure to appoint Arbitrator under section 11(3)	- Section 11(4) provides that if the appointment procedure in section 11(3) applies; and - a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or - the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
Failure to agree on the arbitrator under section 11(2)	According to Section 11(5) of the Act, failing any agreement referred to in Section 11(2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in Section 11(4) as provided above.
Failure to follow the procedure, agreement and function	- Section 11(6) states that where, under an appointment procedure agreed upon by the parties,- - a party fails to act as required under that procedure; or - the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or - a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
Disclosure from Arbitrator	- The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of section 12(1), and have due regard to: - any qualifications required for the arbitrator by the agreement of the parties; and - the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."
Appointment of an arbitrator in International Commercial Arbitration	Section 11(9) provides that in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
Discretion of the Court	Section 11 (11) states that where more than one request has been made under Section 11(4), Section 11(5) and Section 11(6), to the Chief Justices of different High Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

Reference to courts

- Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) of section 11 arise in an international commercial arbitration, the reference shall be construed as a reference to the “Supreme Court” and in other cases reference shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in section 2 (1)(e) is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

Limitation period for appointment

- Section 11(13) provides that an application for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Fees and Manner of payment

- Section 11(14) states that For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.
- it was clarified that section 11(4) shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

Example

A & B intends to commence arbitration proceedings. A is willing to appoint X as their arbitrator while B wants Y to arbitrate their matter. Both A and B, failed to appoint arbitrator within 30 days. Both A and B has an option to approach the Court for such appointment of arbitrator

Case Law

Cox & Kings Ltd. v. SAP India Pvt. Ltd. & Anr, 2024 INSC 670

Decided by: Supreme Court on 09.09.2024

Key Point:

- At the Section 11(6) stage, the Court only checks if an arbitration agreement exists.
- The arbitral tribunal itself decides on its own jurisdiction and arbitrability under Section 16 (principle of competence-competence).

Observations:

- Courts should not delve into complex factual disputes at the referral stage.
- Issues like impleading a non-signatory party should primarily be decided by the arbitral tribunal.
- Section 16 empowers the tribunal to rule on preliminary objections including the validity of the arbitration agreement.

Takeaway:

- Judicial intervention at the referral stage is limited.
- The tribunal is the first authority to decide on jurisdiction and arbitrability.

Case Law

Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors., 2024 INSC 710

Decided by: Supreme Court on 20.09.2024

Facts:

- Petition under Section 11(6) and 11(9) seeking appointment of a sole arbitrator.
- Question: Should a non-signatory party (SRG Group) also be bound by arbitration?

Decision/Observations:

- Definition of “party” under Section 2(1)(h) and Section 7 includes non-signatories if they intend to be bound.
- Consent can be inferred from:
 - Actions or conduct of the non-signatory.
 - Participation in negotiation, performance, or termination of the contract.
- Conduct must be positive, direct, and substantial, not incidental.
- Court held that arbitral tribunal is best placed to decide if the non-signatory is a real party to the arbitration agreement.

Takeaway:

- Non-signatories can be bound by an arbitration agreement if their actions show consent.
- Determination of this question is better left to the arbitral tribunal.

POWER OF CENTRAL GOVERNMENT TO AMEND FOURTH SCHEDULE

- In terms of Section 11A of the Act, if the Central Government is satisfied that it is necessary or expedient so to do,
- it may, by notification in the Official Gazette, amend the Fourth Schedule (Model fee), and
- thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

GROUND FOR CHALLENGE (Section 12)

- Disclosure by prospective arbitrator (Section 12(1)):
 - A person approached for possible appointment as an arbitrator shall disclose in writing any circumstances:
 - a. Existence, either direct or indirect, of any past or present relationship with or interest in any party or in relation to the subject matter in dispute (financial, business, professional, or other) likely to give rise to justifiable doubts as to his independence or impartiality.
 - b. Circumstances likely to affect his ability to devote sufficient time to the arbitration, particularly to complete the arbitration within 12 months.
- Explanation 1: Grounds stated in the Fifth Schedule guide in determining whether circumstances give rise to justifiable doubts about independence or impartiality.
- Explanation 2: Disclosure shall be made in the form specified in the Sixth Schedule.
- Continuous disclosure (Section 12(2)): An arbitrator, from appointment and throughout the proceedings, shall disclose without delay any circumstances referred to in subsection (1), unless already informed.
- Grounds for challenge (Section 12(3)): An arbitrator may be challenged only if:
 - a. Circumstances exist giving rise to justifiable doubts as to independence or impartiality.

- b. He does not possess the qualifications agreed by the parties.
- Challenge by participating party (Section 12(4)): A party may challenge an arbitrator appointed by him, or in whose appointment he participated, only for reasons becoming known after the appointment.
- Ineligibility of certain persons (Section 12(5)): Notwithstanding any prior agreement, any person whose relationship with the parties, counsel, or subject matter falls under categories in the Seventh Schedule is ineligible to be appointed as an arbitrator.
- Fees after challenge (Section 12(6)): Where an arbitral award is set aside under Section 12(5), the Court may decide whether the challenged arbitrator is entitled to any fees.

Case laws on challenge to arbitrators

1. Jivan Kumar Lohia v. Durgadutt Lohia, AIR 1992 SC 188
 - Revocation of an arbitrator's authority can be sought on the ground of bias.
 - Key point: A reasonable apprehension of bias in the mind of any party is a valid ground for terminating an arbitrator.
2. BCC Developers & Promoters Ltd v. DMRC (28.10.2021, ARB.P 813/2021)
 - Arbitrators who are ex-employees of one of the parties are not automatically ineligible.
 - Key point: Seeking disqualification under Section 12 just because of prior employment is not maintainable.

CHALLENGE PROCEDURE (Section 13)

1. Agreement on Procedure:
 - Sub-section (1) provides that parties are free to agree on a procedure for challenging an arbitrator.
2. Continuation of Proceedings:
 - Sub-section (4) states that if a challenge under an agreed procedure or the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue proceedings and make an arbitral award.
 - At that stage, the challenging party has the right to apply to the Court to set aside the award under Section 34 of the Act.
3. Default Procedure (if no agreement exists):
 - Sub-section (2) provides that if no agreement exists under Sub-section (1):
 - A party intending to challenge an arbitrator must send a written statement of reasons to the arbitral tribunal within 15 days of:
 - a. Becoming aware of the constitution of the tribunal, or
 - b. Becoming aware of any circumstances under Sub-section (3) of Section 12.
4. Decision on Challenge:
 - The tribunal shall decide on the challenge unless:
 - The challenged arbitrator withdraws from office, or
 - The other party agrees to the challenge.
5. Fees of Challenged Arbitrator:

- Where an award is set aside under Sub-section (5) of Section 13, the Court may decide whether the arbitrator who was challenged is entitled to any fees.

FAILURE OR IMPOSSIBILITY TO ACT AS AN ARBITRATOR (Section 14)

1. Termination of Mandate (Section 14(1)):
 - An arbitrator's mandate shall terminate and a substitute arbitrator appointed if:
 - a. The arbitrator becomes de jure or de facto unable to perform functions, or fails to act without undue delay for any reason.
 - b. The arbitrator withdraws from office, or the parties agree to terminate the mandate.
2. Court Intervention (Section 14(2)):
 - If there is a dispute regarding the arbitrator's inability to act or occurrence of undue delay, a party may approach the Court for intervention.
3. No Implication on Validity of Grounds (Section 14(3)):
 - If an arbitrator withdraws or a party agrees to terminate the mandate under Section 14 or Section 13(3), it does not imply acceptance of the validity of any ground under this section or Section 12(3).

TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATOR UNDER SECTION 15

- (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate,
 - a. where he withdraws from office for any reasons; or
 - b. by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.
- (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15]

Case law

Chennai Metro Rail Ltd. v. M/s Transtonnelstroy Afcons (JV) & Anr., SC, 19.10.2023

- Facts:
 - Chennai Metro awarded a contract to Afcons.
 - Tribunal initially fixed hearing fee for arbitrators at ₹1,00,000 per session.
 - Tribunal later sought to revise fee to ₹2,00,000, Chennai Metro objected.
 - Afcons paid revised fee for 5 hearings; Chennai Metro filed petition under Section 14 seeking termination of tribunal mandate.
- Issue:

- Whether a party can challenge the tribunal on grounds other than statutory ineligibility under Section 12(5).
- Decision:
 - Supreme Court held Chennai Metro's plea cannot be sustained.
 - Only grounds listed in Section 12(5)/Fifth Schedule are valid for challenging an arbitrator.
 - Allowing other unenumerated grounds could create uncertainty and clog courts.
- Takeaway:
 - Challenges to arbitrators must follow statutory grounds; unenumerated objections will not be entertained.

COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION (Section 16)

- **Section 16(1):** Arbitral tribunal may rule on its own jurisdiction, including objections regarding existence or validity of arbitration agreement.
 - a) Arbitration clause in a contract is independent of other contract terms.
 - b) If the contract is found null and void, it does not automatically invalidate the arbitration clause.
- **Section 16(2):**
 - Plea that the tribunal lacks jurisdiction must be raised before submission of statement of defence.
 - A party is not barred from raising such a plea just because it appointed or participated in appointing the arbitrator.
- **Section 16(3):**
 - Plea that tribunal is exceeding its authority must be raised as soon as the matter beyond authority arises during proceedings.
- Tribunal discretion:
 - Tribunal may admit a later plea if it considers the delay justified.
 - Tribunal shall decide on the plea and, if rejecting it, continue proceedings and make an arbitral award.
- Aggrieved party:
 - May apply to set aside the arbitral award under Section 34.

Case law

Chloro Controls (I) P. Ltd v. Severn Trent Water Purification Inc, 2012 (9) N SCALE 595

- The court emphasized the kompetenz-kompetenz principle.
- A challenge to the existence or validity of the arbitration agreement does not stop the arbitral tribunal from hearing the case or ruling on its own jurisdiction.
- Arbitrators have the first right to determine their jurisdiction, which can later be reviewed by the court when enforcing or setting aside the award.
- Courts cannot assume jurisdiction unless the arbitration agreement is patently void, inoperative, or incapable of being performed.

INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL (Section 17)

1. Application by Party
 - During arbitral proceedings, a party may apply to the arbitral tribunal:
 - i. For the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings.
 - ii. For an interim measure of protection in respect of the following matters:
 - a. Preservation, interim custody, or sale of goods which are the subject matter of the arbitration agreement.
 - b. Securing the amount in dispute in the arbitration.
 - c. Detention, preservation, or inspection of property or things related to the dispute, including:
 - Authorizing a person to enter land or buildings in possession of any party.
 - Taking samples, observations, or conducting experiments necessary to obtain full information or evidence.
 - d. Interim injunction or appointment of a receiver.
 - e. Any other interim measure deemed just and convenient by the arbitral tribunal.
2. Powers of Arbitral Tribunal
 - The arbitral tribunal has the same powers as a court to make orders for the purposes of, and in relation to, arbitral proceedings.
3. Enforceability of Orders (Sub-section 2)
 - Any order issued by the arbitral tribunal under this section:
 - Shall be deemed an order of the Court for all purposes.
 - Shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as a court order.
 - Subject to any orders passed in an appeal under Section 37 of the Act.

Example An order of interim injunction under section 17 of the Act is deemed to be an order of the court and enforceable under the Code of Civil Procedure, 1908.

EQUAL TREATMENT OF PARTIES

The parties shall be treated with equality and each party shall be given a full opportunity to present this case.

Determination of Rules of Procedure

Section 19 deals with determination of rules of procedure. It says that:

1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.
2. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

4. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

PLACE OF ARBITRATION

1. Agreement by Parties (Sub-section 1)
 - Parties are free to mutually agree on the place of arbitration.
2. Determination by Arbitral Tribunal (Sub-section 2)
 - If parties fail to agree, the arbitral tribunal determines the place of arbitration.
 - Tribunal considers circumstances of the case, including convenience of the parties.
3. Flexibility of Meetings (Sub-section 3)
 - Unless otherwise agreed, the arbitrator/tribunal may meet at any place it considers appropriate for:
 - Consultation among tribunal members.
 - Hearing witnesses, experts, or parties.
 - Inspection of documents, goods, or other property.

Case laws on place/seat of arbitration

1. Brahmani River Pellets Ltd v. Kamachi Industries Ltd (Supreme Court, 25.07.2019)
 - Parties are free to agree on the place of arbitration.
 - If parties choose a “venue,” the court having jurisdiction is the one where the venue/seat is located.
 - Madras High Court wrongly assumed jurisdiction because parties agreed Bhubaneswar as the seat.
 - Only Orissa High Court had jurisdiction under Section 11(6).
 - Key point: Party autonomy in choosing place/seat must be respected.
2. Uttar Pradesh Ban Nigam, Almora v. Bishan Nath Goswami, AIR 1985 All 351, 353
 - Arbitrators cannot fix the venue unilaterally without considering:
 - Convenience of parties, witnesses, and subject matter.
 - Venue must respect principles of natural justice.
 - Arbitrators must give fair hearing before deciding the place.
3. Union of India v. Hardy Exploration and Production (Supreme Court, unreported 2018)
 - Terms “place” and “seat” are interchangeable in arbitration.
 - If only “place” is mentioned with no conditions, it is treated as the seat (juridical seat).
 - If conditions are attached to “place,” they must be fulfilled for it to become the seat.

Key Takeaways:

- Parties have autonomy to choose place/seat.
- Arbitrators cannot fix venue ignoring convenience or fairness.
- Place agreed by parties determines jurisdiction of courts.
- “Place” usually equals “seat,” unless conditions change its meaning.

COMMENCEMENT OF ARBITRAL PROCEEDINGS (Section 21)

- Arbitral proceedings commence on the date the request for arbitration is received by the respondent, unless parties agree otherwise.

LANGUAGE (Section 22)

1. Parties are free to agree on the language(s) to be used in arbitral proceedings.
2. If parties do not agree, the arbitral tribunal shall determine the language(s).
3. The agreed/determined language applies to:
 - Written statements by parties
 - Hearings
 - Arbitral awards, decisions, or other communications by the tribunal
4. The tribunal may order documentary evidence to be translated into the agreed/determined language(s).

STATEMENTS OF CLAIM AND DEFENCE (Section 23)

1. **Section 23(1):**
 - Claimant shall state: facts supporting claim, points at issue, relief/remedy sought.
 - Respondent shall state defence to these particulars.
 - Parties can agree on other required elements of statements.
2. **Section 23(2):** Parties may submit relevant documents or reference other evidence.
3. **Section 23(2A):** Respondent may submit a counterclaim or set-off, if within the arbitration agreement; tribunal will adjudicate.
4. **Section 23(3):** Parties may amend or supplement claim/defence during proceedings unless tribunal finds it inappropriate due to delay.
5. **Section 23(4) (Amendment 2019):** Statements of claim and defence must be completed within six months from the date arbitrator(s) received notice of their appointment.

HEARINGS AND WRITTEN PROCEEDINGS (Section 24)

1. **Section 24(1):**
 - Tribunal decides whether to hold oral hearings or proceed based on documents/materials, unless parties agree otherwise.
 - Oral hearings must be held if requested by a party, unless parties agreed no hearing.
 - Oral hearings should, as far as possible, be conducted day-to-day.
 - Adjournments granted only for sufficient cause; costs (including exemplary) may be imposed on the party seeking adjournment without sufficient cause.
2. **Section 24(2):**
 - Parties must be given sufficient advance notice for hearings or tribunal inspections of documents, goods, or other property.
3. **Section 24(3):**

- All statements, documents, or applications made to the tribunal by one party must be communicated to the other party.
- Expert reports or evidentiary documents relied upon by the tribunal must be shared with the parties.

DEFAULT OF A PARTY (Section 25)

1. Claimant defaults:
 - Fails to submit statement of claim → tribunal terminates proceedings.
2. Respondent defaults:
 - Fails to submit statement of defence → tribunal continues proceedings.
 - Failure not treated as admission of claimant's allegations.
 - Tribunal may treat the right to file defence as forfeited.
3. Failure to appear or produce evidence:
 - Tribunal may continue proceedings and make award based on available evidence.

Failure under the Act	Consequence
Claimant fails to communicate his statement of claim	Arbitral tribunal shall terminate the proceedings
Respondent fails to communicate his statement of defence	Arbitral tribunal shall continue the proceedings without treating the failure as admission; may forfeit respondent's right to file defence
Party fails to appear at an oral hearing or produce evidence	Arbitral tribunal may continue the proceedings and make the arbitral award based on available evidence

EXPERT APPOINTED BY ARBITRAL TRIBUNAL (Section 26)

1. Appointment of Expert
 - Subject to party agreement, the arbitral tribunal may:
 - a. Appoint one or more experts to report on specific issues.
 - b. Require a party to provide relevant information, documents, goods, or access to property for inspection by the expert.
2. Expert Participation in Hearings
 - If requested by a party or deemed necessary by the tribunal:
 - Expert participates in oral hearings.
 - Parties may question the expert and present their own expert witnesses on the points at issue.
3. Access to Documents
 - Expert must make available to any requesting party all documents, goods, or property provided to prepare the report.

COURT ASSISTANCE IN TAKING EVIDENCE (Section 27)

1. Application to Court
 - Arbitral tribunal or a party (with tribunal approval) may apply to the Court for assistance in taking evidence.
2. Contents of Application
 - Must specify:
 - a. Names and addresses of parties and arbitrators.
 - b. General nature of claim and relief sought.
 - c. Evidence required:
 - i. Names and addresses of witnesses or expert witnesses and subject-matter of testimony.
 - ii. Description of documents to be produced or property to be inspected.
3. Execution by Court
 - Court may, within its competence, order that evidence be provided directly to the arbitral tribunal.
4. Court Processes
 - Court may issue same processes to witnesses as in regular court suits (summons, commissions, etc.).
5. Consequences of Non-Compliance
 - Persons failing to attend, refusing to give evidence, or committing contempt are subject to penalties similar to those in court proceedings.
6. Definition of “Processes”
 - Includes summons and commissions for examination of witnesses and summons to produce documents.

RULES APPLICABLE TO SUBSTANCE OF DISPUTE (Section 28)

1. Place of Arbitration in India
 - a. Domestic Arbitration (Non-International)
 - Tribunal decides the dispute according to the substantive law in force in India.
 - b. International Commercial Arbitration
 - i. Tribunal applies the rules of law designated by the parties as applicable to the dispute.
 - ii. Designation of a country’s law refers to its substantive law, not conflict of laws rules, unless otherwise expressed.
 - iii. If no law is designated by the parties, the tribunal applies the law it considers appropriate given the circumstances.
2. Ex Aequo et Bono / Amiable Compositeur
 - Tribunal may decide ex aequo et bono or as amiable compositeur only if expressly authorized by the parties.
3. Consideration of Contract and Trade Usages

- Tribunal must take into account the terms of the contract and trade usages applicable to the transaction while making the award.

DECISION MAKING BY PANEL OF ARBITRATORS (Section 29)

1. Majority Decision
 - Unless agreed otherwise, in proceedings with more than one arbitrator, decisions are made by a majority of all members.
2. Presiding Arbitrator's Authority
 - Questions of procedure may be decided by the presiding arbitrator if authorized by the parties or all members.

ESSENTIALS OF AWARDS

- Arbitral award includes interim awards as well.

Feature	Description
Written and Stamped	Arbitration agreement, reference to arbitration, and the award must be in writing.
Signed	Award to be signed by members of the arbitral tribunal; majority signatures suffice if reasons for omitted signatures are stated.
Reasoned	• Making of an award is a rational process, emphasized by recording reasons. • Awards should generally contain reasons. • Exceptions where an award without reasons is valid: 1. Arbitration agreement expressly provides that no reasons are to be given. 2. Award under Section 30 of the Act (parties settle the dispute and tribunal records settlement as award on agreed terms). • Formulating reasons is a discipline that may lead the arbitrator to reconsider initial views. • Recording reasons involves analyzing the dispute to reach a logical conclusion. • Tribunal should explain its view of evidence and the rationale for its conclusions. • Preamble of the award may include: ○ Reference to the arbitration agreement ○ Constitution of the tribunal ○ Procedure adopted by the tribunal • Second part of the award may include: ○ Points at issue ○ Arguments of the claimant ○ Arguments of the respondent ○ Findings of the tribunal

	- Points at issue can be divided into two heads: - Issues of fact - Issues of law
Dated	Date of making of the award should be mentioned.
Mention of Place	Place of arbitration must be stated; determines rules applicable and recourse against award; refers to jurisdiction of a Court of a city or State as per Section 20.
Clarity of Value and Interest	Award may include the sum, interest up to the date of award, and directions regarding future interest.
Cost of Arbitration	Award may include decisions and directions regarding costs of arbitration.
Delivery of Copies	Signed copy should be delivered to each party for implementation or recourse against the award.
Type of Arbitral Award	Description
Interim Award	Award made by the tribunal during the pendency of the matter.
Additional Award	- Party may request within 30 days from receipt of the arbitral award for claims omitted in the award. - Tribunal, if request is justified, must make additional award within 60 days of request.
Settlement Award	- Tribunal may encourage settlement through mediation, conciliation, or other procedures. - If parties settle, tribunal may terminate proceedings and, if requested, record settlement as arbitral award on agreed terms.
Final Award	Award that finally determines all the issues in a dispute.

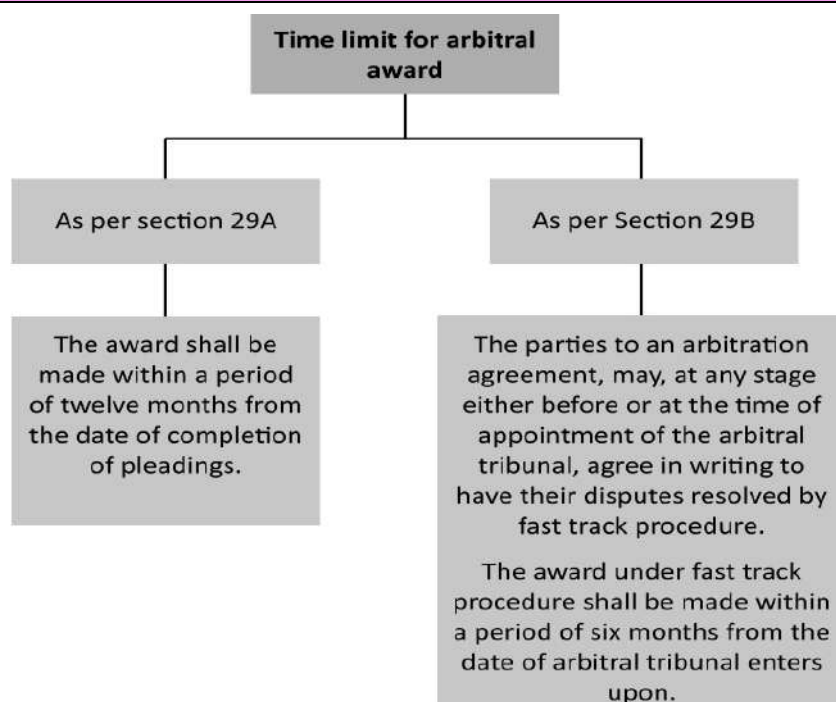
Case Law

Union of India v. Om Vajrakaya Construction Company (Delhi High Court, 20.12.2021, OMP (COMM) 299/2021)

Key Point:

- The Delhi High Court held that, unlike the arbitral tribunal's limited power to award interest, the court has unrestricted power to award costs under Section 31A of the Arbitration and Conciliation Act.
- Any agreement between parties preventing the awarding of costs is irrelevant, except if made after a dispute has arisen.

TIME LIMIT FOR ARBITRAL AWARD



- The award shall be made within a period of twelve months from the date of completion of pleadings.
- The parties may extend this period for making award for a further period not exceeding six months.
- The parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon.
- **Section 29A(1):** The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under section 23(4).
 Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under section 23(4).
- **Section 29A(2):** 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.
- **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):** If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall

terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period.

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application.

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

- **Section 29A(5):** The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.
- **Section 29A(6):** While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
- **Section 29A(7):** In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.
- **Section 29A(8):** It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.
- **Section 29A(9):** An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Case Law

Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal Thermal Power Ltd. OMP (MISC) (COMM) 512/2019
It was stated that amended section 29A (1) of Arbitration and Conciliation Act shall have a retrospective effect with respect to the pending arbitration suits as on the date of amendment.

FAST TRACK PROCEDURE

- **Section 29B(1):** 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):** While agreeing for resolution of dispute by fast track procedure, the parties may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
- **Section 29B(3):** The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):
 - a) Written pleadings without oral hearing: The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents, and submissions filed by the parties without any oral hearing.
 - b) Further clarification: The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them.
 - c) Oral hearing on request: An oral hearing may be held only if all the parties make a request or if the arbitral tribunal considers it necessary to have an oral hearing for clarifying certain issues.
 - d) Procedural discretion: 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):** The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- **Section 29B(5):** If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.
- **Section 29B(6):** The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

SETTLEMENT

- **Section 30(1):** It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute. With the agreement of the parties, the arbitral tribunal may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.
- **Section 30(2):** If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- **Section 30(3):** An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
- **Section 30(4):** An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Case Law State of Jharkhand v. Gitanjali Enterprises Arb. Appeal No. 09 of 2017 It is stated that Section 73 forms part III of the Arbitration and Conciliation Act, 1996 and is only applicable to conciliation proceedings and will not have any effect on Section 30 of the Act.

FORM AND CONTENTS OF ARBITRAL AWARD

- As per **section 31(1)** an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
- **Section 31(2)** states that for the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
- Under **Section 31(3)** the arbitral award shall state the reasons upon which it is based, unless
 - a. the parties have agreed that no reasons are to be given, or
 - b. the award is an arbitral award on agreed terms under section 30.
- **Section 31(4)** provides that the arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.
- **Section 31(5)** says that after the arbitral award is made, a signed copy shall be delivered to each party.
- Under **Section 31(6)** the arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
- Under **Section 31(7)**
 - a. Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
 - b. A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.
Explanation – The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978.
- As per **Section 31(8)** the cost of arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.

Case Law

R.P. Garg v. The Chief General Manager, Telecom Department & Ors., 2024 INSC 743
Decided by: Supreme Court on 10.09.2024

Facts/Background:

- The Arbitrator denied interest on the awarded sum, mistakenly believing the contract forbade it.
- The executing Court agreed with the Arbitrator.
- The District Court allowed the appeal, granting post-award interest to the appellant.
- The High Court overturned the District Court, saying the contract did not permit post-award interest.

Key Issue:

- Is the appellant entitled to post-award interest on the sum awarded by the Arbitrator?

Decision / Principle:

- Supreme Court held that under Section 31(7)(b) of the Arbitration & Conciliation Act, 1996, any sum directed to be paid by an Arbitral Award must carry interest.
- Post-award interest (from award date to payment):
 - Statutory and cannot be denied based on the contract.
 - The Arbitrator can fix the rate; if not, the statutory rate applies.
 - Parties cannot “contract out” of post-award interest.
- Pre-award interest (before award is made):
 - Regulated by Section 31(7)(a).
 - Interest is subject to agreement between parties.
- Supreme Court restored the District Court’s order granting 18% interest from award date till realization.

Takeaway / Concept:

- Post-award interest is automatic by law under Section 31(7)(b), irrespective of the contract.
- Pre-award interest depends on parties’ agreement (Section 31(7)(a)).
- Section 31(7) distinguishes before award vs after award interest.

REGIME FOR COSTS

- **Section 31A (1)** provides that in relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine,
 - (a) whether costs are payable by one party to another;
 - (b) the amount of such costs; and
 - (c) when such costs are to be paid.
- **Explanation:** For the purpose of this sub-section, “costs” means reasonable costs relating to,
 - (viii) the fees and expenses of the arbitrators, Courts and witnesses;
 - (ix) legal fees and expenses;
 - (x) any administration fees of the institution supervising the arbitration; and
 - (xi) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

- Under **Section 31A (2)** if the Court or arbitral tribunal decides to make an order as to payment of costs,
 - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; or
 - (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.
- **Section 31A (3)** provides that in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including,
 - (a) the conduct of all the parties;
 - (b) whether a party has succeeded partly in the case;
 - (c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
 - (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.
- Under **Section 31A (4)** the Court or arbitral tribunal may make any order under this section including the order that a party shall pay,
 - a. a proportion of another party's costs;
 - b. a stated amount in respect of another party's costs;
 - c. costs from or until a certain date only;
 - d. costs incurred before proceedings have begun;
 - e. costs relating to particular steps taken in the proceedings;
 - f. costs relating only to a distinct part of the proceedings; and
 - g. interest on costs from or until a certain date.
- **Section 31A (5)** states that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Termination of Proceedings

As per **section 32 (1)** the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

Under **section 32 (2)** the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where, a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises

- a. legitimate interest on his part in, obtaining a final settlement of the dispute,
- b. the parties agree on the termination of the proceedings, or
- c. the arbitral tribunal finds that the continuation of the proceedings has for any other 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; ADDITIONAL AWARD

- **Section 33(1)** provides that within 30 days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties:
 - a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
 - b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
- **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.
- **Section 33(3)** states that the arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
- **Section 33(4)** provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
- **Section 33(5)** provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
- **Section 33(6)** states that 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):** 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 sub-section (3).
- **Section 34(2):** An arbitral award may be set aside by the Court only if:
 - a. The party making the application establishes on the basis of the record of the arbitral tribunal that:
 - i. a party was under some incapacity, or

- ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
 - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- b. The Court finds that:
- i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - ii. the arbitral award is in conflict with the public policy of India.
- **Explanation 1:** An award is in conflict with the public policy of India only if:
 - (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
 - (ii) it is in contravention with the fundamental policy of Indian law; or
 - (iii) it is in conflict with the most basic notions of morality or justice.
 - **Explanation 2:** The test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.
 - **Section 34(2A):** An arbitral award arising out of arbitrations, other than international commercial arbitrations, may also be set aside by the Court if it is vitiated by patent illegality appearing on the face of the award:
Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.
 - **Section 34(3):** 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.

- **Section 34(4):** On receipt of an application under sub-section (1), the Court may, where appropriate and so requested by a party, adjourn the proceedings for a period of time determined by it to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.
- **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.
- **Section 34(6):** An application under this section shall be disposed of expeditiously, and in any event, within one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Case Laws

1. State of Maharashtra v. Hindustan Construction Co. AIR 2010 SC 1299
 - Any ground not raised initially under Section 34 cannot be raised after the expiry of the prescribed period.
2. TPI Ltd. v. Union of India, 2001(3) RAJ 70 (Del)
 - Section 34 is constitutional.
 - Challenge to an arbitral award can be made only on grounds specified by the law, not on merits of the case.
3. Oil and Natural Gas Corp. Ltd. v. Saw Pipes Ltd. AIR 2003 SC 262
 - Public policy should be interpreted broadly, not narrowly.
 - It relates to public good and interest, not government policy.
 - A foreign award can be refused if enforcement would conflict with:
 - i. Fundamental policy of Indian law
 - ii. Interests of India
 - iii. Justice or morality
 - Courts can challenge an arbitral award if it fails to dispense justice.

FINALITY OF ARBITRAL AWARDS AND ENFORCEMENT

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively

Enforcement

1. Section 36(1):

- When the time for making an application to set aside the arbitral award under Section 34 has expired, the award shall be enforced in accordance with the Code of Civil Procedure, 1908, as if it were a decree of the court.

2. Section 36(2):

- Filing an application under Section 34 does not automatically make the award unenforceable.

- The award becomes unenforceable only if the Court grants a stay on a separate application for that purpose.

3. Section 36(3):

- Upon a separate application for stay, the Court may grant stay of the award, subject to conditions, with reasons recorded in writing.
- While considering stay of an award for payment of money, the Court shall have due regard to provisions for grant of stay of a money decree under the Code of Civil Procedure, 1908.

4. Proviso added by Arbitration and Conciliation (Amendment) Act, 2021:

- The Court shall stay the award unconditionally if satisfied that a prima facie case exists showing:
 - a. The arbitration agreement or contract forming the basis of the award; or
 - b. The making of the award was induced or effected by fraud or corruption.
- This stay is pending disposal of the challenge under Section 34.

5. Explanation:

- The proviso applies to all court cases arising out of or in relation to arbitral proceedings.
- It applies regardless of whether the arbitral or court proceedings commenced before or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

APPEALABLE ORDERS

Section 37(1) provides that notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely,

- (a) refusing to refer the parties to arbitration under section 8;
- (b) granting or refusing to grant any measure under section 9;
- (c) setting aside or refusing to set aside an arbitral award under section 34.

Further **Section 37(2)** provides that appeal shall also lie to a court from an order of the arbitral tribunal –

- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
- (b) granting or refusing to grant an interim measure under section 17.

Section 37(3) states that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Case Law

SECTION 37 ARBITRATION AND CONCILIATION ACT, 1996

1. Augmont Gold Pvt Ltd. v. One97 Communication Ltd. (27.09.2021) ARB A.(COMM.) 30/2021
 - Held that no appeal lies under Section 37 to the Court if the tribunal's order is made under Section 17 due to its discretionary and final nature.

2. Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Co. (13.11.2021, Civil Appeal 6832/2021)
 - Observed that the powers of the High Court under Section 37 are different from the powers of a First Appellate Court under Section 34.
3. State of Chhattisgarh v. M/s. Sal Udyog Pvt. Ltd. (08.11.2021, Civil Appeal 4353/2010)
 - Held that “patent illegality” is a valid ground under Section 37.
 - A party is not barred from raising a fresh ground of challenge in an appeal.

Deposits (Section 38)

1. As per **Section 38(1)** the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it.
2. Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.
3. **Section 38(2)** states that the deposit referred to in sub-section (1) shall be payable in equal shares by the parties.
4. Provided that where one party fails to pay his share of the deposit, the other party may pay that share.
5. Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.
6. **Section 38(3)** provides that upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Lien on Arbitral Award and Deposits as to Costs (Section 39)

1. **Section 39(1)** provides that subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.
2. **Section 39(2)** states that if in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.
3. **Section 39(3)** provides that an application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and

the arbitral tribunal and the arbitral tribunal shall be entitled to appear and be heard on any such application.

4. **Section 39(4)** states that the Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Arbitration Agreement not to be Discharged by Death of Party Thereto (Section 40)

1. **Section 40(1)** provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.
2. **Section 40(2)** states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.
3. **Section 40(3)** states that nothing in this section shall affect the operation or any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of Insolvency (Section 41)

1. **Section 41(1)** provides that where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.
2. **Section 41(2)** states that where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.
3. **Section 41(3)** states that the expression “receiver” includes an Official Assignee.

Jurisdiction (Section 42)

1. **Section 42** provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications

arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Confidentiality of Information (Section 42A)

1. **Section 42A** provides that notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

Protection of Action Taken in Good Faith (Section 42B)

1. **Section 42B** provides that no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

Limitations (Section 43)

1. **Section 43(1)** provides that the Limitation Act, 1963, shall apply to arbitrations as it applies to proceedings in court.
2. **Section 43(2)** states that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.
3. **Section 43(3)** provides that where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.
4. **Section 43(4)** provides that where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

ARBITRATION COUNCIL OF INDIA (ACI)

Part IA as inserted in the Amendment Act, 2019 deals with Arbitration Council of India. Section 43A of Act contains definitions of terms used in Part IA such as Chairperson, Council and Member

Establishment and Incorporation of Arbitration Council of India (Section 43B)

1. **Section 43B** empowers the Central Government to establish the Arbitration Council of India to perform the duties and discharge the functions under the Arbitration and Conciliation Act, 1996.
2. The Council shall be a body corporate by the name “Arbitration Council of India,” having perpetual succession and a common seal.
3. The Council shall have the power, subject to the provisions of the Act, to acquire, hold, and dispose of property, both movable and immovable, and to enter into contracts.
4. The Council shall, by the said name, sue or be sued.
5. The head office of the Council shall be at Delhi.
6. The Council may, with the prior approval of the Central Government, establish offices at other places in India.

Composition of the Council (Section 43C)

1. The Council shall consist of the following Members:
 - (a) Chairperson – A person who has been a Judge of the Supreme Court or Chief Justice of a High Court or a Judge of a High Court or an eminent person having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India.
 - (b) Member – An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government.
 - (c) Member – An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson.
 - (d) Member, ex officio – Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary.
 - (e) Member, ex officio – Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary.
 - (f) Part-time Member – One representative of a recognised body of commerce and industry,
 - (f) chosen on rotational basis by the Central Government.
 - (g) Member-Secretary, ex officio – Chief Executive Officer.
2. The Chairperson and Members of the Council, other than ex officio Members, shall hold office for a term of three years from the date on which they enter upon their office.
3. The Chairperson shall not hold office after attaining the age of seventy years.
4. A Member, other than ex officio Member, shall not hold office after attaining the age of sixty-seven years.
5. The salaries, allowances, and other terms and conditions of the Chairperson and Members shall be prescribed by the Central Government.

6. The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.

Duties and Functions of the Council (Section 43D)

1. The Council shall take all measures necessary to promote and encourage arbitration, mediation, conciliation, or other alternative dispute resolution mechanisms.
2. The Council shall frame policy and guidelines for the establishment, operation, and maintenance of uniform professional standards in all matters relating to arbitration.
3. For performing its duties and functions under the Act, the Council may:
 - (a) Frame policies governing the grading of arbitral institutions.
 - (b) Recognise professional institutes providing accreditation of arbitrators.
 - (c) Review the grading of arbitral institutions and arbitrators.
 - (d) Hold training, workshops, and courses in arbitration in collaboration with law firms, law universities, and arbitral institutes.
 - (e) Frame, review, and update norms to ensure a satisfactory level of arbitration and conciliation.
 - (f) Act as a forum for exchange of views and techniques to create a platform for India as a robust centre for domestic and international arbitration and conciliation.
 - (g) Make recommendations to the Central Government on measures for easy resolution of commercial disputes.
 - (h) Promote institutional arbitration by strengthening arbitral institutions.
 - (i) Conduct examinations and training on various subjects relating to arbitration and conciliation and award certificates thereof.
 - (j) Establish and maintain a depository of arbitral awards made in India.
 - (k) Make recommendations regarding personnel, training, and infrastructure of arbitral institutions.
 - (l) Perform such other functions as may be decided by the Central Government.

Vacancies, etc., not to invalidate proceedings of Council (Section 43E)

1. No act or proceeding of the Council shall be invalid merely by reason of:
 - (a) Any vacancy or defect in the constitution of the Council.
 - (b) Any defect in the appointment of a person acting as a Member of the Council.
 - (c) Any irregularity in the procedure of the Council not affecting the merits of the case

Resignation of Members (Section 43F)

1. The Chairperson or Full-time or Part-time Member may resign by notice in writing to the Central Government.
2. The Chairperson or Full-time Member shall, unless permitted by the Central Government to relinquish office sooner, continue to hold office until:
 - Three months from the date of receipt of the notice, or
 - A person duly appointed as his successor enters office, or
 - The expiry of his term of office, whichever is earlier.

Removal of Member (Section 43G)

1. The Central Government may remove a Member from office if he:
 - (a) Is an undischarged insolvent.
 - (b) Has engaged during his term (except Part-time Member) in any paid employment.
 - (c) Has been convicted of an offence involving moral turpitude.
 - (d) Has acquired financial or other interest likely to prejudicially affect his functions.
 - (e) Has abused his position making continuance prejudicial to public interest.
 - (f) Has become physically or mentally incapable of acting as a Member.
2. No Member shall be removed on grounds (d) or (e) unless the Supreme Court, on reference by the Central Government, has held after inquiry that the Member ought to be removed.

Appointment of Experts and Constitution of Committees (Section 43H)

1. The Council may appoint experts and constitute Committees of experts as necessary to discharge its functions.
2. Terms and conditions of such experts and Committees shall be specified by regulations.

General Norms for Grading of Arbitral Institutions (Section 43I)

1. The Council shall grade arbitral institutions based on:
 - Infrastructure.
 - Quality and calibre of arbitrators.
 - Performance.
 - Compliance with time limits for disposal of domestic or international commercial arbitrations.
2. The grading criteria shall be specified by regulations.

Norms for Accreditation (Section 43J)

1. The qualifications, experience, and norms for accreditation of arbitrators shall be as specified by regulations.

General Norms Applicable to Arbitrator

1. The arbitrator shall be a person of general reputation of fairness, integrity, and capable of applying objectivity in arriving at settlement of disputes.
2. The arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or reasonably create an appearance of partiality or bias among the parties.
3. The arbitrator should not be involved in any legal proceeding and should avoid any potential conflict connected with any dispute to be arbitrated by him.
4. The arbitrator should not have been convicted of an offence involving moral turpitude or economic offence.

5. The arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing arbitral awards.
6. The arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices.
7. The arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes, apply legal principles to a situation under dispute, and apply judicial decisions relating to arbitration.
8. The arbitrator should be capable of suggesting, recommending, or writing a reasoned and enforceable arbitral award in any dispute before him for adjudication.

Depository of Awards (Section 43K)

1. The Council shall maintain an electronic depository of arbitral awards made in India.
2. The Council shall maintain such other records related to arbitral awards in a manner specified by the regulations.

Power to Make Regulations by Council (Section 43L)

1. The Council may, in consultation with the Central Government, make regulations consistent with the provisions of this Act and the rules made thereunder.
2. Such regulations shall be for the discharge of its functions and performance of its duties under the Act.

Chief Executive Officer (Section 43M)

1. There shall be a Chief Executive Officer of the Council responsible for the day-to-day administration of the Council.
2. Qualifications, appointment, and other terms and conditions of the service of the Chief Executive Officer shall be prescribed by the Central Government.
3. The Chief Executive Officer shall discharge functions and perform duties as specified by the regulations.
4. There shall be a Secretariat to the Council consisting of such number of officers and employees as prescribed by the Central Government.
5. Qualifications, appointment, and other terms and conditions of service of employees and other officers of the Council shall be prescribed by the Central Government.

ENFORCEMENT OF CERTAIN FOREIGN ARBITRAL AWARDS

Foreign Awards under New York and Geneva Conventions

1. Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with enforcement of foreign awards.
2. Foreign award definition (Sections 44 & 53):
 - Arbitral award on differences arising out of legal relationships (contractual or not).
 - Considered commercial under Indian law.

- Made on or after:
 - 11th Oct 1960 for New York Convention awards.
 - 28th July 1924 for Geneva Convention awards.

CHAPTER I – NEW YORK CONVENTION AWARDS

Awards Made under New York or Geneva Convention

1. Any foreign award enforceable under respective provisions is binding on parties.
2. Such awards may be relied upon in India for defence, set-off, or otherwise in legal proceedings.

Power of Judicial Authority to Refer Parties to Arbitration (Section 45)

1. Courts must refer parties to arbitration if an arbitration agreement exists.
2. Exception: if the agreement is prima facie null, void, inoperative, or incapable of performance.

When Foreign Award is Binding (Section 46)

1. Foreign awards enforceable under this chapter are binding on parties.
2. Can be relied upon in legal proceedings as defence, set-off, or otherwise.

Evidence Required (Section 47)

1. Party applying for enforcement must produce:
 - Original award or authenticated copy.
 - Original arbitration agreement or certified copy.
 - Evidence proving the award is foreign.
2. If in a foreign language, a certified English translation must be produced.
3. Court definition: High Court with original jurisdiction or appellate jurisdiction depending on the award's subject matter.

Conditions for Enforcement of Foreign Awards (Section 48)

Grounds to Oppose Enforcement

1. Incapacity of parties or invalidity of arbitration agreement under applicable law.
2. Party was not given proper notice of arbitrator appointment or proceedings, or unable to present case.
3. Award deals with issues not submitted to arbitration, or contains decisions beyond scope.
 - Part of award within scope may still be enforced.
4. Composition of arbitral authority or procedure not in accordance with agreement or law of country where arbitration took place.
5. Award not yet binding, or set aside/suspended by competent authority of the country of origin.

Additional Grounds

1. Subject matter not capable of settlement by arbitration under Indian law.
2. Enforcement contrary to public policy of India.

Public Policy Clarifications

1. Award conflicts with Indian public policy if:
 - Induced/affected by fraud or corruption, or violates Sections 75 or 81.
 - Contravenes fundamental policy of Indian law.
 - Conflicts with basic notions of morality or justice.
2. Review for fundamental policy does not involve re-examining the merits of the dispute.

Enforcement of Foreign Awards (Section 49)

Court satisfied with enforceability can execute foreign award as a decree of the Court.

Appealable Orders

Section 50(1) provides that “notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the order refusing to

- refer the parties to arbitration under section 45;
- enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court is not affected or taken away by virtue of these provisions.

CHAPTER II: GENEVA CONVENTION AWARDS

Power of Judicial Authority to Refer Parties to Arbitration (Section 54)

1. Courts must refer disputes to arbitration if:
 - The dispute relates to a contract between persons covered under Section 53.
 - The contract includes a valid arbitration agreement for present or future differences.
2. Reference can be made on the application of either party or any person claiming through them.
3. Court’s referral does not affect its competence if the arbitration cannot proceed or becomes inoperative.

Foreign Awards When Binding (Section 55)

1. Foreign awards enforceable under this Chapter are binding on parties.
2. Such awards can be relied upon in India for:
 - Defence
 - Set-off
 - Other legal proceedings
3. References to enforcing a foreign award also include relying on the award.

Evidence for Enforcement (Section 56)

1. Party applying for enforcement must produce:
 - Original award or authenticated copy.
 - Evidence proving the award has become final.
 - Evidence showing conditions in clauses (a) and (c) of Section 57(1) are satisfied.
2. If any document is in a foreign language, a certified English translation must be produced:
 - Certified by a diplomatic/consular agent of the party's country, or
 - In any other manner sufficient under Indian law.

Court Definition

1. Primary meaning: Principal Civil Court of original jurisdiction in the district, including the High Court in its original civil jurisdiction.
2. Excludes: Civil courts inferior to the Principal Civil Court or Courts of Small Causes.
3. Alternate meaning: High Court with original jurisdiction over questions forming the subject matter of the award, or appellate jurisdiction for subordinate courts.

Conditions for Enforcement of Foreign Awards (Section 57)

Sub-section (1) – Mandatory Conditions for Enforcement

A foreign award is enforceable only if:

1. The award was made pursuant to a valid submission to arbitration under the applicable law.
2. The subject-matter of the award is capable of settlement by arbitration under Indian law.
3. The award was made by the arbitral tribunal provided in the submission, or constituted according to the agreed procedure and in conformity with governing law.
4. The award has become final in the country where it was made (i.e., it is not open to appeal or opposition, and no contesting proceedings are pending).
5. Enforcement of the award is not contrary to public policy or law of India.

Explanation 1 – Public Policy Violation:

- An award conflicts with public policy of India if:
 - i. It was induced or affected by fraud or corruption, or violated Sections 75 or 81;
 - ii. It contravenes the fundamental policy of Indian law;
 - iii. It conflicts with basic notions of morality or justice.

Explanation 2 – Fundamental Policy Test:

- Determining contravention of fundamental policy does not involve review of merits of the dispute.

Sub-section (2) – Grounds for Refusing Enforcement Even if Conditions are Met

The Court may refuse enforcement if:

- a. The award has been annulled in the country of origin.
- b. The party against whom the award is invoked was not given proper notice of arbitration or, due to legal incapacity, was not properly represented.

- c. The award exceeds the scope of submission to arbitration or does not deal with all differences:
 - Court may postpone enforcement or allow enforcement subject to guarantee if not all differences are covered.

Sub-section (3) – Other Grounds Under Governing Law

- If the party proves a ground under the law governing arbitration (other than grounds in sub-sections (1) and (2)),
 - The Court may refuse enforcement or adjourn to allow the party to get the award annulled by the competent tribunal.

Enforcement of Foreign Awards (Section 58)

- If the Court is satisfied that the foreign award is enforceable, it is deemed to be a decree of the Court.

Appealable Orders (Section 59)

Sub-section (1) – Orders Appealable

- Appeal lies against orders:
 - a. Refusing to refer parties to arbitration under Section 54.
 - b. Refusing to enforce a foreign award under Section 57.
- Appeal is to the court authorized to hear such appeals.

Sub-section (2) – Limitation on Further Appeals

- No second appeal is allowed against an appellate order under this section.
- Right to appeal to the Supreme Court remains unaffected.

CONCILIATION

- Conciliation is an informal process where a neutral third party (conciliator) assists disputing parties to reach a settlement.
- The conciliator:
 - Lowers tensions between parties.
 - Improves communication.
 - Interprets issues and provides technical assistance.
 - Explores potential solutions.
 - Facilitates a negotiated settlement.
- Difference from Mediation:
 - Mediation is a structured process where the mediator assists parties in reaching a negotiated agreement.
 - Mediation usually results in a signed agreement defining future conduct.
 - Mediator cannot render a binding decision; similar principle applies in conciliation.
- Success of conciliation or mediation depends heavily on the personality and skill of the conciliator or mediator to induce settlement.

- Conciliation is formally recognized in India under the Arbitration and Conciliation Act, 1996.
- It is complementary to arbitration or litigation, not an alternative.

Application and Scope (Sections 61(1)–61(2))

2. Section 61(1):

- Part III of the Act applies to conciliation of disputes arising out of legal relationships, whether contractual or not.
- Also applies to all proceedings relating to conciliation, unless parties have agreed otherwise or another law provides differently.

3. Section 61(2):

- Part III does not apply where any law in force prohibits certain disputes from being submitted to conciliation.

Commencement of Conciliation Proceedings (Section 62)

1. Initiation by Written Invitation (Sub-section 1)

- The party wishing to start conciliation sends a written invitation to the other party.
- The invitation must briefly identify the subject of the dispute.

2. Acceptance of Invitation (Sub-section 2)

- Conciliation proceedings commence when the other party accepts the invitation in writing.

3. Rejection of Invitation (Sub-section 3)

- If the other party rejects the invitation, no conciliation proceedings will take place.

4. No Response to Invitation (Sub-section 4)

- If no reply is received within 30 days (or another period specified in the invitation), the initiating party may treat it as a rejection.
- The initiating party must inform the other party in writing if they choose to treat it as a rejection.

Number of Conciliators



There shall be one conciliator unless the parties agree that there shall be two or three conciliators



Where there is more than one conciliator, they ought, as a general rule, to act jointly

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1. Appointment of Conciliators (Section 64)

- Sub-section 1: Modes of appointment:

- One conciliator: Parties agree on a sole conciliator.
- Two conciliators: Each party appoints one conciliator.
- Three conciliators: Each party appoints one conciliator, and the parties agree on the third (presiding) conciliator.
- Sub-section 2: Assistance of institutions/persons:
 - Parties can seek help from an institution/person to recommend or appoint conciliators.
 - Must ensure independence and impartiality.
 - For sole or presiding conciliators, nationality different from parties may be considered.

2. Submission of Statements to Conciliator (Section 65)

- Initial statement: Parties submit a brief written statement describing the dispute; copies are shared with the other party.
- Further statement: Parties may provide detailed positions, facts, documents, and evidence; shared with the other party.
- Additional information: Conciliator may request further information at any stage.

Explanation: “Conciliator” includes sole, two, or three conciliators.

3. Conciliator’s Independence (Section 66)

- Not bound by CPC, 1908 or Indian Evidence Act, 1872.
- Free to conduct proceedings in a flexible, informal manner.

4. Role of Conciliator (Section 67)

- Assist parties independently and impartially to reach an amicable settlement.
- Guided by objectivity, fairness, justice, trade usages, previous practices, and circumstances of the dispute.
- Conduct proceedings in a manner appropriate to the case; may consider oral statements and speed of settlement.
- May propose settlements at any stage; proposals need not be in writing or reasoned.

5. Administrative Assistance (Section 68)

- Parties or conciliator may seek administrative support from an institution or person to facilitate proceedings.

6. Communication (Section 69)

- Conciliator may meet or communicate with parties together or separately, orally or in writing.
- Place of meetings determined by conciliator after consulting parties unless agreed otherwise.

7. Disclosure of Information (Section 70)

- Factual information received by conciliator must be disclosed to the other party.
- Exception: If party gives information conditionally confidential, conciliator must not disclose.

8. Co-operation of Parties (Section 71)

- Parties must co-operate in good faith, including providing written materials, evidence, and attending meetings.

9. Suggestions for Settlement (Section 72)

- Parties may propose settlement terms on their own initiative or at conciliator's invitation.

10. Settlement Agreement (Section 73)

- Formulation: Conciliator drafts possible settlement terms and seeks parties' observations; may reformulate.
- Execution: Parties may draw up and sign a written settlement agreement; conciliator may assist.
- Binding effect: Signed agreement is final and binding on parties and those claiming under them.
- Authentication: Conciliator authenticates the agreement and provides copies.

11. Status and Effect (Section 74)

- Settlement agreement has the same effect as an arbitral award on agreed terms under Section 30.

12. Confidentiality (Section 75)

- All matters relating to conciliation proceedings are confidential.
- Confidentiality extends to the settlement agreement, except for implementation or enforcement purposes.

TERMINATION OF CONCILIATION PROCEEDINGS

Conciliation proceedings can be terminated in the following ways:

1. Signing of Settlement Agreement
 - Proceedings terminate on the date of the agreement.
2. Conciliator's Written Declaration
 - After consulting parties, if further efforts are no longer justified.
3. Written Declaration by Parties
 - Parties may jointly declare termination, effective on the date of declaration.
4. Written Declaration by One Party

- A party may terminate by a written declaration to the other party and the conciliator (if appointed).

Key point: Termination is effective immediately on the date of the declaration or agreement.

2. Resort to Arbitral or Judicial Proceedings (Section 77)

- During conciliation, parties shall not initiate arbitration or court proceedings on the same dispute.
- Exception: A party may initiate proceedings if necessary to preserve its rights.

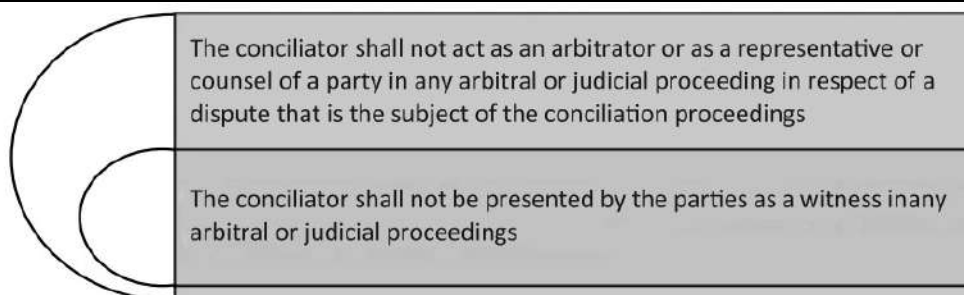
3. Costs of Conciliation (Section 78)

- Sub-section 1: Conciliator fixes costs upon termination and informs parties in writing.
- Sub-section 2: Costs include:
 1. Fees and expenses of conciliator and witnesses (with parties' consent).
 2. Expert advice requested by conciliator (with consent).
 3. Administrative assistance (per Section 64(2)(b) and Section 68).
 4. Any other reasonable expenses related to conciliation or settlement.
- Sub-section 3:
 - Costs are borne equally by the parties, unless the settlement agreement provides otherwise.
 - Other expenses incurred individually are borne by that party.

4. Deposits for Costs (Section 79)

1. Initial deposits:
 - Conciliator may direct each party to deposit an equal advance for expected costs (Section 78).
2. Supplementary deposits:
 - During proceedings, conciliator may require additional equal deposits.
3. Non-payment consequences:
 - If deposits are not paid in 30 days, conciliator may:
 - Suspend proceedings, or
 - Terminate proceedings by written declaration.
4. Accounting after termination:
 - Conciliator renders an account of deposits.
 - Returns any unspent balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS



Admissibility of Evidence in Other Proceedings (Section 81)

- Parties cannot rely on or introduce as evidence in arbitral or judicial proceedings, whether or not they relate to the dispute in conciliation:
 1. Views or suggestions made by the other party regarding a possible settlement.
 2. Admissions made by the other party during conciliation proceedings.
 3. Proposals made by the conciliator.
 4. The fact that the other party indicated willingness to accept a proposal made by the conciliator.

Power of High Court to Make Rules (Section 82)

- The High Court may make rules consistent with the Act regarding all proceedings before the Court under this Act.

Removal of Difficulties (Section 83)

1. Sub-section (1):
 - If difficulties arise in giving effect to the Act, the Central Government may issue orders in the Official Gazette to remove the difficulty.
 - Orders must be consistent with the Act.
 - Orders cannot be made after 2 years from the commencement of the Act.
2. Sub-section (2):
 - Every order made under this section shall be laid before each House of Parliament as soon as possible.

Power to Make Rules (Section 84)

1. Sub-section (1):
 - The Central Government may make rules by notification in the Official Gazette to carry out the provisions of the Act.
2. Sub-section (2):
 - Every rule must be laid before both Houses of Parliament as soon as possible for a period of 30 days (can be one or more sessions).
 - If both Houses modify or annul the rule before the end of the next session:
 - The rule applies only in modified form or is of no effect.
 - Previous actions under the rule remain valid despite modification or annulment.

MEDIATION

1. Nature of Mediation

- Non-adversarial method of dispute resolution, unlike the adversarial method.
- Informal, friendly, and simpler process.
- Encourages communication between parties to:
 - Identify issues driving the conflict.

- Recognize shared interests.
- Focus on resolving the dispute independently.
- Saves time and money for the parties.

2. Definition and Meaning

According to Civil Procedure ADR and Mediation Rules, 2003:

- Mediation is a process where a mediator (appointed by parties or court) facilitates discussions between parties.
- The mediator assists in:
 - Identifying issues.
 - Reducing misunderstandings.
 - Clarifying priorities.
 - Exploring areas of compromise.
 - Generating options for dispute resolution.
- Emphasizes that the parties themselves are responsible for decisions affecting them.

According to Section 4 of Mediation Bill, 2021:

- Mediation refers to any process (mediation, pre-litigation mediation, online mediation, community mediation, conciliation, or similar) where parties request a third person (mediator) or mediation service provider to help them reach an amicable settlement.

3. Characteristics of Mediation

- Voluntary: Parties choose to participate.
- Party-centered: Focus on the needs, desires, and interests of the parties.
- Structured negotiation: Conducted in an organized manner using specific communication and negotiation techniques.
- Active participation: Parties are the key decision-makers; mediator, advocates, and others facilitate but do not impose solutions.
- Assisted negotiation: Mediator assists parties to negotiate rather than decide for them.

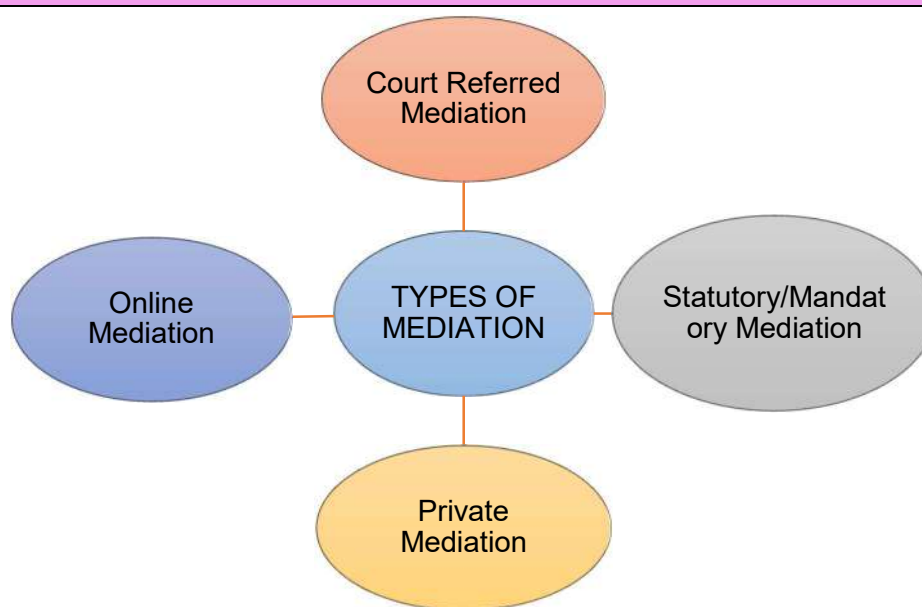
4. Scope and Focus

- Addresses both:
 - Factual/legal issues of the dispute.
 - Underlying causes (personal, business, family, social, community interests).
- Goal: Achieve a mutually acceptable solution that satisfies the needs and interests of all parties.

5. Advantages of Mediation

- Efficient, effective, and speedy.
- Convenient and less expensive than traditional litigation.
- Promotes resolution with dignity, mutual respect, and civility.

Types of Mediation



Type of Mediation	Description
Court-Referred Mediation	Applies to cases pending in Court; Court refers cases under Sec. 89 of CPC. Cases are assigned to skilled mediators from Court Mediation Centres after a preliminary investigation.
Court-Annexed Mediation	Mediation services are provided directly by the court as part of the judicial system, unlike Court-Referred Mediation where the court only refers the case to a mediator.
Statutory/Mandatory Mediation	Certain disputes (e.g., labor and family law) are required by law to go through mediation. Mandates attempting mediation but does not force parties to reach a settlement.
Private Mediation	Qualified mediators offer services privately on a fee-for-service basis to courts, the public, commercial sector, and government. Can be used for both pre-litigation and court-pending disputes.
Online Mediation	Conducted at any stage of mediation (including pre-litigation) with written consent of parties, using electronic forms or computer networks.

Merits of Mediation

Mediation is:

- Quick and responsive.
- Economical.
- There is no extra cost.
- Harmonious settlement.
- Creating solutions and remedies.
- Confidential and informal.
- Parties controlling the proceedings.

Mediation Act, 2023

- Mediation Act, 2023 has received the assent of the Hon'ble President of India on 14th September, 2023.
- The object of this law inter alia is to:
 - Promote and facilitate mediation,
 - Resolution of disputes,
 - Enforce mediated settlement agreements,
 - Provide for a body for registration of mediators,
 - Encourage community mediation,
 - Make online mediation an acceptable and cost-effective process.
- The provisions of this law will come into force on such date(s) as the Central Government will notify.
- Sections of the Mediation Act, 2023 in force w.e.f. 9th October, 2023:

Section 1: Short title, extent and commencement

- This Act may be called the Mediation Act, 2023.
- It shall extend to the whole of India.
- It shall come into force on such date as the Central Government may, by notification, appoint.
- Different dates may be appointed for different provisions of this Act.
- Any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Section 3: Definitions

- “Commercial dispute” means a dispute defined in clause (c) of sub-section (1) of section 2 of the Commercial Courts Act, 2015.
- “Community mediator” means a mediator for the purposes of conduct of community mediation under Chapter X.
- “Council” means the Mediation Council of India established under section 31.
- “Court-annexed mediation” means mediation including pre-litigation mediation conducted at the mediation centres established by any court or tribunal.
- “Institutional mediation” means mediation conducted under the aegis of a mediation service provider.
- “International mediation” means mediation undertaken under this Act and relates to a commercial dispute arising out of a legal relationship, contractual or otherwise, under any law in force in India, and where at least one of the parties is:
 - An individual who is a national of, or habitually resides in, any country other than India; or
 - A body corporate including a Limited Liability Partnership with its place of business outside India; or
 - An association or body of individuals whose place of business is outside India; or
 - The Government of a foreign country.

- “Mediation” includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute.
- “Mediator” means a person who is appointed to be a mediator by the parties or by a mediation service provider to undertake mediation, and includes a person registered as mediator with the Council.
 - Explanation: Where more than one mediator is appointed, reference to a mediator under this Act shall be a reference to all the mediators.
- “Mediation agreement” means a mediation agreement referred to in sub-section (1) of section 4.
- “Mediation communication” means communication made, whether in electronic form or otherwise, through:
 - Anything said or done;
 - Any document; or
 - Any information provided,
 - For the purposes of, or in relation to, or in the course of mediation, and includes a mediation agreement or a mediated settlement agreement.
- “Mediation institute” means a body or organisation that provides training, continuous education, and certification of mediators and carries out other functions under this Act.
- “Mediation service provider” means a mediation service provider referred to in sub-section (1) of section 40.
- “Mediated settlement agreement” means mediated settlement agreement referred to in sub-section (1) of section 19.
- “Online mediation” means online mediation referred to in section 30.
- “Pre-litigation mediation” means a process of undertaking mediation, as provided under section 5, for settlement of disputes prior to filing of a suit or proceeding of civil or commercial nature before a court or notified tribunal under sub-section (2) of section 5.
- “Specified” means specified by regulations made by the Council under this Act.

Sections 31 to 38: Mediation Council of India

- The Central Government shall, by notification, establish a Council to be known as the Mediation Council of India to perform duties and discharge functions under this Act.
- Composition of Council shall be in accordance with section 32.
- Other provisions relate to:
 - Vacancies not invalidating proceedings of Council,
 - Resignation, removal,
 - Appointment of experts and constitution of Committees,
 - Secretariat and Chief Executive Officer of Council,
 - Duties and functions of Council.

Sections 45 to 47: Mediation Fund, Accounts and Audits & Power of Central Government to issue directions

- Section 45 provides for creation of “Mediation Fund” and prescribes amounts to be credited.
- Accounts of the Council to be audited by Comptroller and Auditor-General of India; expenditure payable by the Council.
- Council bound by directions on policy questions from Central Government; Central Government’s decision on policy questions is final.

Sections 50 to 54: Protection, power of making rules, regulations, and removal of difficulties

- Section 50: No suit, prosecution or legal proceeding shall lie against the Central Government, State Government, their officers, Council members, mediators, mediation institutes, mediation service providers if done in good faith under this Act or rules/regulations.
- Central Government has power to make rules; Mediation Council can make regulations.
- Notification, rules, and regulations laid before both Houses of Parliament for 30 days; modifications or annulment by both Houses apply prospectively without affecting previous actions.
- Central Government may make provisions to remove difficulties, not inconsistent with this Act; no order after five years from commencement.

Sections 56 and 57: Effect on pending proceedings and transitory provisions

- Act does not apply to mediation or conciliation commenced before coming into force.
- Rules in force governing court-annexed mediation continue until regulations made under section 15(1).
- Rules continue to apply to all court-annexed mediation pending on the date of coming into force of regulations.

Mediation under Various Laws

There are various laws that provides for mediation as dispute redressal mechanism. An inclusive list of laws along with the related provisions covering the subject matter is provided below:

- The Companies Act, 2013
- Industrial Disputes Act, 1947
- Code of Civil Procedure, 1908
- Legal Services Authority Act, 1987 read with Section 89 of CPC
- Micro, Small and Medium Enterprises (MSME) Development Act, 2006
- Hindu Marriage Act, 1955 and Special Marriage Act, 1954
- Real Estate (Regulation and Development) Act, 2016
- Commercial Courts Act, 2015 and the Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018
- The Consumer Protection Act, 2019

Case Law

Salem Advocate Bar Association v. Union of India (2002, SC)

- Challenged amendments to CPC, especially Section 89.
- Supreme Court emphasized promoting ADR to reduce court delays.
- Section 89 includes arbitration, conciliation, judicial settlement, Lok Adalat, and mediation.
- Mediation requires rules to be prescribed; ADR aims for amicable settlement but does not remove the case from judicial system if settlement fails.

Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (2010, SC)

- Clarified Section 89 CPC on court referring parties to ADR.
- Arbitration/conciliation require party consent; Lok Adalat, mediation, judicial settlement do not.
- Court must choose ADR process based on nature of dispute, availability of mediation, and suitability for speedy resolution.

Arbitration v. Mediation

Since both options look appealing to resolve business disputes, there is a need to distinguish between the two:

- Mediation is when a neutral third party aims to assist the parties in arriving at a mutually agreeable solution whereas arbitration is like litigation which is outside the court and which results in an award like an order.
- Mediation is more collaborative; arbitration is more adversarial.
- The process of mediation is more informal than that of arbitration.
- The outcome in mediation is controlled by the parties whereas in arbitration it is controlled by the arbitrator.
- In mediation, the dispute may or may not be resolved whereas in arbitration it is always settled in either party's favour.

Alternative Dispute Resolution (ADR)

- Courts alone cannot handle the entire justice system; many disputes can be resolved through ADR.
- ADR includes arbitration, mediation, conciliation, negotiation, etc.
- ADR processes:
 - Provide procedural flexibility.
 - Save time and money.
 - Reduce stress compared to conventional trials.
- There is a need to establish and promote ADR services for both domestic and international disputes.
- ADR services require:
 - Sound conceptual foundations.

- Expertise in implementation.
- Comprehensive and modern facilities.

International Centre for Alternative Dispute Resolution (ICADR)

- Promotes teaching, research, and ADR services in India and internationally.
- Registered under Societies Registration Act, 1860; independent non-profit organization.
- Maintains panels of independent experts for implementing ADR processes.

Areas where ADR is effective

- Commercial, civil, labour, and family disputes.
- Business-related disputes, including:
 - Joint ventures
 - Construction projects
 - Partnership differences
 - Intellectual property
 - Personal injury
 - Product and professional liability
 - Real estate and securities
 - Contract interpretation and performance
 - Insurance coverage

LESSON-14

Right to Information Law

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

REGULATORY FRAMEWORK

The Right to Information Act, 2005

INTRODUCTION

- RTI is seen as the key to strengthening participatory democracy and ensuring more people-centred development.
- Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies
- In India also, the Government enacted Right to Information (RTI) Act in 2005 which came into force w.e.f. October 12, 2005.

RIGHT TO KNOW

- The case of *Reliance Petrochemicals Limited v. Indian Express Newspapers* (1989 AIR 90) recognized the right to know under Article 21 of the Constitution.
- The Supreme Court held that the right to know is a necessary ingredient of participatory democracy.
- Due to transnational developments and global cooperation, the term “liberty” under Article 21 must receive an expanded meaning.
- The expression “liberty” is not limited to absence of bodily restraint, but extends to a full range of rights, including:
 - Right to hold a particular opinion.
 - Right to sustain and nurture that opinion.
- To sustain and nurture an opinion, it becomes necessary to receive information.
- Therefore, Article 21 confers a right to know, which includes the right to receive information.
- Article 19(1)(a) guarantees freedom of speech and expression to all citizens.
- Article 19(2) allows the State to impose reasonable restrictions on this freedom in the interest of:
 - Sovereignty and integrity of India,
 - Security of the State,
 - Friendly relations with foreign States,

- Public order,
- Decency or morality,
- Contempt of court,
- Defamation,
- Incitement of offence.
- The right to freedom of speech and expression includes the right to propagate and circulate one's views and opinions, subject to reasonable restrictions.
- The prerequisite for enjoying this right is knowledge and information.
- Information adds something new to our awareness and removes vagueness of ideas.

THE RIGHT TO INFORMATION (RTI) ACT, 2005

- The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution.
- The Right to Information Bill was:
 - Passed by the Lok Sabha on May 11, 2005,
 - Passed by the Rajya Sabha on May 12, 2005,
 - Received the assent of the President on June 15, 2005.
- The Act is considered a watershed legislation.
- Regarded as the most significant milestone in the history of the Right to Information movement in India.
- The Act allows transparency, autonomy, and access to accountability.

SALIENT FEATURES OF THE ACT

Extends to the whole of India

Commencement- 120 days from enactment

Apply to public authorities

All citizens shall have right to information

Public Information Officer/Assistant Public Information Officer- responsible to deal with the requests and assist person seeking information

Fees payable depending upon the nature of information

Categories exempted from disclosure under sec 8 & 9 and Intelligence & security agencies specifies under sec 11

- The RTI Act confers on all citizens a right to information.
- The Act sets out the practical regime of the right to information.
- Purpose- To enable citizens to secure access to information held by public authorities.
- The objective is to promote transparency and accountability in the working of every public authority.

CASE LAW

In *Anjali Bhardwaj vs. UOI (2019)*, the Supreme Court linked RTI with good governance, highlighting four key aims:

1. Transparency in public functioning.
2. Informed citizen participation in decisions.
3. Accountability & better performance of government.
4. Reduction of corruption.

Essence: RTI = Tool for transparency, accountability, and clean governance.

- The right to information is not only a constitutional right of citizens.
- The RTI Act provides a legal regime for people to exercise their fundamental right to information.
- The Act enables citizens to access information from public authorities.
- The Preamble of the RTI Act emphasizes the importance of this democratic right, stating:
 - “Democracy requires an informed citizenry and transparency of information which are vital to its functioning.”
 - Transparency helps contain corruption and hold Governments and their instrumentalities accountable to the governed.
- The Act is enacted not only to ensure freedom of speech, but also to promote good governance.
- Proper implementation of the Act has the potential to bring about good governance.
- Good governance is described as an integral part of any vibrant democracy.
- Attaining good governance is one of the visions of the Constitution.

Question: Which of the given is provided with the Right to know under RTI Act, 2005?

Options: (A) Residents

(B) Peoples

(C) All persons having age of atleast 21 years

(D) Citizens

Answer: (D)

DEFINITIONS (section 2)

Public Authority [Section 2(h)]	means any authority or body or institution of self-government established or constituted – • By or under the Constitution; • By any other law made by Parliament; • By and other law made by State Legislature;

	• By notification issued or order made by the appropriate Government, and includes any– • body owned, controlled or substantially financed; • non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government
Record [Section 2(i)]	includes– (a) any document, manuscript and file; (b) any microfilm, microfiche and facsimile copy; (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and (d) any other material produced by a computer or any other device;
Information [Section 2(f)]	• means any material in any form • including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material in any electronic form and • information relating to any private body which can be accessed by a public authority under any other law for the time being in force.
Right to Information [Section 2(j)]	means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to– (i) taking notes, extracts, or certified copies of documents or records; (ii) inspection of work, documents, records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts Section 3 of the Act provides that subject to the provisions of this Act, all citizens shall have the right to information.
Third Party [Section 2(n)]	means a person other than the citizen making a request for information and includes a public authority.

OBLIGATIONS OF PUBLIC AUTHORITY

- Every public authority under the RTI Act has a duty to maintain records and publish manuals, rules, regulations, instructions, etc. as prescribed under the Act.
- This obligation is specified under Section 4(1)(a) of the RTI Act.
- As per Section 4(1)(a):
 - I. Every public authority must maintain all its records duly catalogued and indexed.
 - II. The records should be maintained in a manner and form that facilitates the right to information.
 - III. All records that are appropriate to be computerised should be computerised within a reasonable time, subject to availability of resources.
 - IV. These computerised records should be connected through a network across the country on different systems.
 - V. The purpose is to facilitate easy access to such records.
- As per Section 4(1)(b) of the RTI Act, every public authority must publish certain information within 120 days of the enactment of the Act.

- The information to be published includes:
 - I. Particulars of its organization, functions, and duties.
 - II. Powers and duties of officers and employees.
 - III. Procedure followed in decision-making, including channels of supervision and accountability.
 - IV. Norms set for the discharge of its functions.
 - V. Rules, regulations, instructions, manuals, and records used by employees in discharging functions.
 - VI. Statement of categories of documents held or controlled by it.
 - VII. Arrangements for consultation or representation of the public in policy formulation or implementation.
 - VIII. Statement of boards, councils, committees, and other bodies constituted by it, and information on whether:
 - Meetings are open to the public, or
 - Minutes of such meetings are accessible to the public.
 - IX. Directory of officers and employees.
 - X. Monthly remuneration of officers and employees and the system of compensation.
 - XI. Budget allocation for each agency, with plans, proposed expenditures, and disbursement reports.
 - XII. Execution of subsidy programmes, including amounts allocated, details, and beneficiaries.
 - XIII. Particulars of recipients of concessions, permits, or authorizations granted.
 - XIV. Details of information available or held in electronic form.
 - XV. Facilities available to citizens for obtaining information, including working hours of library or reading room, if maintained.
 - XVI. Names, designations, and other particulars of Public Information Officers.
 - XVII. Any other information as may be prescribed.
- These publications must be updated every year.
- As per Section 4(1)(c): every public authority must publish all relevant facts while formulating important policies or announcing decisions affecting the public.
- As per Section 4(1)(d): every public authority must provide reasons for its administrative or quasi-judicial decisions to the affected persons.

DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

- Every public authority is required to:
 1. Designate in all administrative units or offices Central or State Public Information Officers (PIOs) to provide information to persons who make requests.
 2. Designate at each sub-divisional or sub-district level Central Assistant or State Assistant Public Information Officers (APIOs) to:
 - Receive applications for information or appeals, and
 - Forward them to the concerned Central or State Public Information Officers.
- The person making a request for information is not required to give any reason for seeking the information, except contact details necessary for communication.

REQUEST FOR OBTAINING INFORMATION

- The RTI Act specifies the manner in which a citizen can make a request to a public authority for obtaining information.
- The Act also provides for the transfer of a request to another concerned public authority if that authority holds or is more closely connected with the information requested.

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO)



*40 days include maximum period + time given to the party to make representation

Note:

- Time taken for calculation and intimation of fees excluded from the time frame.
- No action on application for 30 days is a deemed refusal.
- No fee for delayed response.

Example:

A public authority received RTI application from H. The information sought for concerns the life or liberty of J. How much time is provided for providing information to this RTI application?

Answer: If the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

DUTIES OF A PIO

1. Dealing with requests:
 - Handle requests for information from citizens.
 - Provide reasonable assistance if the request cannot be made in writing.
2. Transfer of requests:
 - If information relates to another public authority, transfer the request within 5 days and inform the applicant immediately.
3. Assistance:
 - PIO may seek help from other officers to properly discharge duties.
4. Timeframe for providing information:
 - Provide information as quickly as possible, and within 30 days of receipt.
 - For requests concerning life or liberty, provide information within 48 hours.
 - If no decision is made within the prescribed period, the request is deemed refused.
5. Rejection of requests:
 - If a request is rejected, PIO must inform the requester about:
 1. Reasons for rejection
 2. Period to file an appeal
 3. Particulars of the Appellate Authority

6. Form of information:

- Provide information in the form requested, unless it:
 - Disproportionately diverts resources, or
 - Affects safety/preservation of records.

7. Partial access:

- If only part of the information is provided:
 - Inform the applicant about severed exempt portions
 - Provide reasons for decision, including findings and material relied upon
 - Mention name and designation of decision-maker
 - Give details of fees and amount payable
 - Explain rights for review regarding non-disclosure, fees, or form of access

8. Third-party information:

- If information supplied by a third party or treated as confidential, PIO must:
 - Notify the third party in writing within 5 days of receiving the request
 - Allow the third party 10 days to make a representation
- These duties are covered under Sections 5, 7, 10 & 11 of the RTI Act.

Case Law**CBSE vs. Aditya Bandopadhyay (2011) – Key Points****1. Limits on RTI Requests:**

- RTI cannot be used for indiscriminate or impractical demands unrelated to transparency, accountability, or corruption control.
- Misuse of RTI to harass officials or obstruct national development is prohibited.

2. Information Obligations:

- Public authorities must provide existing information (data, statistics, abstracts) subject to Section 8 exemptions.
- Authorities are not required to:
 - Collect or create information not already held.
 - Provide opinions, advice, or make inferences.

3. Time-bound Access to Records:

- RTI access is limited to information actually maintained.
- Example: CBSE answer-books are kept for 3 months; other examining bodies may keep for 6 months.
- Authorities are not obliged to preserve records longer than required by rules/regulations.

4. Core Principle:

- RTI provides access only to existing, maintained, or preserved information, not to generate or speculate new information.

This makes it easy to remember: RTI = access to existing info, not creation of new info; misuse or harassment is prohibited; access is time-bound to preserved records.

EXEMPTION FROM DISCLOSURE

Disclosure Prejudicially affecting	Where disclosure prejudicially affects the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence.
Expressly forbidden by court or tribunal	Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court.
Breach of privilege of Parliament or State Legislature	Where disclosure would cause a breach of privilege of Parliament or the State Legislature.
Harming competitive position	Information including commercial confidence, trade secrets or intellectual property, where disclosure would harm competitive position of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants.
Confidence from a third party	Information received in confidence from a foreign government.
Disclosure endangering life or physical safety	Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance.
Impede the process of investigation or apprehension or prosecution	Information that would impede the process of investigation or apprehension or prosecution of offenders.
Cabinet Papers	Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers.
Personal Information	Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

- Decisions of Council of Ministers:
 - The decisions, reasons, and material on which decisions are based must be made public after the decision is taken and the matter is complete.
- Exemptions:

- Information falling under exemptions specified in the Act shall not be disclosed.
- Parity with Legislature:
 - Any information that cannot be denied to Parliament or a State Legislature cannot be denied to any person.

Example: In case of a war or invasion, revealing or giving out information about strategically placed troops and related information, will be treated as information protected under section 8 of the Act. Such disclosure prejudicially affects the sovereignty and integrity of India.

Example: A, blows a whistle against sand corruption. His identity should be kept a secret since there is an increased risk to his safety and chances of violence against him increases. Such disclosure endangers his life and physical safety.

Example: A court while passing an order states that a particular information in that order shall not be disclosed. Such information shall fall under the disclosure by way of court order and would lead to contempt if not adhered to.

Case Law:

Kayalvizhi vs. CPIO, Office of IT Officer, Ward-1 (2022 – CIC)

1. Facts of the Case:

- The appellant sought income-related details of her brother and mother under RTI.
- The information pertained to third-party personal details.
- She also raised issues related to a family dispute, which is not redressable under RTI.

2. Decision:

- The RTI request was denied under Section 8(1)(j) (protection of personal information).

3. Observations of CIC:

- Personal records (e.g., name, address, physical/mental status, marks, grades, answer sheets) are treated as personal information.
- Such information is protected from unwarranted invasion of privacy.
- Conditional access may be allowed only if a larger public interest is demonstrated.

Key Takeaway: RTI cannot be used to access private information of third parties unless there is a significant public interest.

Question: NCLT forbids an information to be shared under RTI Act, 2005. Is the information exempted under Right to Information Act, 2005?

Answer: Yes, Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court are exempted.

Rejection of Request

The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved. (Section 9)

PARTIAL DISCLOSURE ALLOWED (Section 10 of RTI Act)

- Partial Access Allowed:
 - Only the part of a record that does not contain exempt information can be provided.
- Severability:
 - Exempt information can be severed from the record, and the remaining non-exempt part can be shared.
- Rejection with Partial Disclosure:
 - If a request is rejected due to exempt information, the non-exempt portion of the record must still be made accessible.

Key Idea: *“Share what can be shared, hide only what is exempt.”*

Case Law

Chief Information Commissioner vs. High Court of Gujarat (2020 – SC)

1. Issue:

- Whether a third party can obtain certified copies from the High Court under RTI Act, bypassing the Gujarat High Court Rules.

2. Supreme Court Observation:

- The High Court’s existing procedure (application/affidavit + court fee + reason for certified copy) is simple and effective.
- There is no need to invoke Section 11 of RTI Act to bypass this procedure.
- Avoiding the prescribed procedure would waste time and resources, contrary to the preamble of RTI Act which promotes efficiency.

Key Takeaway:

- RTI cannot be used to bypass simpler, existing procedures for obtaining information if those procedures are already effective.

WHO IS EXCLUDED?

Category	Agencies Excluded	Conditions / Exceptions
Central Intelligence & Security Agencies	IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman & Nicobar, Crime Branch-CID-CB, Dadra & Nagar Haveli Special Branch, Lakshadweep Police	Exclusion not absolute; must provide info on corruption & human rights violations
State-specified Agencies	Agencies notified by State Governments	Same exception applies: info on corruption & human rights violations

Timeframe for human rights info	N/A	Info must be provided within 45 days with approval of CIC

INFORMATION COMMISSIONS

Central Information Commission

- **Constitution:**
 - Constituted by Central Government through Gazette Notification.
- **Composition:**
 - Chief Information Commissioner (CIC)
 - Central Information Commissioners (CICs) – maximum 10.
- **Appointment:**
 - Appointed by the President of India
 - Based on recommendations of a committee:
 - Prime Minister (Chairman)
 - Leader of Opposition in Lok Sabha
 - Union Cabinet Minister nominated by PM
- **Eligibility / Qualifications:**
 - Persons of eminence in public life
 - Wide knowledge/experience in: law, science & technology, social service, management, journalism, mass media, administration & governance
 - Cannot be MP/MLA, hold other office of profit, be connected with political party, or pursue business/profession
- **Powers & Functions:**
 - Chief IC has general superintendence, direction, and management of Commission
 - Assisted by Information Commissioners
 - Commission functions independently, without direction from any other authority
- **Headquarters:** Located in Delhi
 - Other offices may be established with Central Government approval

Term of office and conditions of service of Central Information Commission

- **Chief Information Commissioner (CIC):**
 - Term: As prescribed by Central Government
 - Max age: 65 years
 - Not eligible for reappointment
- **Information Commissioner (IC):**
 - Term: As prescribed or until 65 years, whichever is earlier
 - Not eligible for reappointment as IC
 - Can be appointed as CIC after vacating office
 - Total term as IC + CIC cannot exceed 5 years
- **Oath:**

- CIC and IC must take an oath/affirmation before entering office (to the President or appointed person)
- **Resignation & Removal:**
 - Can resign anytime by writing to the President
 - Can be removed as per Section 14
- **Salaries & Allowances:**
 - Determined by Central Government
 - Cannot be reduced after appointment
 - Existing appointees before RTI Amendment 2019 continue under old rules
- **Support Staff:**
 - Central Government to provide necessary officers/employees
 - Their salaries & conditions are also prescribed and cannot be varied to CIC/IC's disadvantage

State Information Commission (SIC)

1. **Constitution:**
 - Formed by the State Government via Gazette notification
2. **Composition:**
 - 1 State Chief Information Commissioner (SCIC)
 - Up to 10 State Information Commissioners (SICs)
3. **Appointment Authority:**
 - Appointed by the Governor
4. **Recommendation Committee:**
 - Chief Minister – Chairman
 - Leader of Opposition in Legislative Assembly
 - 1 Cabinet Minister nominated by the Chief Minister

Term of office and conditions of service of State Information Commission

1. **State Chief Information Commissioner (SCIC):**
 - Holds office for term prescribed by Central Government.
 - Cannot be reappointed.
 - Maximum age: 65 years.
2. **State Information Commissioner (SIC):**
 - Holds office for term prescribed by Central Government or till 65 years, whichever is earlier.
 - Cannot be reappointed as SIC.
 - Can be appointed as SCIC after vacating SIC post.
 - Aggregate term limit: 5 years (as SIC + SCIC).
3. **Oath:**
 - SCIC and SIC must make and subscribe an oath/affirmation before the Governor or designated person.
4. **Resignation and Removal:**
 - Can resign anytime via writing to Governor.
 - Removal as per Section 17.
5. **Salaries & Allowances:**

- Prescribed by Central Government.
- Cannot be reduced to their disadvantage after appointment.
- Officers appointed before RTI Amendment 2019 continue under previous rules.

6. Support Staff:

- State Government provides officers/employees necessary for efficient functioning.
- Terms, conditions, and salaries of such staff are prescribed by the State Government.

Aspect	Central Information Commission (CIC)	State Information Commission (SIC)
Constitution	By Central Government via Gazette Notification	By State Government via Gazette Notification
Composition	Chief Information Commissioner + up to 10 Central Information Commissioners	State Chief Information Commissioner + up to 10 State Information Commissioners
Appointment Authority	President of India on recommendation of a committee: PM (Chair), Leader of Opposition in Lok Sabha, Union Cabinet Minister nominated by PM	Governor on recommendation of a committee: CM (Chair), Leader of Opposition in Legislative Assembly, Cabinet Minister nominated by CM
Eligibility / Qualification	Eminence in public life with knowledge/experience in law, science & tech, social service, management, journalism, mass media, administration & governance; cannot be MP/MLA or hold other office of profit	Same as CIC
Term of Office	As prescribed by Central Government, not eligible for reappointment; age limit 65 years; total term not exceeding 5 years if promoted from IC to CIC	As prescribed by Central Government, not eligible for reappointment; age limit 65 years; total term not exceeding 5 years if promoted from SIC to SCIC
Oath / Affirmation	Before President or authorized person	Before Governor or authorized person
Resignation / Removal	Can resign by writing to President; removal as per Section 14	Can resign by writing to Governor; removal as per Section 17
Powers / Superintendence	Chief IC has general superintendence; assisted by ICs; Commission functions independently without external directions	State Chief IC has general superintendence; assisted by SICs; functions independently

Salaries & Allowances	Prescribed by Central Government; cannot be varied to disadvantage after appointment; officers/staff provided by Central Government	Prescribed by Central Government; cannot be varied to disadvantage after appointment; officers/staff provided by State Government
Headquarters	Delhi; other offices possible with Central Government approval	State capital; other offices possible with State Government approval

POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person –

Non appointment of PIO	● who has not been able to submit an information request because a PIO has not been appointed;
Refusal of Information	● who has been refused information that was requested;
Breach of privilege of Parliament or State Legislature	● where disclosure would cause a breach of privilege of Parliament or the State Legislature;
No response	● who has received no response to his/her information request within the specified time limits;
Unreasonable Fees	● who thinks the fees charged are unreasonable;
Incomplete or Misleading information	● who thinks information given is incomplete or false or misleading; and
Any other matter	● any other matter relating to obtaining information under this law.

If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court. The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds. (Section 18)

Example

‘A’ wants to seek the information pertaining to the functioning of a public welfare fund such as who is its head, appointment of such head, expenses incurred by that particular authority in last financial year. ‘A’ received a reply containing information about the functioning, the appointment of head and his name but not the expenses incurred without and reasonable

explanation. 'A' shall have the right to make complaint against incomplete information given to him.

Example

'A' seeks the information pertaining the constitution of a committee. Such information was denied to him without any reasonable justifications. 'A' has right to file a complaint against such unreasonable and unjustified refusal of information.

Case Law

CIC v. D.D.A. & Anr. (2024) INSC 513

Court: Supreme Court of India

Date: 10.07.2024

Facts:

- The Delhi High Court quashed the CIC (Management) Regulations, 2007, framed by the Chief Information Commissioner.
- It held that the CIC has no power to constitute benches or frame such regulations.
- The case challenged this order, focusing on CIC's powers under Section 12(4) of the RTI Act, 2005.

Key Issue:

- Does the CIC have the authority under Section 12(4) to:
 1. Constitute benches?
 2. Frame regulations for management, allocation of work, and formation of committees within the Commission?

Observations / Findings:

- The RTI Act should be interpreted purposively – keeping in mind its goal to ensure transparency and accountability.
- For the CIC to function effectively and dispose of cases timely, it must have flexible powers to manage its affairs.
- Section 12(4) includes all necessary powers to:
 - Form benches,
 - Allocate work efficiently,
 - Frame regulations, and
 - Issue orders.

Decision:

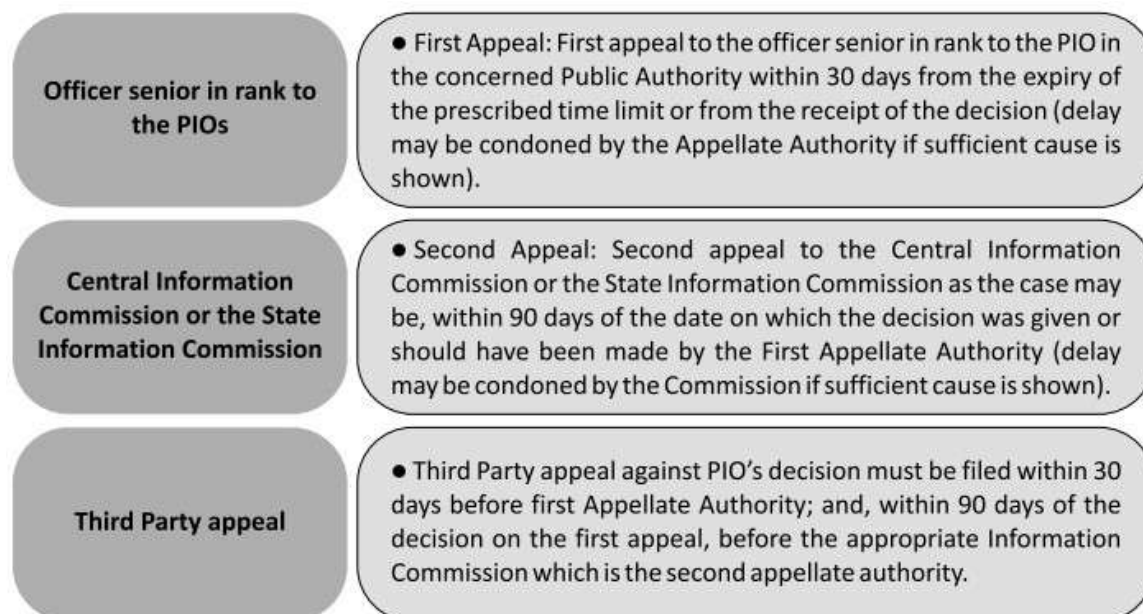
- The Supreme Court upheld the CIC's power to constitute benches and frame regulations.
- This ensures efficient functioning of the Commission and safeguards citizens' right to information.

Key Takeaway:

CIC has inherent powers under Section 12(4) to manage its affairs, including forming benches and framing regulations, to ensure effective and timely disposal of RTI cases.

APPELLATE AUTHORITIES

Appeal can be filed if- person does not received decision on time or aggrieved by a decision of PIO



Section 19 – First Appeal & Burden of Proof

- Burden of proof: PIO must justify denial of information.
- Time for disposal: First appeal must be decided within 30 days of receipt.
- Extension: Can be extended up to 45 days with reasons in writing.
- Further extension: Extra 15 days if necessary.

Key point: PIO must prove denial is justified, and appeals have strict timelines.

Example

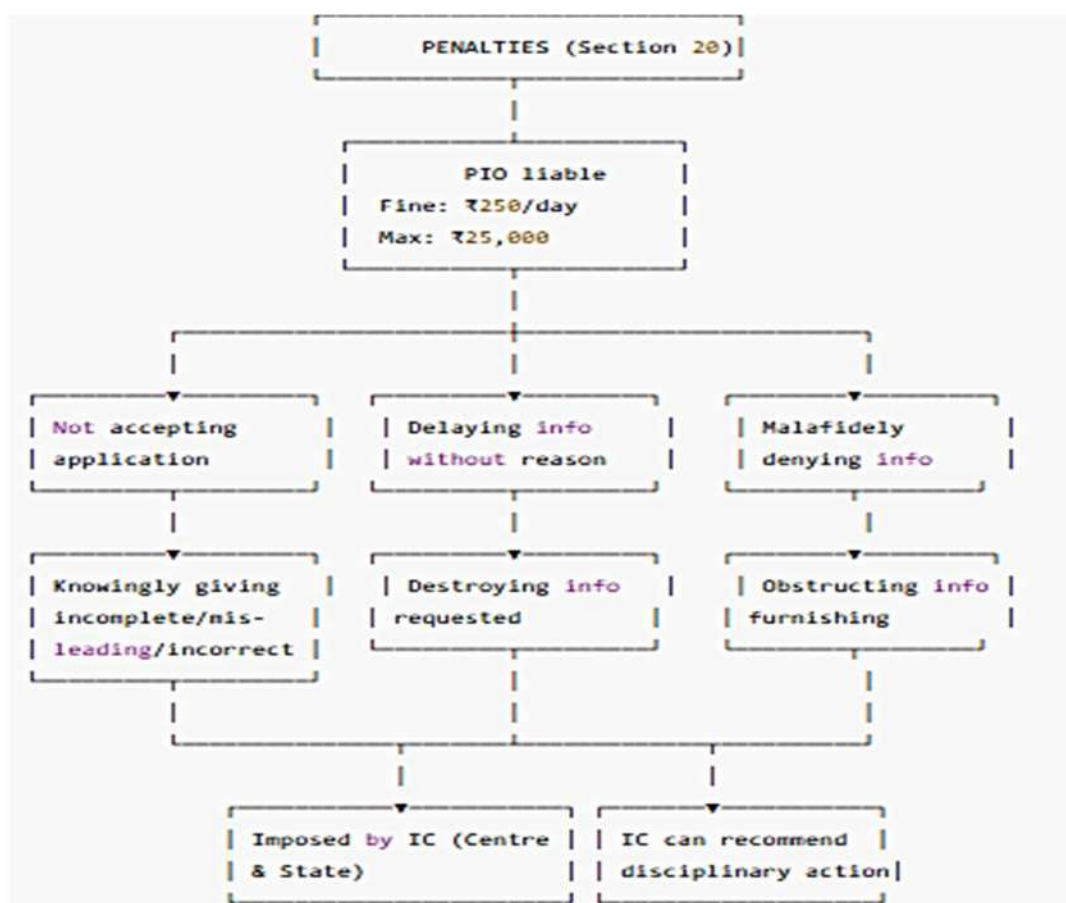
An application by B, seeking information regarding a particular matter was denied by PIO. B filed an appeal with the officer in rank to PIO regarding such rejection/denial of information. It is upon PIO to justify such non-disclosure.

Case Law:

N.N. Dhumane vs. PIO, Department of Posts (2018)

- Issue: Pension payment was stopped because of Aadhaar linking, without notice to pensioners.
- RTI sought: Information about linking Aadhaar to pension accounts.
- CIC Observation:
 - Pension cannot be delayed in the name of Aadhaar linking or other conditions.
 - Pensioners depend on their pension for livelihood; delaying it is inhumane and violates the right to life.
 - Linking with Aadhaar should not prevent pension payment or information access.

Key takeaway: Public authorities cannot withhold pensions for procedural reasons like Aadhaar linking; citizens' rights and livelihood come first.



JURISDICTION OF COURTS

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

Role of Central/State Governments (Section 26)

Develop and organise educational programmes to advance the understanding of the public, in particular of disadvantaged communities as to how to exercise the rights contemplated under this Act;

Encourage public authorities to participate in the development and organisation of programmes referred to in clause (a) and to undertake such programmes themselves;

Promote timely and effective dissemination of accurate information by public authorities about their activities; and

Train Central Public Information Officers or State Public Information Officers, as the case may be, of public authorities and produce relevant training materials for use by the public authorities themselves.

Case Laws:

HN Malviya vs. CPIO, Dept. of Personnel and Training (31.10.2022, CIC)

- RTI sought: Information on employee seniority.
 - Decision:
 - The information requested was speculative/futuristic and did not qualify as “information” under Section 2(f) of RTI.
 - CPIO and FAA had already tried to assist the appellant.
 - The Commission clarified that CPIOs are not required to provide deductions or inferences, only factual information.
 - Key Point: RTI covers existing factual information, not guesses, predictions, or deductions.
2. Mr. Raj Kumar vs. CPIO, Guru Teg Bahadur Hospital (31.10.2022, CIC)
- RTI sought: Salary records and DA implementation details.
 - Issue: First Appeal not addressed by FAA; Complainant filed complaint.
 - Decision:
 - Respondent had partially provided information; Commission ordered complete and correct information within 21 days.
 - Commission cautioned the CPIO to handle RTI applications carefully in the future.
 - Key Point: RTI ensures transparency and accountability, and PIOs must provide full and timely information.

LESSON-15

Law relating to Information Technology

Information Technology Act, 2000 provides legal framework for electronic governance by giving recognition to electronic records and digital signatures.

REGULATORY FRAMEWORK

- The Information Technology Act, 2000
- Digital Personal Data Protection Act, 2023

INTRODUCTION

- “Information technology”, most commonly termed as IT, is the use of computers or computer system to create, process, store, retrieve, and exchange all kinds of data and information.
- An information technology system (IT system) is a communications system, or, more specifically speaking, a computer system — including all hardware, software, and peripheral equipment — operated by a limited group of IT users.
- United Nations General Assembly by resolution A/RES/51/162, dated January 30, 1997, has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law.
- This is referred to as the UNCITRAL Model Law on E-Commerce.
- Subsequent to the adoption of this Resolution, Indian government has passed the Information Technology Act, 2000 on 17th October 2000.
- The Act is supplemented by a number of rules which includes rules for cyber cafes, electronic service delivery, data security, blocking of websites.
- It also has rules for observance of due diligence by internet intermediaries (ISP’s, network service providers, cyber cafes, etc.).
- Any person affected by data theft, hacking, spreading of viruses can apply for compensation.
- With the changing needs and requirement of the information technology and communication, the Information Technology Act 2000 has been substantially amended through the Information Technology (Amendment) Act 2008.
- The Information Technology (Amendment) Act 2008 was passed by the Indian Parliament on December 24, 2008 and received the Presidential assent on February 5, 2009.
- The Amendment Act came into force on October 27, 2009.
- The Information Technology Act, 2000, was enacted to make three main provisions.
 - a. Provides legal recognition for electronic data interchange and other means of “electronic Commerce”.
 - b. Facilitates electronic filing of documents with Government agencies and publication of rules in electronic form.
 - c. Amends IPC, Indian Evidence Act, Bankers’ Book Evidence Act, and RBI Act to include electronic documentation.

DOCUMENTS OR TRANSACTIONS TO WHICH THE ACT SHALL NOT APPLY

According to Section 1 (4) of the Information Technology Act, 2000 nothing in Information Technology Act, 2000, shall apply to documents or transactions specified in the First Schedule. The documents or transactions mentioned in first schedule are as under:

1. Negotiable Instruments with exceptions:

A negotiable instrument other than:

- A cheque,
- A Demand Promissory Note, or
- A Bill of Exchange issued in favour of or endorsed by an entity regulated by:
 - Reserve Bank of India (RBI),
 - National Housing Bank (NHB),
 - Securities and Exchange Board of India (SEBI),
 - Insurance Regulatory and Development Authority of India (IRDAI),
 - Pension Fund Regulatory and Development Authority (PFRDA).
- As defined in Section 13 of the Negotiable Instrument Act, 1881.

2. Power of Attorney with exceptions:

- A power-of-attorney as defined in Section 1A of the Powers-of-Attorney Act, 1882.
- But excluding those power-of-attorney that empower an entity regulated by:
 - Reserve Bank of India (RBI),
 - National Housing Bank (NHB),
 - Securities and Exchange Board of India (SEBI),
 - Insurance Regulatory and Development Authority of India (IRDAI),
 - Pension Fund Regulatory and Development Authority (PFRDA).
- To act for, on behalf of, and in the name of the person executing them.

3. Trusts:

A trust as defined in section 3 of the Indian Trust Act, 1882.

4. Wills:

A will as defined in section 2(h) of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.

DEFINITIONS OF BASIC EXPRESSIONS {Section 2(1)}

Term	Definition	Section
Access	Gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network	2(1)(a)
Addressee	A person intended by the originator to receive the electronic record, excluding any intermediary	2(1)(b)
Adjudicating Officer	An officer appointed under sub-section (1) of section 46	2(1)(c)
Affixing electronic signature	Adoption of any methodology or procedure to authenticate an electronic record by digital signature	2(1)(d)

Appellate Tribunal	The Appellate Tribunal referred to in sub-section (1) of section 48	2(1)(da)
Asymmetric crypto system	A system of secure key pair: private key for creating digital signature, public key for verification	2(1)(f)
Certification practice statement	Statement issued by Certifying Authority specifying practices for issuing electronic signature certificates	2(1)(h)
Communication device	Cell phones, PDAs, combination, or any device used to communicate/send/transmit text, video, audio, or image	2(1)(ha)
Computer	means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions, by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network.	2(1)(i)
Computer network	means the interconnection of one or more computers through - (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained.	2(1)(j)
Computer resource	Computer, computer system, computer network, data, database or software	2(1)(k)
Computer system	means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions.	2(1)(l)
Cyber cafe	Facility offering internet access to public as ordinary course of business	2(1)(na)
Cyber security	Protecting information, equipment, devices, computer resources, communication devices, and information stored from unauthorised access, use, disclosure, disruption, modification, or destruction	2(1)(nb)
Digital signature	Authentication of electronic record by subscriber via electronic method/procedure	2(1)(p)
Electronic form	Information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, microfiche	2(1)(r)

Electronic record	Data, recorded or generated, image or sound stored, received, sent in electronic form, microfilm, or computer generated microfiche	2(1)(t)
Electronic signature	Authentication of electronic record by subscriber using electronic technique including digital signature	2(1)(ta)
Electronic Signature Certificate	Certificate issued under section 35, includes Digital Signature Certificate	2(1)(tb)
Information	Data, message, text, images, sound, voice, codes, programs, software, databases, microfilm, computer generated microfiche	2(1)(v)
Intermediary	• A person who receives electronic records on behalf of another. • A person who stores electronic records on behalf of another. • A person who transmits electronic records on behalf of another. • A person who provides any service related to such electronic records. ◦ Includes: ◦ Telecom service providers ◦ Network service providers ◦ Internet service providers (ISPs) ◦ Web-hosting service providers ◦ Search engines ◦ Online payment sites ◦ Online auction sites ◦ Online marketplaces ◦ Cyber cafes	2(1)(w)
Key pair	in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key	2(1)(x)
Originator	” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary	2(1)(za)
Prescribed	Prescribed by rules made under this Act	2(1)(zb)
Private Key	Key of key pair used to create a digital signature	2(1)(zc)
Public Key	Key of key pair used to verify digital signature, listed in Digital Signature Certificate	2(1)(zd)
Secure system	means computer hardware, software, and procedure that – (a) are reasonably secure from unauthorised access and misuse;	2(1)(ze)

	(b) provide a reasonable level of reliability and correct operation; (c) are reasonably suited to performing the intended functions; and (d) adhere to generally accepted security procedures.	
Security Procedure	Security procedure prescribed under section 16 by Central Government	2(1)(zf)
Subscriber	Person in whose name electronic signature certificate is issued	2(1)(zf)
Verify	in relation to a digital signature, or electronic record or its grammatical variations and cognate expressions, means to determine whether - (a) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber; (b) the initial electronic record is retained intact, or has been altered since such electronic record was so affixed with the digital signature.	2(1)(zh)

Case Law:

Syed Asifuddin vs. State of Andhra Pradesh (2006)

- Issue: Whether a mobile phone can be considered a “computer” under Section 65 of the IT Act for hacking offences.
- Court’s Observation: Mobile phones work with a central system (MTSO) that uses computers to send, receive, and process signals instantly. Therefore, the functioning of mobile phones involves computers, making the offence under IT Act applicable.

Concept in one line: A mobile phone operates through computers, so hacking a phone falls under the IT Act.

DIGITAL SIGNATURE AND ELECTRONIC SIGNATURE

- As per section 2(1)(ta) of the Information Technology Act, 2000, “electronic signature” means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.
- Electronic Signature Certificate are issued under section 35 and includes Digital Signature Certificate.
- Digital Signature Certificate are issued under section 35(4) of the Act.
- Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognised as a valid method of authentication.
- The authentication is to be effected by the use of “asymmetric crypto system and hash function”, which envelop and transform electronic record into another electronic record.
- [Sections 3(1), 3(2)].

Example

A driver's license identifies someone who can legally drive in a particular country. Likewise, a digital certificate can be presented electronically to prove one's identity, to access information or services on the Internet or to sign certain documents digitally.

Example

Physical documents are signed manually, similarly, electronic documents, for example e-forms are required to be signed digitally using a Digital Signature Certificate. Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning "key pair".

- Section 3A deals with electronic signature.
- Section 3A(1) provides that notwithstanding anything contained in section 3(1), but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which—
 - a. is considered reliable; and
 - b. may be specified in the Second Schedule.
- Any electronic signature or electronic authentication technique shall be considered reliable if—
 - a. The signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or authenticator and to no other person;
 - b. The signature creation data or the authentication data were, at the time of signing, under the control of the signatory or authenticator and of no other person;
 - c. Any alteration to the electronic signature made after affixing such signature is detectable;
 - d. Any alteration to the information made after its authentication by electronic signature is detectable; and
 - e. It fulfils such other conditions which may be prescribed.
- Central Government may prescribe the procedure for the purpose of ascertaining whether electronic signature is that of the person by whom it is purported to have been affixed or authenticated.

ELECTRONIC GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)

- The Act grants legal recognition to electronic records.
- Where (by any law) "information" or any other matter is required to be:
 - a. in writing, or
 - b. typewritten form, or
 - c. printed form,
- Such requirement is satisfied if the information or matter is:
 - i. rendered or made available in electronic form, and
 - ii. accessible so as to be usable for a subsequent reference. (Section 4)
- "Information", as defined in Section 2(1)(v) of the Act, includes:
 - Data, text, images, sound, voice, codes, computer programmes, software, databases, micro-film, or computer-generated "micro-fiche".
- Examples of e-governance:
 - Digital India initiative,

- National Portal of India,
- Aadhaar Portal,
- Filing and payment of taxes online,
- Digital land management systems,
- Common Entrance Test.

Private transactions

- Section 4 of the Information Technology Act equates electronic record with a manual, typed, or printed record.
- Section 5 deals with legal recognition of electronic signatures.
- Where any law requires information or any other matter to be authenticated by affixing a signature, or any document to bear a person's signature, such requirement is deemed satisfied if authenticated by electronic signature in the manner prescribed by the Central Government.
- "Signed," with its grammatical variations and cognate expressions, refers to affixing a handwritten signature or any mark on a document.
- The expression "signature" is construed accordingly.

Public records

- The provisions of the Act are primarily intended for private transactions.
- The Act provides recognition to electronic records and electronic record signatures in public records where any law provides for:
 - a. Filing of any form, application, or other document with a Governmental office or agency;
 - b. Grant of any licence, permit, etc.;
 - c. Receipt or payment of money in a particular manner. (Section 6)

Delivery of services by service provider

- Section 6A allows the appropriate Government to authorise any service provider, by order, to set up, maintain, and upgrade computerised facilities and perform other specified services for efficient delivery of services to the public through electronic means.
- Authorised service providers include:
 - Any individual,
 - Private agency,
 - Private company,
 - Partnership firm,
 - Sole proprietor firm, or
 - Any other body or agency granted permission by the appropriate Government to offer services through electronic means as per the governing policy.

Example

A portal for Ministry of Corporate affairs, MCA 21, has been maintained and operated by Infosys. Earlier it was operated by Tata Consultancy Services. Likewise Income tax portal has also been operated by Infosys. So Infosys is service provider for this purpose

RETENTION OF INFORMATION

Retention of documents in electronic form as per law with conditions of accessibility and format. (Section 7)

AUDIT OF DOCUMENTS MAINTAINED IN ELECTRONIC FORM

Audit provisions for documents also apply to electronic records. (Section 7A)

PUBLICATION OF SUBORDINATE LEGISLATION IN ELECTRONIC GAZETTE

- Can be published in Official or Electronic Gazette; first publication date is deemed date of publication. (Section 8)

Example

A subordinate legislation was published by the authority in official gazette on 02.01.2020 and in electronic Gazette on 31.12.2019. The date 31.12.2019 shall be deemed to be the date of publication.

But the provisions summarised above shall not confer any right upon any person to insist, that any Government agency shall accept, issue etc. any document in electronic form or effect any monetary transaction in electronic form. (Section 9)

VALIDITY OF CONTRACTS FORMED THROUGH ELECTRONIC MEANS

- The 2008 amendment to the IT Act introduced Section 10A.
- Section 10A provides greater acceptance to electronic contracts, establishing their validity in the eyes of the law.
- Electronic contracts, e-commerce, and e-signatures are increasingly recognized for their effectiveness and efficiency.
- As per Section 10A, in contract formation, if communication of proposals, acceptance of proposals, or revocation of proposals and acceptances are expressed in electronic form or by means of electronic records,
 - Such contract shall not be deemed unenforceable solely because electronic form or means was used.

Case Law:

(Trimex Case, 2010)

- Supreme Court dealt with contracts concluded via emails and other telecommunication.
- Held that a valid contract can exist if the exchanged documents (emails, telegrams, etc.) show:
 - The parties' intention to be bound by the terms, and
 - Presence of essential elements of a valid contract.
- Clarified that electronic communications can establish legally enforceable contracts.

ATTRIBUTION AND DISPATCH OF ELECTRONIC RECORDS

- Electronic records require provision for "attribution" since the maker is behind the curtain.
- An electronic record is attributed to the "originator" [Defined in Section 2(1)(za)].

- Broadly, the “originator” is the person at whose instance the record was sent in the following cases:
 - a. If it was sent by the originator himself;
 - b. If it was sent by a person authorised to act on behalf of the originator in respect of that electronic record;
 - c. If it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

Example

An Automatic email is received from or on behalf of a XYZ Ltd. confirming an order placed in online platform. This electronic record shall be attributed to the said company.

- Acknowledgment of receipt of electronic records:
 - If no agreement on form, acknowledgment may be given by:
 - (a) Any communication by the addressee (automated or otherwise);
 - (b) Any conduct indicating to the originator that the record has been received. [Section 12(1)]
- Special provisions:
 - Where originator has stipulated receipt of acknowledgment. [Section 12(b)]
 - Where acknowledgment is not received in time. [Sections 12(2), 12(3)]
- If originator stipulates record is binding only on receipt of acknowledgment, the record is deemed never sent unless acknowledgment is received. [Section 12(2)]
- If no such stipulation, and acknowledgment is not received within agreed or reasonable time:
 - Originator may notify addressee specifying a reasonable time for acknowledgment.
 - If not received within that time, originator may treat the record as never sent. [Section 12(2)]
- Emphasis on the need for acknowledgment to make electronic records binding.

TIME AND PLACE OF DISPATCH ETC.

- Significance: Dates of offer and acceptance are crucial for determining contract formation.
- Dispatch of electronic record:
 - Occurs when it enters a “computer resource” outside the control of the originator. [Section 13(1)]
 - “Computer resource” includes computer, system, network, data, database, or software. [Section 2(k)]
- Time of receipt:
 - If addressee has designated a computer resource, receipt occurs when record enters that resource. [Section 13(2)(a)]
 - If sent to a non-designated resource, receipt occurs when addressee retrieves it.
 - If no resource is designated, receipt occurs when the record enters the addressee’s computer resource. [Sections 13(1), 13(2)]
- Place of dispatch and receipt: Provisions apply even if computer location differs from deemed place of receipt. [Section 13(3)]

SECURE ELECTRONIC RECORDS AND SIGNATURES

- Central Government may prescribe security procedures and practices for:
 - Section 14: Secure electronic records
 - Section 15: Secure electronic signatures
- While prescribing, the Government shall consider:
 - Commercial circumstances
 - Nature of transactions
 - Other relevant factors
- Once the prescribed procedure is applied to an electronic record at a specific time, the record is deemed a secure electronic record from that time until verification. [Section 14]

An electronic signature shall be deemed to be a secure electronic signature, if—

- (i) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and
- (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed. (Section 15)

Example

If the signature creation data such as codes or private cryptographic keys are in control of 2 or more persons. The electronic signature cannot be deemed to be a secure electronic signature.

CERTIFYING AUTHORITIES (Sections 17–34)

- Role of Certifying Authorities (CAs):
 - Reliably identify persons applying for signature key certificates.
 - Verify legal capacity of applicants.
 - Confirm attribution of public signature key to a physical person via signature key certificate.
- Controller of Certifying Authorities (CCA):
 - Appointed by Central Government under Section 17.
 - Regulates Certifying Authorities.
 - Promotes E-Commerce and E-Governance through digital signatures.
 - Certifies public keys of CAs using its private key to enable verification by users.
 - Operates the Root Certifying Authority of India (RCAI).
 - Maintains the Repository of Digital Certificates containing all certificates issued to CAs.
- Obligations of CAs: Specified in Sections 30–34 of the Act.



ELECTRONIC SIGNATURE CERTIFICATES

- Issuance: Certifying Authority (CA) issues Electronic Signature Certificates.
- Procedure to obtain certificate:
 1. Any person may apply in the prescribed form to the CA.
 2. Application must be accompanied by prescribed fees.
 3. Application must include a certification practice statement or, if not available, a statement with particulars as specified by regulations.
 4. CA considers the statement, makes necessary enquiries, and may:
 - Grant the electronic signature certificate, or
 - Reject the application with reasons recorded in writing.
- Opportunity to be heard: No application shall be rejected without giving the applicant a reasonable opportunity to show cause against rejection.

SUSPENSION OF DIGITAL SIGNATURE CERTIFICATE (DSC)

- Authority: Issued Digital Signature Certificate may be suspended by the Certifying Authority (CA).
- Grounds for suspension:
 1. On request from:
 - The subscriber listed in the DSC, or
 - Any person authorised to act on behalf of the subscriber.
 2. If the CA considers suspension necessary in public interest.
- Hearing: Suspension exceeding 15 days requires giving the subscriber an opportunity to be heard.
- Communication: CA must inform the subscriber when the DSC is suspended.

REVOCATION OF DIGITAL SIGNATURE CERTIFICATE (DSC)

- Authority: A Certifying Authority (CA) may revoke a DSC issued by it.
- Circumstances for revocation:
 1. Request by the subscriber or an authorised person.
 2. Death of the subscriber.
 3. Dissolution of a firm or winding up of a company where the subscriber is a firm or company.
- Additional grounds for revocation at CA's discretion:
 - a. Material fact in the DSC is false or concealed.
 - b. Requirement for issuance of DSC not satisfied.
 - c. CA's private key or security system compromised affecting DSC reliability.
 - d. Subscriber declared insolvent or dead; or firm/company dissolved, wound up, or ceased to exist.
- Hearing: DSC shall not be revoked unless the subscriber is given an opportunity to be heard.
- Communication: CA must inform the subscriber upon revocation.

CONTROL OF PRIVATE KEY

- Subscriber must retain control of the private key corresponding to the public key in the DSC and prevent its disclosure.
- If the private key is compromised, the subscriber must immediately inform the Certifying Authority as per regulations.
- Subscriber remains liable until the Certifying Authority is informed of the compromise.

PENALTIES AND ADJUDICATIONS

- The Act provides a dual scheme for wrongful acts concerning computers.
- Certain acts attract penalties, which are adjudicated by adjudication officers, not courts. (Sections 43-47)
- Section 43 specifically deals with penalty and compensation for damage to computer or computer system.

Section 43 – Liability for Unauthorized Acts on Computers

If a person, without permission of the owner or person in charge, commits any of the following acts on a computer, computer system, or network:

- a. Accesses or secures access to the computer, system, network, or resource.
- b. Downloads, copies, or extracts data, databases, or information, including from removable storage.
- c. Introduces or causes introduction of any computer virus or contaminant.
- d. Damages any computer, system, network, data, database, or programs residing therein.
- e. Disrupts or causes disruption of any computer, system, or network.
- f. Denies or causes denial of access to authorized users.
- g. Assists anyone to access a computer, system, or network in contravention of the Act, rules, or regulations.
- h. Charges services availed by one person to another's account by tampering/manipulating the system.
- i. Destroys, deletes, alters information or diminishes its value, utility, or affects it injuriously.
- j. Steals, conceals, destroys, or alters, or causes another to do so, any computer source code with intent to cause damage.

Consequence

- The person shall be liable to pay damages as compensation to the affected person.

Definitions for Section 43

- Computer contaminant: Any set of computer instructions designed to:
 - a. Modify, destroy, record, or transmit data/programs in a computer, system, or network.
 - b. Usurp the normal operation of a computer, system, or network by any means.
- Computer data-base: Representation of information, knowledge, facts, concepts, or instructions in text, image, audio, or video that are:
 - Prepared or being prepared in a formalised manner or produced by a computer, system, or network.
 - Intended for use in a computer, system, or network.
- Computer virus: Any instruction, information, data, or program that:

- Destroys, damages, degrades, or adversely affects a computer resource.
- Attaches to another resource and operates when a program, data, or instruction is executed or an event occurs.
- Damage: To destroy, alter, delete, add, modify, or rearrange any computer resource by any means.
- Computer source code: Listing of program, computer commands, design, layout, and program analysis of a computer resource in any form.

COMPENSATION FOR FAILURE TO PROTECT DATA (Section 43A)

- A body corporate handling sensitive personal data or information in a computer resource it owns, controls, or operates, is liable to pay damages if negligent in implementing and maintaining reasonable security practices and procedures, causing wrongful loss or wrongful gain to any person.
- Body corporate: Any company, including a firm, sole proprietorship, or other association of individuals engaged in commercial or professional activities.
- Reasonable security practices and procedures: Security practices designed to protect information from unauthorised access, damage, use, modification, disclosure, or impairment, as:
 - Specified in an agreement between the parties, or
 - Specified in any law for the time being in force, or
 - Prescribed by the Central Government in consultation with professional bodies or associations, in the absence of agreement or law.
- Sensitive personal data or information: Personal information as prescribed by the Central Government in consultation with professional bodies or associations.

Penalty for failure to furnish information, return, etc. (Section 44)

- Failure to furnish document, return, or report to the Controller or Certifying Authority: Penalty not exceeding ₹15 lakh for each such failure.
- Failure to file return or furnish information, books, or other documents within specified time: Penalty not exceeding ₹50,000 for every day the failure continues.
- Failure to maintain books of account or records: Penalty not exceeding ₹1 lakh for every day the failure continues.
- Amendment: Jan Vishwas (Amendment of Provisions) Act, 2023 w.e.f. 30.11.2023 increased the penalties to 10 times of those provided before the amendment.

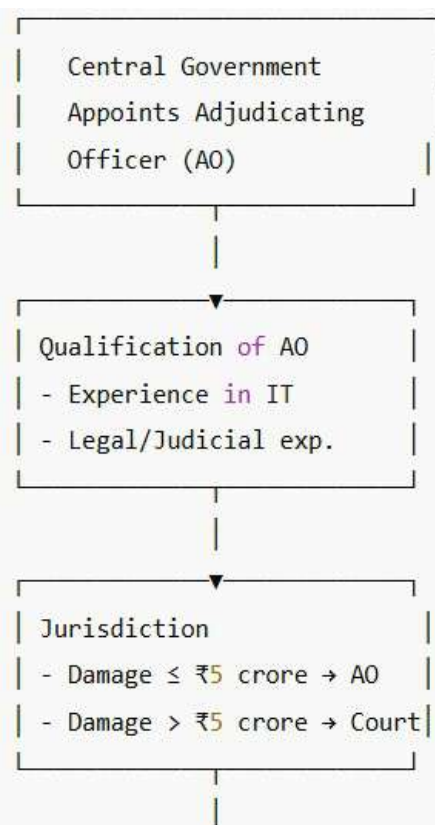
Residuary Penalty (Section 45)

- Contravention of rules, regulations, directions, or orders under the Act, where no separate penalty is provided: Penalty not exceeding ₹1 lakh.
- Compensation to affected person:
 - ₹10 lakh if contravention is by an intermediary, company, or body corporate.
 - ₹1 lakh if contravention is by any other person.
- Amendment: Jan Vishwas (Amendment of Provisions) Act, 2023 w.e.f. 30.11.2023 increased the penalty from ₹25,000 to ₹1,00,000 and extended compensation as mentioned above.

Section	Nature of Contravention	Penalty	Compensation	Amendment (Jan Vishwas Act, 2023)
44	(a) Failure to furnish any document, return, or report to Controller/Certifying Authority	Up to ₹15 lakh per failure	N/A	Penalty increased 10 times from pre-amendment amount
	(b) Failure to file return or furnish information/books/documents within specified time	Up to ₹50,000 per day of delay	N/A	Penalty increased 10 times
	(c) Failure to maintain books of account or records	Up to ₹1 lakh per day of failure	N/A	Penalty increased 10 times
45	Contravention of any rules, regulations, directions, or orders under the Act, where no separate penalty is provided	Up to ₹1 lakh	By intermediary/company/body corporate: ₹10 lakh; By other person: ₹1 lakh	Penalty increased from ₹25,000 to ₹1 lakh; Compensation extended as above

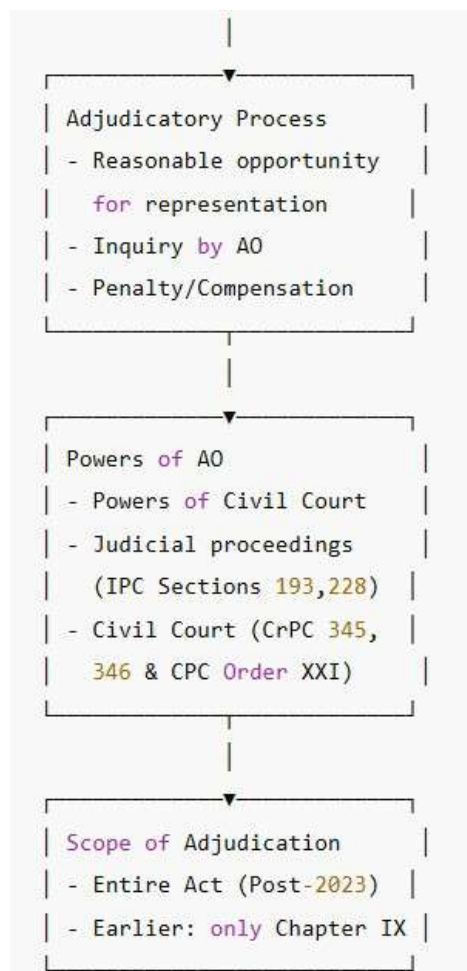
Power to adjudicate (Section 46)

- Appointment of Adjudicating Officer (AO) [Section 46(1)]:
Central Government appoints an officer not below the rank of Director (Government of India) or equivalent State Government officer.
 - Purpose: To adjudge whether any person has committed a contravention under the Act or any rules, regulations, directions, or orders
 - The AO holds inquiry in the manner prescribed by the Central Government.
- Jurisdiction of Adjudicating Officer:
 - Matters with claims for damage not exceeding ₹5 crore → AO.
 - Claims for damage exceeding ₹5 crore → Competent Court.
- Adjudicatory Process [Section 46(2)]:
 - AO gives the person a reasonable opportunity for making representation.
 - If AO is satisfied that a contravention has occurred, he may impose penalty or award



compensation as per the provisions of this section.

- Qualification for Adjudicating Officer [Section 46(3)]:
 - Must possess experience in Information Technology.
 - Must possess legal or judicial experience as prescribed by the Central Government.
- Powers of Adjudicating Officer:
 - AO has powers of a civil court as conferred on the Appellate Tribunal under Section 58(2).
 - Proceedings before AO are deemed judicial proceedings under Sections 193 and 228 of IPC.
 - AO is deemed a civil court for purposes of Sections 345 and 346 of CrPC, 1973.
 - AO is deemed a civil court for purposes of Order XXI of Civil Procedure Code, 1908.
- Amendment (Jan Vishwas Act, 2023 w.e.f. 30.11.2023):
 - Scope of adjudication through a central government-appointed officer under Section 46 has been expanded to the entire Act.
 - Earlier, it was restricted to Chapter IX (penalties, compensation, and adjudication).



CYBER REGULATION APPELLATE TRIBUNAL

- Establishment
 - Chapter X (Sections 48–62) provides for the establishment of the Appellate Tribunal.
 - The Telecom Disputes Settlement and Appellate Tribunal (TDSAT), established under Section 14 of the Telecom Regulatory Authority of India Act, 1997, serves as the Appellate Tribunal for this Act from the commencement of Part XIV of Chapter VI of the Finance Act, 2017.
- Jurisdiction and Authority
 - The Appellate Tribunal exercises jurisdiction, powers, and authority conferred under this Act.
 - The Central Government specifies, by notification, the matters and places in relation to which the Appellate Tribunal may exercise jurisdiction.
- Compounding of Offences and Recovery of Penalties
 - Sections 63 and 64 of the Act deal with compounding of offences and recovery of penalties.
- Appeals
 - Any person aggrieved by an order of the Controller of Certifying Authorities or an adjudicator can appeal to the Appellate Tribunal within 45 days (Section 57).

- Any person aggrieved by any decision or order of the Appellate Tribunal may appeal to the High Court within 60 days.

- Exclusion of Civil Courts**

- Jurisdiction of Civil Courts is barred in matters which an adjudicating officer or the Appellate Tribunal has the power to determine.

OFFENCES

Section / Topic	Offence / Provision	Punishment / Penalty	Mnemonic / Memory Aid
Section 65	Tampering with computer source documents (conceal, destroy, alter source code)	Imprisonment up to 3 years, fine up to ₹2 lakh, or both	"3C2" → 3 years, 2 lakh, Code
Section 66	Computer-related offences (dishonestly/fraudulently acts in Section 43)	Imprisonment up to 3 years, fine up to ₹5 lakh, or both	"3C5" → 3 years, 5 lakh, Computer crimes
Offences under Section 66	- Dishonestly receiving stolen computer resource/device - Identity theft - Cheating by personation using computer - Violation of privacy - Cyber terrorism - Publishing sexually explicit material - Publishing child sexual material - Misrepresentation - Breach of confidentiality/privacy - Disclosure in breach of contract - False electronic signature certificate - Publication for fraudulent purpose	Same as Section 66	"RI-PVCP-MBDF" Received stolen, Id theft, Personation, Violation privacy, Cyber terrorism, Publishing explicit, Misrepresentation, Breach privacy, Disclosure, Fraud certificate/publication
Section 68	Failure to comply with Controller's directions to Certifying Authorities	Penalty up to ₹25 lakh (imprisonment removed after 2023 amendment)	"C25" → Controller, ₹25 lakh

Section 69	Government-directed interception, monitoring, or decryption of information in computers for sovereignty, security, public order, or investigation	As prescribed by safeguards and procedure	“G69” → Government, 69 = intercept/monitor/decrypt

Case Law:

Shreya Singhal v. Union of India (2015):

- Issue: Section 66A of the IT Act, 2000 penalized sending “offensive” messages online. It was challenged for violating:
 - Article 19(1)(a): Right to freedom of speech and expression
 - Article 14: Right to equality
- Court’s Observation:
 - Terms like “grossly offensive” or “causing annoyance” are vague and overbroad.
 - Section 66A could criminalize innocent or protected speech.
 - The internet’s wide reach cannot limit free speech.
- Decision:
 - Section 66A is unconstitutional under Article 19(1)(a) and not protected by Article 19(2).
 - Challenge under Article 14 fails.
 - Section 66A was struck down completely.
- Aftermath:
 - Section 66A was formally removed by the Jan Vishwas (Amendment of Provisions) Act, 2023.

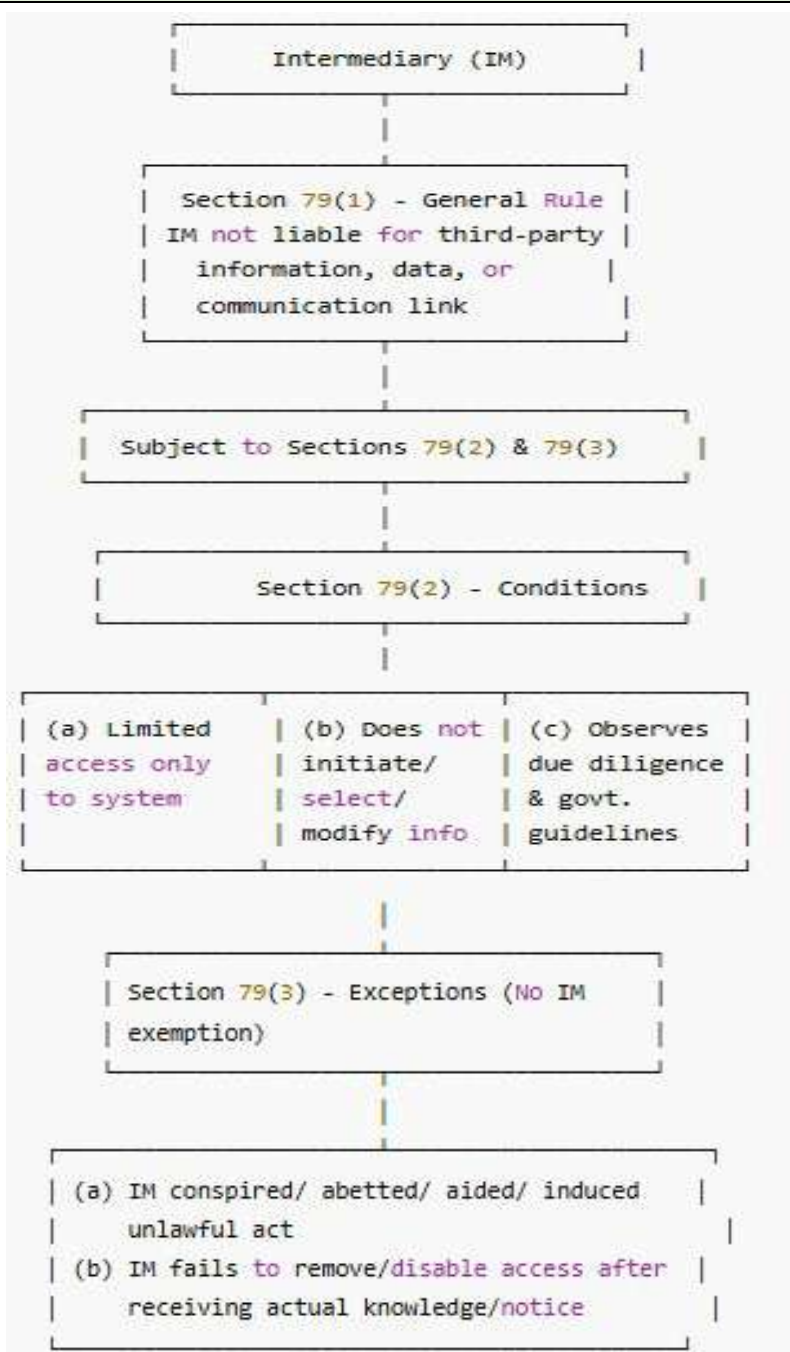
Core Concept: You cannot criminalize vague or broadly defined “offensive” online speech; free speech online is protected under Article 19(1)(a).

Extraterritorial Operation (Section 75)

- The Act applies to offences or violations committed outside India.
- Applies regardless of the nationality of the person.
- Condition: The act must involve a computer, computer system, or computer network located in India.

Core Concept: The Act has global reach if the illegal activity affects Indian computers or networks.

EXEMPTION FROM LIABILITY OF INTERMEDIARY IN CERTAIN CASES



INFORMATION TECHNOLOGY (REASONABLE SECURITY PRACTICES AND PROCEDURES AND SENSITIVE PERSONAL DATA OR INFORMATION) RULES, 2011

- **Third Party Information:**
 - Any information dealt with by an intermediary in his capacity as an intermediary.
- **Right to Privacy:**
 - Recognized as a fundamental right under Article 21 (Justice KS Puttaswamy v. Union of India).
- **Legislative Basis:**
 - Issued under Section 87(2) read with Section 43A of the IT Act.

- Applicable to body corporate or any person located in India.
- **Sensitive Personal Data (Rule 3):**
 - Passwords
 - Bank Account details
 - Credit/debit card details
 - Present and past health records
 - Sexual orientation
 - Biometric data
- **Information Provider Rights:**
 - Consent is required before collection of sensitive personal data.
 - Provider can abstain from giving consent.
 - Provider can withdraw consent by writing to the body corporate.
- 1. Privacy Policy (Rule 4):**
 - Body corporate must provide a privacy policy on their website.
 - Should be easily accessible.
 - Must include type and purpose of personal/sensitive information collected and used.
 - Must include reasonable security practices and procedures.
- 2. Consent (Rule 5):**
 - Prior to collection, body corporate must obtain consent in writing or through fax.
- 3. Collection Limitation (Rule 5(2)):**
 - Collect sensitive personal data only if connected to a lawful purpose.
 - Data collected should be necessary for that purpose.
- 4. Notice (Rule 5(3)):**
 - Must inform individual:
 - That information is being collected
 - Purpose of collection
 - Intended recipients
 - Name and address of collecting agency
 - Name and address of retaining agency
- 5. Retention Limitation (Rule 5(4)):**
 - Retain sensitive personal data only as long as required to fulfil stated purpose or as required under law.
- 6. Purpose Limitation (Rule 5(5)):**
 - Information must be used only for the purpose it was collected for.
- 7. Right to Access and Correct (Rule 5(6)):**
 - Individuals must be able to review, access, and correct their personal/sensitive information.
- 8. Right to Opt-Out and Withdraw Consent (Rule 5(7)):**
 - Individuals must have the option to opt-out of providing data.
 - Individuals can withdraw consent at any time.
- 9. Grievance Officer (Rule 5(9)):**
 - Body corporate must designate a grievance officer.
 - Details must be posted on website.
 - Grievances must be addressed within a month of receipt.

10. Disclosure with Consent, Prohibition on Publishing and Further Disclosure (Rule 6):

- Consent required before disclosing sensitive personal data to any third party.
- Exception: Government agencies for verification, prevention, detection, investigation on written request.
- Body corporate or any person on its behalf shall not publish sensitive personal information.
- Third party receiving data shall not disclose it further.

11. Requirements for Transfer of Sensitive Personal Data (Rule 7):

- Transfer allowed only if destination country ensures same level of protection.
- Allowed if necessary for performance of lawful contract or with consent of information provider.

12. Security of Information (Rule 8):

- Body corporate must secure information according to ISO 27001 standard or other best practices notified by Central Government.
- Security must be audited annually or when significant process/computer upgrades are undertaken.

LAW OF PERSONAL DATA PROTECTION

- Date of Assent:
 - Received assent from the President of India on 11th August, 2023.
- Supplementary Legislation:
 - Will be supplemented by delegated legislation through rules made by the Central Government.
- Purpose of the Law:
 - To govern the processing of digital personal data.
 - Recognizes the right of individuals to protect their personal data.
 - Facilitates processing of personal data for lawful purposes.
 - Covers matters connected with or incidental to the processing of digital personal data.

Important Definitions

Term	Definition (As per the provided content)
Board	Data Protection Board of India established by the Central Government.
Data	Representation of information, facts, concepts, opinions, or instructions suitable for communication, interpretation, or processing by humans or automated means.
Data Principal	Individual to whom personal data relates; includes: (i) A child – parents or lawful guardian act on behalf. (ii) Person with disability – lawful guardian acts on behalf.
Data Processor	Any person who processes personal data on behalf of a Data Fiduciary.
Personal Data	Any data about an individual who is identifiable by or in relation to such data.

Personal Data Breach	Any unauthorized processing or accidental disclosure, acquisition, sharing, use, alteration, destruction, or loss of access to personal data that compromises confidentiality, integrity, or availability.
Processing	Any wholly or partly automated operation on digital personal data, including: collection, recording, organisation, structuring, storage, adaptation, retrieval, use, alignment/combination, indexing, sharing, disclosure, restriction, erasure, or destruction.
Data Fiduciary	Any person who alone or with others determines the purpose and means of processing personal data. Person includes: (i) Individual (ii) Hindu Undivided Family (iii) Company (iv) Firm (v) Association of persons/body of individuals, incorporated or not (vi) The State (vii) Artificial juristic person not covered above.

Application of the Act

Provision	Details
Within India	Applies to processing of digital personal data collected: (i) In digital form (ii) In non-digital form and later digitised
Outside India	Applies if processing is connected with offering goods or services to Data Principals in India
Exemptions	Does not apply to: (i) Personal data processed by an individual for personal/domestic purpose (ii) Personal data made publicly available by: (A) The Data Principal (B) Any other person obligated by law to make it public

Illustration. X, an individual, while blogging her views, has publicly made available her personal data on social media. In such case, the provisions of this Act shall not apply.

Digital Data Protection Act, 2023 will come into force only after notification in the Official Gazette by the Central Government which is yet to be notified

LESSON-16

Contract Law

REGULATORY FRAMEWORK

- Indian Contract Act, 1872

FORMATION OF AN AGREEMENT, INTENTION TO CREATE LEGAL RELATIONSHIP

Meaning and Nature of Contract

The Indian Contract Act has defined contract in Section 2(h) as “an agreement enforceable by law”.

- The law relating to contract is governed by the Indian Contract Act, 1872.
- The Act came into force on the first day of September, 1872.
- The preamble to the Act says that it is an Act “to define and amend certain parts of the law relating to contract.”
- The Act is by no means exhaustive on the law of contract.
- It does not deal with all the branches of the law of contract.
- Contracts relating to partnership, sale of goods, negotiable instruments, insurance etc. are dealt with by separate Acts.
- The Indian Contract Act mostly deals with the general principles and rules governing contracts.
- The Act is divisible into two parts:
 1. The first part (Section 1–75) deals with the general principles of the law of contract and therefore applies to all contracts irrespective of their nature.
 2. The second part (Sections 124–238) deals with certain special kinds of contracts, namely contracts of Indemnity and Guarantee, Bailment, Pledge, and Agency.
- A contract essentially consists of two distinct parts:
 1. There must be an agreement.
 2. Such an agreement must be enforceable by law.
- To be enforceable, an agreement must be coupled with an obligation.

A contract therefore, is a combination of the two elements: (1) an agreement and (2) an obligation.

Example

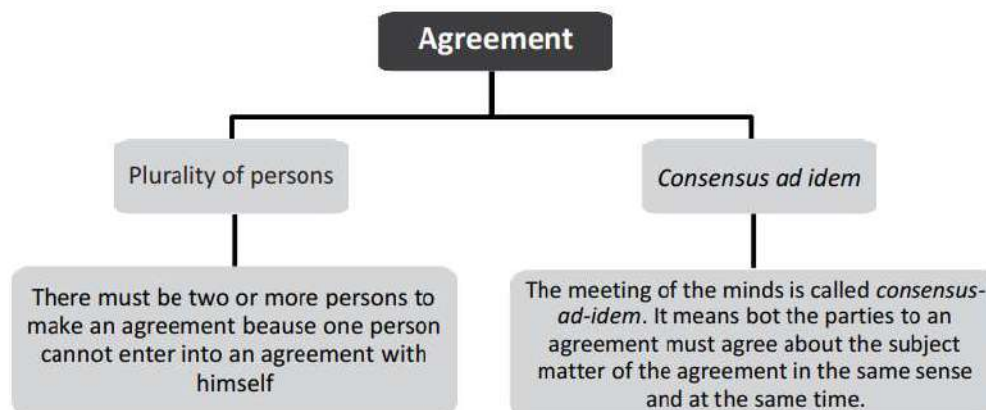
A orally agreed to supply goods to B and to receive payment against it. Is it an agreement? Yes, it is an oral agreement.

Agreement

- An agreement gives birth to a contract.
- As per Section 2(e) of the Indian Contract Act, “every promise and every set of promises, forming the consideration for each other, is an agreement.”
- It is evident from the definition given above that an agreement is based on a promise.

- According to Section 2(b) of the Indian Contract Act, “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.”
- A proposal, when accepted, becomes a promise.
- An agreement, therefore, comes into existence when one party makes a proposal or offer to the other party and that other party signifies his assent thereto.
- In nutshell, an agreement is the sum total of offer and acceptance.

An analysis of the definition given above reveals the following characteristics of an agreement:



Obligation

- An obligation is the legal duty to do or abstain from doing what one has promised to do or abstain from doing.
- A contractual obligation arises from a bargain between the parties to the agreement who are called the promisor and the promisee.
- Section 2(b) says that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; and a proposal when accepted becomes a promise.
- In broad sense, therefore, a contract is an exchange of promises by two or more persons, resulting in an obligation to do or abstain from doing a particular act, where such obligation is recognised and enforced by law.

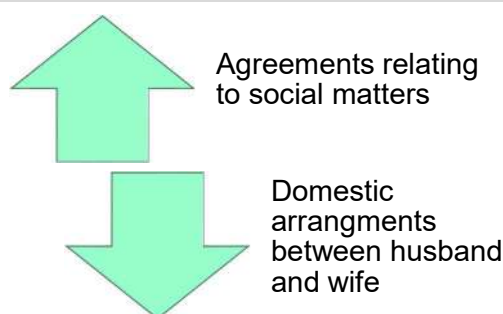
Rights and Obligations

Where parties have made a binding contract, they have created rights and obligations between themselves. The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for Rs. 10,000 to him. In this example, the following rights and obligations have been created:

- (i) A is under an obligation to deliver the car to B. B has a corresponding right to receive the car.
- (ii) B is under an obligation to pay Rs. 10,00,000 to A. A has a correlative right to receive Rs. 10,00,000

Agreements which are not Contracts

Agreements in which the idea of bargain is absent and there is no intention to create legal relations are not contracts. These are:



(a) Agreements relating to social matters:

- An agreement between two persons to go together to the cinema, or for a walk, does not create a legal obligation on their part to abide by it.
- If a person promises to take another for a dinner and breaks that promise, there is no liability to legal penalties.
- There cannot be any offer and acceptance to hospitality.

(b) Domestic arrangements between husband and wife:

- In *Balfour v. Balfour* (1919) 2 KB 571, a husband working in Ceylone had agreed in writing to pay a housekeeping allowance to his wife living in England.
- On receiving information that she was unfaithful to him, he stopped the allowance.
- It was held that he was entitled to do so.
- This was a mere domestic arrangement with no intention to create legally binding relations.
- Therefore, there was no contract.

Three consequences follow from the above discussion:

- To constitute a contract, the parties must intend to create legal relationship.
- The law of contract is the law of those agreements which create obligations, and those obligations which have their source in agreement.
- Agreement is the genus of which contract is the specie and, therefore, all contracts are agreements but all agreements are not contracts.

Intention to Create Legal Relations

- Intention to Create Legal Relations is an essential element of a valid contract.
- There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations.
- If there is no such intention on the part of the parties, there is no contract between them.
- Agreements of a social or domestic nature do not contemplate legal relationship.
- A proposal or an offer is made with a view to obtain the assent of the other party.
- When that other party expresses his willingness to the act or abstinence proposed, he accepts the offer and a contract is made between the two.
- Both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective.
- The Courts seek to give effect to the presumed intention of the parties.
- Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct.

- The Court is not concerned with the mental intention of the parties, but rather with what a reasonable man would say was the intention of the parties, having regard to all the circumstances of the case.
- For example, if two persons agree to assist each other by rendering advice, in the pursuit of virtue, science or art, it cannot be regarded as a contract.
- In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. This presumption is rebuttable, which means that it must be shown that the parties did not intend to be legally bound.

Other Important Types of Contracts

Contingent Contract (section 31)

- As per Section 31, a contingent contract is a contract to do or not to do something, if some event collateral to such contract does or does not happen.

Example

A contracts to sell B 10 bales of cotton for Rs. 20,000, if the ship by which they are coming returns safely. This is a contingent contract.

- Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

Example

A contracts to sell B, 10 bales of cotton for Rs. 20,000, if the ship by which they are coming returns safely. This is a contingent contract.

Rules regarding contingent contracts

- a. Contracts contingent upon the happening of a future uncertain event cannot be enforced unless and until that event has happened. If the event becomes impossible, the contract becomes void — *Section 32*.

Examples

- A contracts to buy B's house if A survives C — enforceable only if C dies in A's lifetime.
 - A contracts to pay B when B marries C — C dies unmarried; the contract becomes void.
- b. Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible — *Section 33*.

Example

A contracts to pay B if a ship does not return; the ship sinks — the contract can be enforced.

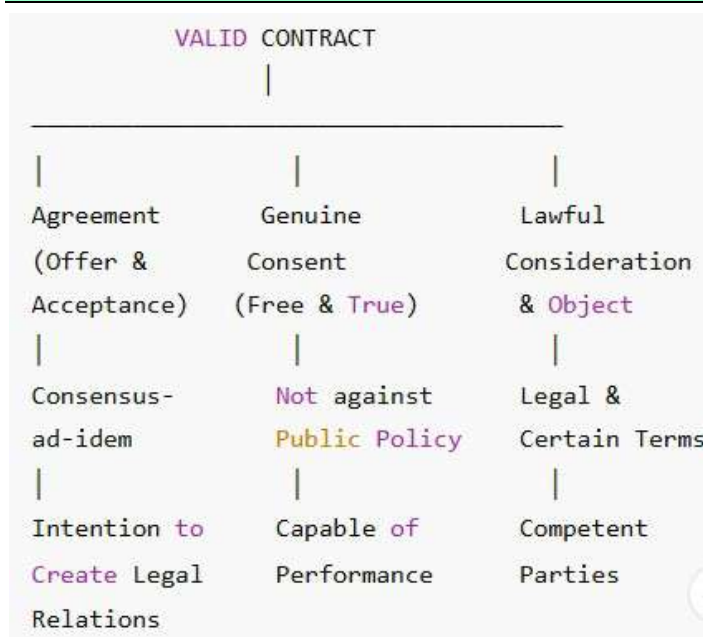
- c. If a contract is contingent upon how a person will act at an unspecified time, the event is considered impossible when the person makes it impossible to act within a definite time — *Section 34*.
- d. Contracts contingent on the happening of an event within a fixed time become void if the event does not happen within that time or becomes impossible before that time — *Section 35*.
- e. Contracts contingent upon the non-happening of an event within a fixed time may be enforced when the time expires without the event happening or when it becomes certain that the event will not happen — *Section 35*.
- f. Contingent agreements based on an impossible event are void, whether or not the parties knew of the impossibility — *Section 36*.

Law relating Other Important Types of Contracts

There are some special type of contracts. These are:

1. Indemnity
2. Guarantee
3. Bailment
4. Pledge
5. Joint Ventures, Collaborations and Multinational Agreements

ESSENTIAL ELEMENTS OF A VALID CONTRACT



- Agreement → Offer + Acceptance
- Consent → Genuine & Free
- Consideration → Lawful & Legal
- Object → Lawful & Not against Public Policy
- Parties → Competent to contract

Question: Can an agreement on ambiguous terms be valid?

No, The agreement shall be on valid terms.

Question: A & B, entered into contract in which A will send goods to B free of cost and B is not required to do anything against it. Is the contract valid?

No, a valid contract must have consideration unless falls into in to exempted category.

KINDS OF OFFER, COMMUNICATION, ACCEPTANCE AND REVOCATION OF OFFER AND ACCEPTANCE

Offer or Proposal and Acceptance

- One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance.
- When one party (the offeror) makes a definite proposal to another party (the offeree) and the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties and a contract comes into being, assuming that all other elements are also present.

What is an Offer or a Proposal?

- A proposal is also termed as an offer.
- The word 'proposal' is synonymous with the English word "offer".
- An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for a promise, act or forbearance.
- The person making the proposal or offer is called the proposer or offeror.
- The person to whom the proposal is made is called the offeree.

1st Definition - Proposal: When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. Section 2(a)

Kinds of Offers

Type of Offer	Definition / Description	Example
1. Particular Offer / Specific Offer	Offer made and addressed to a certain person only; can be accepted only by the person to whom it is made or their authorized person.	A offers to sell his car to B for Rs. 1,00,000/-.
2. General Offer	• In general offers, the offer is made to public at large and may be accepted by anyone. • Tickets are an example of general offer. • Tickets purchased for entrance into places of amusement, or tickets issued by railways or bus companies, clock-room tickets, and many other contracts set out in printed documents contain numerous terms, many of which the party receiving the ticket or document is ignorant of. • If a passenger on a railway train receives a ticket with the printed notice: <i>"this ticket is issued subject to the notices, regulations and conditions contained in the current time-tables of the railway"</i>, the regulations and conditions are deemed to be communicated to him. • The passenger is bound by them whether or not he has read them. • He is bound even if he is illiterate and unable to read them. • It is important that the notice of the conditions is contemporaneous with the making of the contract and not after the contract has been made.	Participation in Lottery, purchasing tickets for performance, railway tickets.
3. Cross Offers	Two parties give offers to each other; no contract is concluded if neither accepts the other's offer, even if terms are similar.	A offers to sell mobile to B for Rs. 10,000/- . B

		offers to buy it for Rs. 10,000/-. No contract.
4. Open / Continuing / Standing Offer	• Open/Continuing/Standing Offer occurs when a person offers to another to supply specific goods, up to a stated quantity or in any quantity required, at a certain rate, during a fixed period. • A tender to supply goods as and when required amounts to a standing offer. • A standing offer or tender is of the nature of a continuing offer. • Acceptance of such an offer merely amounts to intimation that the offer will be considered to remain open during the period specified. • Acceptance is made from time to time by placing orders for specified quantities. • Each successive order given, while the offer remains in force, is an acceptance of the standing offer as to the quantity ordered, and creates a separate contract. • It does not bind either party unless and until such orders are given. • Case Example: Where P tendered to supply goods to L up to a certain amount and over a certain period, L's order did not meet the expected amount and P sued for breach of contract. ◦ Held: Each order made was a separate contract; P was bound to fulfill orders made, but L had no obligation to make all orders. [Percival Ltd. vs. L.C.C. (1918)]	Tender floated to supply raw coffee beans as orders come in; contract concluded only when orders are placed.
5. Counter Offer	An offer made in response to an existing offer; contract arises only after acceptance of counter offer.	A offers to sell mobile for Rs. 10,000/-. B counter offers Rs. 9500/-.
6. Contracts by Post	• - Offer is valid when it reaches offeree.- Contracts by Post are subject to the same rules as other contracts, but are stated separately due to their importance. a. An offer by post may be accepted by post, unless the offeror indicates otherwise. b. An offer is made only when it actually reaches the offeree, i.e., when the letter containing the offer is delivered.	Postal acceptance of an offer to buy goods.

	c. An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted to the offeror's correct address; it binds the offeror, but not the acceptor. • The acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. • The acceptor can revoke acceptance before it reaches the offeror. • (d) An offer may be revoked before the letter containing the acceptance is posted. • An acceptance can be revoked before it reaches the offeror.	
7. Contracts over Telephone	• Contracts over the Telephone are regarded in principle the same as contracts negotiated in the actual presence of the parties. • In both cases, an oral offer is made and an oral acceptance is expected. • The acceptance must be audible, heard, and understood by the offeror. • If during the conversation the telephone lines go "dead" and the offeror does not hear the offeree's acceptance, there is no contract at that moment. • If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete. • Case Example: [Kanhaiyalal v. Dineshwarchandra (1959) AIR, M.P. 234]	Telephone conversation; if lines go dead before acceptance is heard, no contract. Full conversation repeated and heard = contract.

Rules Governing Offers

- A valid offer must comply with the following rules:
 - (a) An offer must be clear, definite, complete, and final. It must not be vague.
 - Example: A promise to pay an increased price for a horse if it proves lucky to promisor is too vague and not binding.
 - (b) An offer must be communicated to the offeree.
 - An offer becomes effective only when it has been communicated so as to give the offeree an opportunity to accept or reject.
 - (c) The communication of an offer may be made by:
 - Express words (oral or written) or
 - Implied by conduct.
 - Example of express offer: A offers his car to B for Rs. 10,000.

- Example of implied offer: A bus plying on a definite route implies the owners' offer to carry passengers at scheduled fares.
- The communication of the offer may be general or specific:
 - Specific offer: Made to a specific person; can be accepted only by that person.
 - General offer: Addressed to an uncertain body of individuals (the world at large); can be accepted by any member of the general public by fulfilling the condition laid down in the offer.

Case Law:

1. Carlill v. Carbolic Smoke Ball Co.

- The company offered a £100 reward to anyone who got influenza after using their smoke ball as instructed.
- Mrs. Carlill used it correctly but still caught influenza.
- Held: She was entitled to the reward because a general offer can be accepted by anyone.
- Key point: A continuing offer can be accepted by multiple people. For reward offers seeking information or recovery of a missing item, only the first person who fulfills the condition and knows about the reward can claim it.

2. Harbhajan Lal v. Harcharan Lal (AIR 1925 All. 539)

- A father offered a ₹500 reward for anyone who would bring his runaway son home.
- The plaintiff saw the boy at a railway station and sent a telegram to the father.
- Held: The handbill was a general offer to the public, and anyone fulfilling the conditions could claim the reward.
- Key point: The plaintiff met the conditions and was entitled to the reward.

Takeaway: General offers can be accepted by anyone who fulfills the conditions, and the claimant must have prior knowledge of the offer.

Example

A advertises in the newspapers that he will pay rupees one thousand to anyone who brings to him his lost cat. B without knowing of this reward finds A's lost cat and restore him to A. In this case since B did not know of the reward, he cannot claim it from A even though he finds A's lost cat and brings him to A.

Offer and invitation to offer

- Invitation to offer is a communication to invite certain person(s) or public for making offer.

- Examples of invitation to offer:

1. An invitation to treat or an invitation to make an offer:

- E.g., an auctioneer's request for bids (which are offered by the bidders),
- The display of goods in a shop window with prices marked upon them,
- The display of priced goods in a self-service store,
- A shopkeeper's catalogue of prices are invitations to an offer.

2. A mere statement of intention:

- E.g., an announcement of a coming auction sale.

- A person who attended the advertised place of auction could not sue for breach of contract if the auction was cancelled [Harris v. Nickerson (1873) L.R. 8 QB 286].

3. A mere communication of information in the course of negotiation:

- E.g., a statement of the price at which one is prepared to consider negotiating the sale of piece of land [Harvey v. Facey (1893) A.C. 552].

Offer

- An offer that has been communicated properly continues as such until it:
 1. Lapses, or
 2. Is revoked by the offeror, or
 3. Is rejected or accepted by the offeree.

Lapse of Offer

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if—

- a. it is not accepted within the specified time (if any) or after a reasonable time, if none is specified;
- b. it is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested;
- c. the offeree rejects it by distinct refusal to accept it;
- d. either the offeror or the offeree dies before acceptance;
- e. the acceptor fails to fulfill a condition precedent to an acceptance;
- f. the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

Revocation of Offer by the Offeror

- An offer may be revoked by the offeror at any time before acceptance.
- Like any offer, revocation must be communicated to the offeree, as it does not take effect until it is actually communicated.
- Before its actual communication, the offeree may accept the offer and create a binding contract.
- The revocation must reach the offeree before he sends out the acceptance.
- An offer to keep open for a specified time (option) is not binding unless it is supported by consideration.

Mode of Revocation

- A proposal may be revoked in different ways.
- Revocation may occur either by act or by omission.
- Section 6 provides the following modes for revocation:
 1. By the communication of notice of revocation by the proposer to the other party.
 2. By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time without communication of acceptance.
 3. By the failure of the acceptor to fulfil a condition precedent to acceptance.

4. By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

- Point 1 is revocation by an act.
- Points 2 to 4 are revocation by omission.

Acceptance

- A contract emerges from the acceptance of an offer.
- Acceptance is the act of assenting by the offeree to an offer.
- Under Section 2(b) of the Contract Act, when a person to whom the proposal is made signifies his assent, the proposal is said to be accepted.
- A proposal, when accepted, becomes a promise.

Rules Governing Acceptance

1. Express or Implied Acceptance:

- Acceptance may be express (by words spoken or written) or implied from the conduct of the parties.

2. Mode of Acceptance:

- If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner.

3. Unqualified and Absolute:

- Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.

4. Counter-offer:

- A counter-offer or conditional acceptance operates as a rejection of the offer and causes it to lapse.
- Example: A horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990 → offer lapses by rejection.

5. Communication of Acceptance:

- Acceptance must be communicated to the offeror.
- Acceptance is complete the moment it is communicated.
- Mere mental acceptance is not enough; intention alone does not create a contract.

6. Silence:

- Mere silence by the offeree does not amount to acceptance.
- The offeror cannot make silence or inaction an acceptance.

7. Acceptance by Conduct:

- If the offer is to be accepted by acting upon it, no communication of acceptance is necessary unless specified.
- Example: Reward for finding a lost dog → acceptance occurs by finding the dog; notice of acceptance beforehand is unnecessary.

8. Time Limit:

- Acceptance must be given within a reasonable time and before the offer lapses or is revoked.
- Once accepted, an offer becomes irrevocable.

9. Knowledge Requirement:

- Acceptance never precedes an offer.
- Performance of conditions without knowledge of the offer is not acceptance.
- Case: *Lalman Shukla v. Gauri Dutt (1913)* → servant who brought a boy without knowing of the reward was not entitled to it.

CONSIDERATION

Need for Consideration

- Consideration is one of the essential elements of a valid contract.
- The requirement arises from the policy of enforcing mutual promises of parties.
- A mere promise is not enforceable at law.
 - Example: If A promises to gift Rs. 500 to B and later changes his mind, B cannot sue, as no consideration was given.
- A promise is enforceable only when something is given in return by the promisee; this is the consideration.

Definition of Consideration

1. Sir Frederick Pollock:
 - Consideration is “an act or forbearance of one party, or the promise thereof, which is the price for which the promise of the other is bought.”
2. Currie v. Misa (1875) L.R. 10 Ex. 153:
 - Consideration is “some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.”
3. Section 2(d) of the Indian Contract Act, 1872:
 - “When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.”

Important Points on Consideration

1. Consideration at the desire of the promisor:
 - Consideration must move at the desire or request of the promisor, not voluntarily or at the desire of a third party.
 - Example: A rushes to help B whose house is on fire → no consideration (voluntary act).
 - If A helps at B's request, it is good consideration.
2. Consideration may move from the promisee or any other person:
 - English law: Consideration must move from the promisee; a stranger cannot sue.
 - Indian law: Consideration may move from the promisee or any other person, so a stranger can maintain a suit.

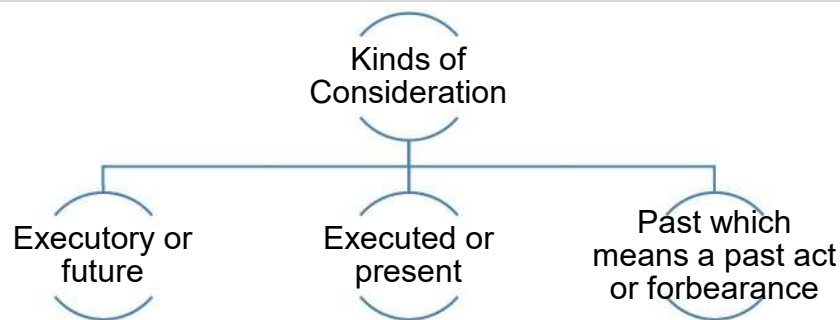
- Example: *Chinnaya v. Ramaya (1882) 4 Mad. 137* → A daughter promised to pay her uncle an annuity based on her mother's deed. The uncle could sue even though the consideration came from the mother, not the daughter.

Doctrine of Privity of Contract and of Consideration

- A stranger to a contract cannot sue under both English and Indian law for want of privity of contract.
- Illustration: *Dunlop Pneumatic Tyre Co. v. Selfridge Ltd. (1915) A.C. 847*
 - D supplied tyres to X on condition that X's retailers (S) would not sell below D's list price.
 - S sold below the list price.
 - Held: D could not sue S, as D was not party to the contract between X and S, nor did D give consideration for S's promise.
- Principle: A person who is not a party to a contract cannot sue upon it, even if the contract benefits them.
 - Example: A owes B; A sells property to C; C promises to pay B → B cannot sue C (no privity of contract).
- Leading case: *Tweddle v. Atkinson (1861) 1B*
 - Fathers of a boy and girl agreed to pay sums to the boy.
 - Boy sued father-in-law's executor after their deaths.
 - Held: Suit not maintainable as boy was not a party to the contract.

Exceptions to the Doctrine of Privity of Contract

1. **Beneficiary under a trust:** Can sue to enforce the trust even if not a party.
 - Example: *Khawaja Muhammad v. Hussaini Begum (1910) 32 All. 410* → Mohammedan lady could enforce arrears of allowance as beneficiary.
 2. **Assignee:** An assignee under assignment (or operation of law) can sue to enforce rights.
 - Exception: Mere nominee cannot sue (e.g., insurance nominee).
 3. **Family arrangements/settlements:** Female members under Hindu family arrangements for maintenance or marriage expenses can sue though not parties.
 4. **Acknowledgement of liability:** If A receives money from B for C and admits receipt to C, A acts as C's agent → C can sue.
 5. **Estoppel:** If promisor is estopped from denying liability, a stranger can sue to enforce the promise.
 6. **Third-party benefits with immovable property charge:** Third party can enforce promise even as stranger to the contract.
- **Privity of Consideration**
 - In India, privity of consideration is not strictly applicable.
 - Consideration may be given by the promisee or any other person.
 - The doctrine of privity of contract ensures a contract cannot confer rights or impose obligations on non-parties.
 - Applicable with exceptions: trust, covenant running with land, family settlements, etc.



1. Executory (Future) Consideration:

- A promise to be performed in the future.
- Example: Engagement to marry someone.

2. Executed (Present) Consideration:

- An act or forbearance already performed or suffered for a promise.
- Example:
 - A pays Rs. 100 to a shopkeeper today for goods to be supplied the next day
→
 - A's consideration is executed.
 - Shopkeeper's consideration is executory (promise to deliver goods the next day).
 - If price and goods are exchanged simultaneously, consideration is executed by both parties.

3. Past Consideration:

- An act or forbearance that took place and is complete before the promise is made.
- Example: Act constituting consideration performed prior to the promise.
- Legal Recognition:
 - English law: Recognizes only executory or executed consideration; past consideration is not valid.
 - Indian law: Recognizes executory, executed, and past consideration.

Rules Governing Consideration

1. Must be supported by valuable consideration:

- Every simple contract requires consideration to be valid, with some exceptions.

2. Form of consideration:

- Consideration may be an act, abstinence, or promise.

3. Mutuality of consideration:

- Each party must do or agree to do something.
- Gratuitous promises (e.g., subscription for charity) are not enforceable.
 - Example: A promises Rs. 5,000 for temple repair and refuses → no action.

4. Real and definite consideration:

- Consideration must be real, not vague, indefinite, or illusory.
 - Example: A son's promise to "stop being a nuisance" → no consideration.

5. Value need not be adequate:

- Consideration must have some value but need not be equivalent to the promise.
- Section 25 (Exp. II): Agreement is valid even if consideration is inadequate.
 - Example: A sells motor car for Rs. 500 voluntarily → valid contract.

6. Lawful consideration:

- Consideration must be lawful; illegal acts (e.g., paying someone to commit a crime) make the agreement void.

7. Must be more than existing duty:

- Consideration must be beyond what the promisee is already bound to do for the promisor.
 - Example: A seaman deserts ship and returns for extra wages → cannot claim extra wages (*Stilk v. Myrick*, 1809).

EXCEPTIONS OF CONSIDERATION

When Consideration not Necessary

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding.

Thus, an agreement without consideration is valid:

If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or

If it is made to compensate a person who has already done something voluntarily for the promisor, or done something which the promisor was legally compellable to do; or

If it is a promise in writing and signed by the person to be charged therewith, or by his agent, to pay a debt barred by the law of limitation

Besides, according to Section 185 of the Indian Contract Act, consideration is

In the case of gift actually made, no consideration is necessary. There need not be nearness of relation and even if it is, there need not be any natural love and affection between them

The requirements in the above exceptions are noteworthy. The first one requires written and registered promise.

The second may be oral or in writing and the third must be in writing.

Illustrations

A, for natural love and affection, promises to give his son B Rs. 10,000. A put his promise to B into writing and registered it. This is a contract.

A registered agreement between a husband and his wife to pay his earnings to her is a valid contract, as it is in writing, is registered, is between parties standing in near relation, and is for love and affection [*Poonoo Bibi v. FyazBuksh*, (1874) 15 Bom L.R. 57].

But where a husband by a registered document, after referring to quarrels and disagreement between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable, as it was not made for love and affection [Rajlucky Deb v. Bhootnath (1900) 4 C.W.N. 488].

Whether Gratuitous Promise can be Enforced

- A gratuitous promise to subscribe to a charitable cause cannot be enforced.
- Exception: If the promisee is put to some detriment by acting on the faith of the promise, and the promisor knew the purpose and that an obligation might be incurred, the promisor is bound by the promise.
 - Case: Kedar Nath v. Gorie Mohan 64.
- It is not necessary that the promisor should benefit by the consideration.
 - Sufficient if the promisee does an act from which a third person is benefited, and he would not have done it but for the promise of the promisor.
- Illustration:
 - Y requests X for a loan; X agrees to give loan if S gives guarantee of repayment.
 - S gives guarantee → X gives loan to Y.
 - Here:
 - S = promisor, X = promisee.
 - Benefit is derived by Y, not S.
 - X would not have given loan to Y without S's guarantee.
 - Detriment suffered by X (giving the loan) is sufficient consideration for S's promise.
- Conclusion:
 - Consideration is some detriment to the promisee or some benefit to the promisor.
 - Detriment to one person and benefit to the other are the same thing from two angles.
 - Ordinarily, a promisor is not bound unless some consideration is offered by the promisee.

Terms Must be Certain

- To be binding, an agreement must result in a contract.
- Parties must agree on the terms of their contract and make their intentions clear.
- Courts will not enforce a contract whose terms are uncertain.
- An agreement to agree in the future (a contract to make a contract) does not constitute a binding contract.
 - Example: Promise to pay an actress a salary to be "mutually agreed between us" is not a contract since the salary is not yet agreed.
 - Case: Loftus v. Roberts (1902).
- If the terms of a final agreement are too vague, the contract fails for uncertainty.
- Therefore, terms must be definite or capable of being made definite without further agreement of the parties.

The legal maxim, therefore, is "a contract to contract is not a contract". If you agree "subject to contract" or "subject to agreement", the contract does not come into existence, for there is no definite or unqualified acceptance.

Thus, a contract is always based upon:

- (i) Agreement (consensus ad idem) an unqualified acceptance of a definite offer;
- (ii) An intent to create legal obligations; and
- (iii) Consideration.

VOID, VOIDABLE & ILLEGAL CONTRACTS: FLAWS IN CONTRACT AND FREE CONSENT

Where there is no real agreement, the law has three remedies:

Firstly: The agreement may be treated as of no effect and it will then be known as void agreement.

Secondly: The law may give the party aggrieved the option of getting out of his bargain, and the contract

is then known as voidable.

Thirdly: The party at fault may be compelled to pay damages to the other party

(a) Void Agreement

1. A void agreement is destitute of all legal effects.
2. It cannot be enforced and confers no rights on either party.
3. Technically, it is not a contract; it is non-existent.
4. The term 'void contract' is a useful label for a situation where a 'contract' is claimed but does not exist.
5. Example: A minor's contract is void.

(b) Voidable Contract

1. A voidable contract is one which a party can put to an end.
2. The party can exercise this option if his consent was not free.
3. The contract will be binding if the party does not exercise his option to avoid it within a reasonable time.
4. Consent is not free if it is given due to misrepresentation, fraud, coercion, or undue influence.

(c) Illegal Agreement

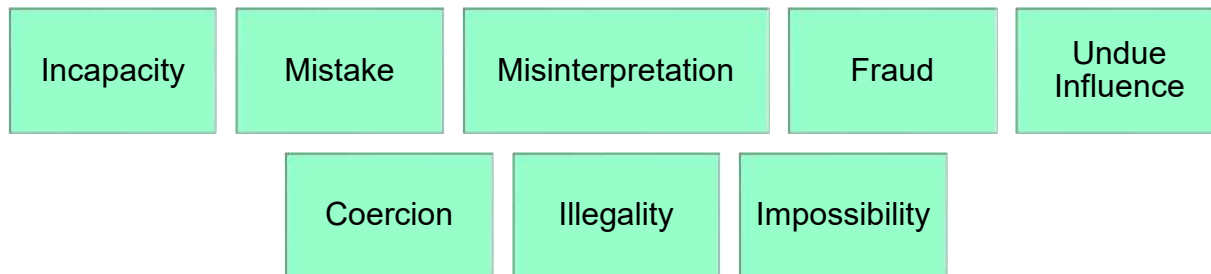
1. An illegal agreement is an unlawful agreement.
2. The law prohibits agreements made with unlawful object or consideration.
3. Like a void agreement, an illegal agreement has no legal effects between the immediate parties.
4. Collateral transactions connected to an illegal agreement also become tainted with illegality and are not enforceable.
5. Parties to an unlawful agreement cannot seek help from a court ("no polluted hands shall touch the pure fountain of justice").
6. A collateral transaction can sometimes be supported by a void agreement.

Example

A & B entered into contract in which A will steal a Diamond from a museum and B will give him Rs. 5,00,000/-. Is it a valid contract?

No, the consideration should not be illegal.

The chief flaws in contract are:



Capacity to contract

- **Flaw in Capacity – Capacity and Persons**
 1. Persons in law are either natural (human beings) or artificial (corporations).
 2. Contractual capacity or incapacity is an incident of personality.
 3. General rule: All natural persons have full capacity to make binding contracts.
 4. Exceptions under Indian Contract Act, 1872:
 - Minors
 - Lunatics
 - Persons disqualified from contracting by any law to which they are subject
 5. These persons are not competent to contract.
 6. Section 11: Every person is competent to contract who:
 - Is of the age of majority according to the law to which he is subject
 - Is of sound mind
 - Is not disqualified from contracting by any law to which he is subject
 7. A valid agreement requires that both parties understand the legal implications of their conduct.
 8. Both parties must have a mature mind.
 - Law presumes that minors and lunatics do not have the maturity to visualize pros and cons of their acts.
 9. Contractual capacity of a corporation depends on the manner in which it was created.
- **Minor's Contract**
 1. According to Indian Majority Act, 1875, a minor is a person who has not completed 18 years of age.
 2. If a guardian is appointed or the minor is under Court of Wards, the minor continues until 21 years of age.
 3. Under Indian Contract Act, a person not of majority age is incompetent to contract.
 4. *Mohori Bibi v. Dharmodas Ghose* (1903):
 - Minor has no capacity to contract.
 - Minor's contract is absolutely void.
 - Example: X, a minor, borrowed Rs. 20,000 and executed a mortgage; contract held void, cannot be compelled to repay.
 5. Courts apply this principle even if the minor has incurred liabilities or mutual obligations; minor is not liable.
 6. If the minor has performed his part of the contract, he can sue the other party.

- Rationale: Protection of minor's interest.
- 7. Under Transfer of Property Act, a minor cannot transfer property but can be a transferee.
 - Illustrates the principle of protecting minor's rights.

The following points must be kept in mind with respect to minors contract:

- a) A minor's contract is altogether void; a minor cannot bind himself.
 - If the minor gains any benefit (e.g., money on a mortgage), he cannot be asked to repay, nor can his property be made liable.
- b) Being void ab initio, the contract cannot be ratified by the minor upon attaining majority.
- c) Estoppel does not apply to minors:
 - A minor can plead minority even if he falsely represented his age.
 - However, the Court may direct restoration of property if obtained fraudulently (Section 33, Specific Relief Act, 1963).
 - Example: Minor fraudulently takes a motor car via promissory note; cannot be compelled to pay, but may be ordered to return the car.
- d) Liability for necessities (Section 68):
 - Minor's estate is liable for reasonable price of necessities supplied to him or someone he must support.
 - Necessaries depend on position and status of the minor and actual need.
 - Examples held as necessities:
 - Costs in defending a suit affecting minor's property.
 - Costs in defending him in a prosecution.
 - Money advanced to Hindu minor for marriage expenses.
- e) Court will never direct specific performance of a minor's contract.
- f) A minor can be an agent; cannot be a principal or partner.
 - He can, however, enjoy benefits of a partnership.
- g) Minor is never personally liable, cannot be adjudicated insolvent.
- h) Agreements by a parent or guardian on behalf of minor:
 - Binding if for the benefit of minor or a legal necessity.
 - Examples:
 - Contract for marriage by guardian is binding if customary (Rose Fernandez v. Joseph Gonsalves).
 - Contract of apprenticeship is binding.
 - Not enforceable: Agreement for service by father on behalf of minor daughter (Raj Rani v. Prem Adib).

Lunatics' Agreements

- Definition:
 - A lunatic is a person of unsound mind, incapable of understanding a contract or forming rational judgment regarding its effect on his interests.
- Effect on Contractual Capacity:
 1. A person of unsound mind cannot enter into a contract.
 2. Lunatic's agreement is void.

3. Exception: Contract made during lucid intervals is valid and binding.
- Temporary Unsoundness:
 - A sane person who is:
 - delirious from fever,
 - drunk to the point of being unable to understand the contract, or
 - under hypnotism is temporarily of unsound mind and cannot contract during that period.
 - Mental decay due to old age or disease also falls under this definition.
 - Liability for Necessaries:
 - Lunatic's estate (if any) is liable for necessities supplied to the lunatic or his family.
 - There is no personal liability on the lunatic.
 - Contracts for Benefit:
 - If the contract is for the lunatic's benefit, it can be enforced against the other party, but not against the lunatic.
 - Example: Jugal Kishore v. Cheddu (1903) 1 All. L.J 43.

Other Persons qualified and disqualified from contracting

- Some statutes disqualify certain persons from entering into contracts.
- Example: Oudh Land Revenue Act declares that a 'disqualified proprietor' cannot alienate his property.

Alien Enemies

- An alien is a person who is not an Indian citizen.
- An alien may be an alien friend or a foreigner whose country is at peace with India; such persons usually have the contractual capacity of an Indian citizen.
- On declaration of war, an alien becomes an alien enemy.
- Contracts with alien enemies are unenforceable once war breaks out.
- An Indian citizen residing voluntarily in hostile territory or carrying on business there is considered an alien enemy.
- Trading with an alien enemy is illegal and against public policy.

Foreign Sovereigns and Ambassadors

- Foreign sovereigns and accredited representatives (Ambassadors, High Commissioners) cannot be sued in Indian courts unless they submit voluntarily to jurisdiction.
- Foreign sovereign governments can contract through agents in India.
- The agent is personally responsible for performance of such contracts.

Professional Persons

- In England, barristers and certain medical professionals cannot sue for professional fees but can be sued for other claims.
- In India, barristers (advocates) have full right to contract and sue for their fees.
- Case: Nihal Chand v. Dilawar Khan, 1933 All. L.R. 417.

Corporations

- A corporation is an artificial person created by law (e.g., company under Companies Act, municipal corporations).
- Exists only in contemplation of law; has no physical form.
- Indian Contract Act does not explicitly mention corporate capacity, but a properly incorporated corporation can enter into contracts.
- Can sue and be sued in its own name.
- Some contracts require the corporate seal; some are prohibited (e.g., marriage).
- Powers to contract are limited by its charter/memorandum of association.
- Contracts beyond powers (ultra vires) are void.

Married Women

- In India, there is no difference between men and women regarding contractual capacity.
- A married or single woman can enter contracts and deal with her property if she is a major and of sound mind.
- English law (pre-1935): husband responsible for wife's contracts.
- Law Reform (Married Women and Tortfeasors) Act, 1935: wife has full contractual capacity unless acting as husband's agent.
- Now, married women in England can sue and be sued in their own name.

Free Consent: Flaw in Consent

- Contract is based on mutual consent (agreement).
- Consent is required to be free; parties must agree voluntarily (consensus ad idem).
- Consent is not free if caused by coercion, undue influence, misrepresentation, fraud, or mistake.
- If consent is absent, contract may be void (e.g., mutual mistake).
- If consent is not free, contract is generally voidable at the option of the affected party.
- Consent can be induced by a non-existent fact (misrepresentation, fraud, coercion, undue influence).

Mistake (Sections 20 and 21)

- Contracts are made to be performed; law generally does not allow evasion on the plea of mistake.
- Some mistakes are fundamental, making the contract void.

Effect of Mistake

- Simple errors, miscalculations, or errors of judgment by one or both parties do not affect contract validity.
 - Example: Paying an excessive price by mistake does not void the contract [Leaf v. International Galleries (1950) 1 All E.R. 693].
- To render a contract void, the mistake must be a "vital operative mistake":
 1. Must be a mistake of fact, not law or opinion.
 2. Fact must be essential to the agreement (fundamental to agreement).
 3. Must be on the part of both parties.

- Mutual mistake as to a fact essential to agreement renders the contract void (Section 20).
 - Example: Buying a horse that is dead at the time of the bargain, unknown to both parties – agreement is void.

Mistake of Law and Mistake of Fact

- Mistake of law of the land: contract is binding; ignorance of law is no excuse (*ignorantia juris non-excusat*).
- Mistake of foreign law or mistake regarding private rights: treated as mistake of fact and excusable.
 - Example: Contract made in ignorance of private right (e.g., buying property already owned) is void.
- Foreign law must be proved in Indian courts as ordinary fact.

Mutual or Unilateral Mistake

- Mistake must be mutual/bilateral (both parties).
- Unilateral mistake (one party only) generally has no effect unless:
 1. It concerns some fundamental fact.
 2. The other party is aware of the mistake.
- Errors of judgment by one party do not affect contract validity; contract remains valid.

Mutual or Common Mistake as to Subject-Matter

- A contract is void when both parties assume a certain state of things exists which does not actually exist, or when the contract means different things to each party.
- Such mistakes may relate to existence, identity, quantity, or quality of the subject matter.

(a) Mistake as to Existence of the Subject Matter

- If both parties believe the subject matter exists but it does not exist at the time of contract, the contract is void.
- Example: *Couturier v. Hastie (1856)* – Contract to buy cargo believed to be at sea, but it was already lost. Contract void due to mistake.

(b) Mistake as to Identity of the Subject Matter

- If parties are not in agreement as to the identity of the subject matter, i.e., each means something different, contract is void (*no consensus ad idem*).
- Example: *Raffles v. Wichelhaus (1864)* – Two ships called “Peerless”; parties intended different ships. Contract void.

(c) Mistake as to Quantity of the Subject Matter

- Mistake regarding quantity or extent renders contract void, even if caused by third-party negligence.
- Example: *Henkel v. Pape (1870)* – Miscommunication via telegraph led to different quantity of rifles sent. No contract existed.

(d) Mistake as to Quality of the Subject Matter or Promise

- Mistake as to quality on both sides → contract void.
- Mistake on one side → more complex; general rule: no duty to disclose facts during negotiations.

- Each party must protect own interests; principle of caveat emptor (let the buyer beware) applies in sale of goods.
- Seller not obliged to reveal defects unless certain conditions exist.

Unilateral Mistake as to Nature of the Contract

- General rule: A person who signs an instrument is bound by its terms, even if not read.
- Exception: A person can avoid the contract if the mistake is fundamental as to the nature of the document, not just its contents.
- Avoidance possible if mistake arises due to:
 1. Blindness, illiteracy, or senility of the person signing.
 2. Trick or fraudulent misrepresentation as to the nature of the document.

Unilateral Mistake as to the Identity of the Person Contracted With

- Rule of law: If a person intends to contract with A, B cannot acquire rights under that contract.
- Importance: When personalities of contracting parties matter, no third party can adopt the contract.
- Example: M intends to contract with A but mistakenly contracts with B believing him to be A → contract is vitiated due to lack of consensus ad idem.

Mistake as to the identity of the person with whom the contract is made will operate to nullify the contract only if:

- i. the identity is for material importance to the contracts; and
- ii. the mistake is known to the other person, i.e., he knows that it is not intended that he should become a party to the contract.

Case Law:

In *Cundy vs. Lindsay* (1878) 3 A.C. 459, one Blenkarn posing as a reputed trader Blankiron, placed an order for some goods with M/s Lindsay and Co. The company, thought that it is dealing with Blankiron and supplied the goods. Blenkarn sold the goods to Cundy and did not pay to Lindsay. The latter sued Cundy. The Court held that there was no contract between Lindsay and Blenkarn and therefore Cundy has no title to the goods.

Misrepresentation (Section 18)

- Definition: Misrepresentation includes both innocent and dishonest (fraudulent) misrepresentation.
- Types of Misrepresentation:
 1. Innocent Misrepresentation:
 - Made when a person believes what he says is true.
 - Any false statement made with honest belief is considered innocent.
 - Effect: The party misled by it can avoid the contract, but cannot claim damages under normal circumstances.
 2. Wilful Misrepresentation (Fraud):
 - Made with intent to deceive.

- This is treated as fraud and has more serious legal consequences.

But in order to avoid a contract on the ground of misrepresentation, it is necessary to prove that:

- there was a representation or assertion.
- such assertion induced the party aggrieved to enter into the contract.
- the assertion related to a matter of fact (and not of law as ignorance of law is no excuse).
- the statement was not a mere opinion or hearsay, or commendation (i.e., reasonable praise). For
- example an advertisement saying, “washes whiter than the whitest”.
- the statement which has become or turned out to be untrue, was made with an honest belief in its truth. Damages for Innocent Misrepresentation.

Damages for Innocent Misrepresentation

Generally the injured party can only avoid the contract and cannot get damages for innocent misrepresentation. But in the following cases, damages are obtainable:

- From a promoter or director who makes innocent misrepresentation in a company prospectus inviting the public to subscribe for the shares in the company;
- Against an agent who commits a breach of warranty of authority:
- From a person who (at the Courts discretion) is estopped from denying a statement he has made where he made a positive statement intending that it should be relied upon and the innocent party did rely upon it and thereby suffered damages;
- Negligent representation made by one person to another between whom a confidential relationship, like that of a solicitor and client exists

Wilful Misrepresentation or Fraud (Section 17)

Fraud is an untrue statement made knowingly or without belief in its truth or recklessly, carelessly, whether it be true or false with the intent to deceive. The chief ingredients of a fraud are:

- a false representation or assertion,
- of fact (and not a mere opinion),
- made with the intention that it should be acted upon,
- the representation must have actually induced the other party to enter into the contract and so deceived him,
- the party deceived must thereby be indemnified, for there is no fraud without damages, and
- the statement must have been made either with the knowledge that it was false or without belief in its truth or recklessly without caring whether it was true or false.

• Effect of Misrepresentation by Concealment:

- It does not matter whether the misrepresentation is made by a false statement or by concealment.
- The defrauded party can:
 - Avoid the contract.

- Claim damages.

- **Mere Silence:**

- Generally, silence alone about facts affecting willingness to contract is not fraud.
- Exceptions where silence amounts to fraud:
 1. Silence is equivalent to speech in the context.
 2. Where there is a duty to speak, e.g., contracts uberrimae fidei (contracts requiring utmost good faith).

Contracts Uberrimae Fidei There are contracts in which the law imposes a special duty to act with the utmost good faith i.e., to disclose all material information. Failure to disclose such information will render the contract voidable at the option of the other party.

Contracts uberrimae fidei are:

1. **Contract of insurance (all kinds):**

- The assured must disclose all material facts to the insurer.
- All statements made must be correct and truthful.

2. **Company prospectus:**

- When a company invites the public to subscribe for shares, it must truthfully disclose matters as per the Companies Act.
- Non-disclosure or false statements make the person responsible liable to damages.
- The contract to buy shares is voidable if material false statements or non-disclosures occur.

3. **Contract for the sale of land:**

- The vendor must show good title to the land being sold.

4. **Contracts of family arrangements:**

- In agreements for settlement of family property, every member must fully disclose all material facts within their knowledge.

Aspect	Innocent Misrepresentation	Fraud
Intent	No intent to deceive; false statement made with honest belief in its truth	Intent to deceive the other party
Defendant's Plea	Defendant can argue that plaintiff could have discovered the truth with ordinary diligence (Section 19 exception)	This plea is not available in case of fraud
Remedies for Plaintiff	Plaintiff can avoid or rescind the contract	Plaintiff can avoid the contract and also claim damages
Legal Consequences	No criminal liability	May lead to prosecution for cheating under Bharatiya Nyaya Sanhita

Coercion

- **Definition (Section 15):** Coercion means:

- Committing or threatening to commit any act forbidden by the Indian Penal Code (IPC).

- Unlawfully detaining or threatening to detain any property to the prejudice of any person.
- The intention must be to cause a person to enter into an agreement.
- **Scope of coercion:**
 - Even acts forbidden by IPC done outside its territorial jurisdiction amount to coercion.
 - Threats can be directed at the person or at third parties.
 - Threats can involve property or goods.
- **Example:**
 - If A points a pistol at B to force him to sign a promissory note, B can avoid the agreement.
 - If A threatens harm to C to compel B to sign, it also counts as coercion.
- **Legal clarification:**
 - Mere threat to prosecute someone does not constitute coercion.
 - There must be a contract made under the threat, which is sought to be avoided due to coercion.
- **Case reference:**
 - *Ramchandra v. Bank of Kohlapur, 1952 Bom. 715* – clarifies that coercion requires a contract made under threat.
- **Additional note:**
 - Coercion can proceed from any person and may target any person or goods.

Undue Influence

- **Definition (Section 16):**
 - A contract is produced by undue influence when the relations between the parties are such that one party is in a position to dominate the will of the other and uses that position to obtain an unfair advantage.
 - **Elements of undue influence:**
 1. A dominant position.
 2. Use of that position to obtain an unfair advantage.
 - **Scope of “unfair advantage”:**
 - It does not limit to cases where the transaction is obviously unfair between persons dealing on an equal footing.
 - Lord Kingston: principle applies wherever influence is acquired and abused, and confidence is reposed and betrayed.
- Sub-section (2) of Section 16 – Deemed to dominate will:
- a. When a person holds real or apparent authority over another or stands in a fiduciary relation, e.g.,
 - Minor and guardian
 - Trustee and beneficiary
 - Solicitor and client
 - No presumption in relations of creditor-debtor, husband-wife (unless wife is parda-nishin), landlord-tenant; in these cases undue influence must be proved.

- b. When a person makes a contract with another whose mental capacity is temporarily or permanently affected by age, illness, or mental/bodily distress, e.g., doctor and patient.

Illustration

A, having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence a bond upon B for a greater amount than the sum due in respect of the advance. A employs undue influence.

A, a man enfeebled by disease or age is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

A parent stands in a fiduciary relation towards his child and any transaction between them by which any benefit is procured by the parent to himself or to a third party, at the expense of the child will be viewed with jealousy by Courts of Equity and the burden will be on the parent or third-party claiming the benefit of showing that the child while entering into the transaction had independent advice, that he thoroughly understood the nature of transaction and that he was removed from all undue influence when the gift was made [Marim Bibi v. Cassim Ebrahim (1939) 184 I.C. 171 (1939) A.I.R. 278].

Where there is a presumption of undue influence, the presumption can be rebutted by showing that

- i. full disclosure of all material facts was made,
- ii. the consideration was adequate, and
- iii. the weaker party was in receipt of independent legal advice.

Transaction with parda-nishin women

- 'Parda-nishin' denotes complete seclusion.
- A woman who:
 - Goes to court and gives evidence,
 - Fixes rents with tenants and collects rents,
 - Communicates in business matters with men other than her family, cannot be regarded as a parda-nishin woman [Ismail Musafee v. Hafiz Boo (1906) 33 Cal. LR 773 and 33 I.A. 86].
- Principles applied are founded on equity and good conscience.
- A person contracting with a parda-nishin woman must prove:
 - No undue influence was used,
 - She had free and independent advice,
 - She fully understood the contents of the contract,
 - She exercised her free will.
- Law provides her a "special cloak of protection" [Kali Baksh v. Ram Gopal (1914) L.R. 41 I.A. 23, 28-29, 36 All 81, 89].

Unconscionable transactions:

- An unconscionable transaction makes an exorbitant profit out of the other's distress by a person in a dominant position.
- High rate of interest alone does not make a money-lending transaction unconscionable.
- If the rate of interest is very exorbitant and regarded as unconscionable by the Court, the creditor bears the burden of proving no undue influence was exercised.
- Urgent need of money by the borrower does not, by itself, place the lender in a position to dominate the borrower's will [Sunder Koer v. Rai Sham Krishen (1907) 34 Cal. 150, C.R. 34 I.A. 9].

Legality of Object

- A valid contract requires that the object should be lawful.
- Section 10 of the Indian Contract Act, 1872 states:
 - "All agreements are contracts if they are made by free consent of parties competent to contract for a lawful consideration and with a lawful object..."
- If the consideration or object of an agreement is unlawful, the agreement is not a contract.

Section 23 of the Indian Contract Act, 1872 provides that the consideration or object of an agreement is

- i. lawful unless it is forbidden by law; or
- ii. it is of such nature that if permitted it would defeat the provisions of law; or
- iii. is fraudulent; or
- iv. involves or implies injury to the person or property of another; or
- v. the Court regards it an immoral or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustration

- (i) X, Y and Z enter into an agreement for the division among them of gains acquired by them by fraud. The agreement is void as its object is unlawful.
- (ii) X promises to obtain for Y an employment in the Government service and Y promises to pay Rs. 1,500 to X. The agreement is void, as the consideration for it is unlawful.
- (iii) X promises to Y to drop a prosecution which he has instituted against Y for robbery, and Y promises to restore the value of the things taken. The agreement is void as its object is unlawful.
- (iv) A who is B's mukhtar promises to exercise his influence, as such, with B in favour of C and C promises to pay Rs. 1,000 to A. The agreement is void because it is immoral.
- (v) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void as it implies or involves injury to the person of another.

- Void Contract:
 - A void contract is completely destitute of legal effects.
- Illegal Contract:

- An illegal contract has no legal effect between the immediate parties.
 - It also taints collateral contracts with illegality.
- Illustrations:
 - If A borrows Rs. 1,000 from B to lend to C (a minor), the contract between A and C is void, but B can recover the money from A.
 - If A borrows Rs. 1,000 from B to buy a pistol to shoot C, recovery by B depends on whether B knew the illegal purpose:
 - If B knew, he cannot recover.
- Key Principle:
 - All illegal agreements are void, but all void agreements are not necessarily illegal.

Consequence of Illegal Agreements

- An illegal agreement is entirely void.
- No action can be brought by a party to an illegal agreement. (*Maxim: "Ex turpi causa non-oritur action" – from an evil cause, no action arises*)
- Money paid or property transferred under an illegal agreement cannot be recovered. (*Maxim: "in pari delicto potior est conditio defendentis" – in cases of equal guilt, more powerful is the position of the defendant*)
- If an agreement consists of two parts, one legal and one illegal, and the legal part is separable, the court will enforce the legal part.
 - If the legal and illegal parts cannot be separated, the whole agreement is illegal.
- Any agreement collateral to an illegal agreement is also tainted with illegality and treated as illegal, even if it would have been lawful by itself. (*Film Pratachand v. Firm Kotri Re. AIR (1975) S.C. 1223*)

Exception to General Rule of no Recovery of Money or Property

In the following cases, a party to an illegal agreement may sue to recover money paid or property transferred:

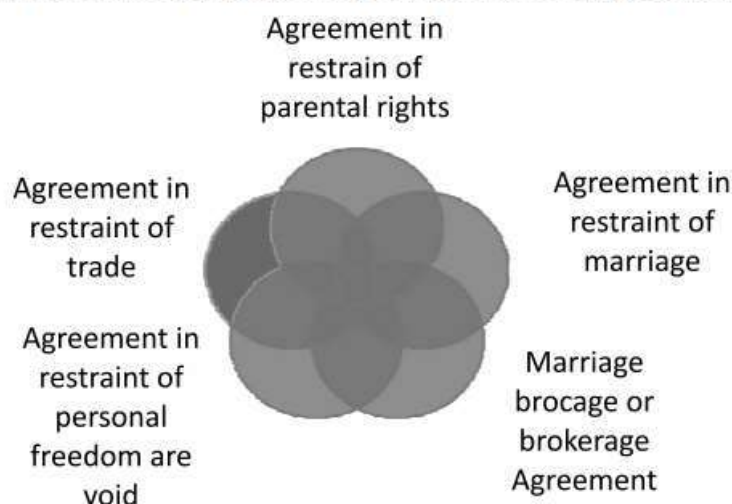
- a. Where the transfer is not in pari delicto (equally guilty) with the defendant, i.e. the transferee. For example, where A is induced to enter into an illegal agreement by the fraud of B, A may recover the money paid if he did not know that the contract was illegal.
- b. If the plaintiff can frame a cause of action entirely dependent of the contract.
- c. Where a substantial part of the illegal transaction has not been carried out and the plaintiff is truly and genuinely repentant. [*Bigos v. Bonstead* (1951), All E.R. 92].

Agreements Void as being Opposed to Public Policy

- Public policy covers a wide range of topics.
- Agreements may offend public policy by:
 - Prejudicing the State in times of war.
 - Abusing justice.
 - Imposing unreasonable or inconvenient restrictions on:
 - Free choice in marriage.

- Liberty to exercise lawful trade or calling.
- Doctrine of public policy is a branch of Common Law and is governed by precedents. (*Gherulal Parakh v. Mahadeodas Maiya, 1959*)
- Doctrine of public policy cannot be extended beyond the classes of cases already covered.
- Courts cannot invent a new head of public policy. (*Lord Halsbury, Janson v. Driefontien Consolidated Mines, 1902*)
- Public policy is considered unsafe and treacherous for legal decisions.
- A new head of public policy can only be evolved under extraordinary circumstances causing incontestable harm to society.

The following agreements are void as being against public policy but they are not illegal:



- Agreement in restraint of parental rights:** An agreement by which a party deprives himself of the custody of his child is void.
- Agreement in restraint of marriage:** An agreement not to marry at all or not to marry any particular person or class of persons is void as it is in restraint of marriage.
- Marriage brokerage or brokerage Agreements:** An agreement to procure marriage for reward is void. Where a purohit (priest) was promised Rs. 200 in consideration of procuring a wife for the defendant, the promise was held void as opposed to public policy, and the purohit could not recover the promised sum.
- Agreements in restraint of personal freedom are void:** Where a man agreed with his money lender not to change his residence, or his employment or to part with any of his property or to incur any obligation on credit without the consent of the money lender, it was held that the agreement was void.
- Agreement in restraint of trade:** An agreement in restraint of trade is one which seeks to restrict a person from freely exercising his trade or profession.

AGREEMENTS IN RESTRAINT OF TRADE VOID

- Section 27: Every agreement restraining a person from exercising a lawful profession, trade, or business is, to that extent, void.
- The Section is not happily worded and has been criticised.

- English law: Reasonable restraint may be valid. (*Nordenfelt v. Maxim Nordenfelt Guns Co., 1894*)
 - N sold his worldwide gun business and promised not to manufacture guns for 25 years.
 - House of Lords held the restraint reasonable and binding.
 - Reasonableness depends on facts of each case.
- Indian courts not consistent on whether reasonable restraints are permitted.
 - (*Madhub Chunder v. RaCoomar, 1874*): A paid Rs. 900 to B's workman. B undertook not to do business in a locality. Suit dismissed; agreement void under Section 27.
- If restraint is necessary for carrying on business, it is not prohibited. (*Mackenzie v. Sitarmiah, 1891*)
 - A agreed to sell all salt to B and not to sell to third parties; Court held agreement valid.
- Personal covenants between employer and employee not to compete:
 - (*Niranjan Shanker Golikari v. The Century Spinning and Manufacturing Co. Ltd., 1967*): N agreed to serve 5 years; left early and joined competitor.
 - Supreme Court held restraint necessary for protection of company's interests and enforceable.
- Restriction must be reasonable, considering facts and circumstances.
 - (*Superintendence Company of India Ltd. v. Krishna Murgai, 1981*): Restraint beyond term of service is void; justified only if necessary to protect employer's goodwill.
- Words "to the extent" in Section 27: Only covenants operating as restraint of trade are void; others remain valid.
 - (*Brahmputra Tea Co. Ltd. v. Scarth, 1885*): Employee agreed not to compete (void) and not to injure employer's interest during employment (binding).

Example

A & B entered into contract in which A will not engage in the business of selling spices in Delhi. B paid Rs. 5,00,00/- as consideration to this agreement. Is this agreement void? Yes, this agreement is void pursuant to section 27 of Indian Contract Act, 1872.

When Contracts in Restraint of Trade Valid

- Prima facie rule: Every restraint of trade is void, but certain exceptions are recognised.
- Exceptions where partial and reasonable restraint is enforceable:
 - a. Sale of goodwill:
 - Seller undertakes not to compete with purchaser of goodwill.
 - Contract enforceable if restraint reasonable in territorial limits and duration.
 - b. Partners' agreements:
 - Section 11(2) Indian Partnership Act: Partner may agree not to carry on business other than firm's business while a partner.
 - Sections 36(2) and 54 Indian Partnership Act: Partner may agree not to carry on similar business after ceasing partnership within specified period or limits, if restrictions are reasonable.

Trade combinations:

- Agreement aiming to regulate business, not restrain it, is valid.
- Example: Business combination among traders/manufacturers not to sell below certain price, to pool profits/output, and divide proportionately.
- (*Fraser & Co. v. Laxmi Narain, 1931*): Such agreements valid.

Negative stipulations in service agreements:

- Service agreement where a person binds not to take service with anyone else during term.
- Not a restraint of lawful profession and is valid.

Wagering Agreements

- Literal meaning: “Wager” means a bet.
- Definition: Wagering agreements are ordinary betting agreements.
 - Example: A and B agree to pay each other depending on outcome of England’s cricket match.
 - Nothing can be recovered by winning party.
- Essence: One party wins, the other loses on a future event of uncertain nature.
 - (*Thacker v. Hardy, 1878*).

Wagering Agreements Void

- In India, except Mumbai: wagering agreements are void.
- In Mumbai: wagering agreements declared illegal by Avoiding Wagers (Amendment) Act, 1865.
 - Illegal agreements in Mumbai void between parties and collateral agreements.
 - Example: A loses bet to B, C pays B for A → C cannot recover from A in Mumbai.
- Agent and principal:
 - If agent bets on behalf of principal and loses, cannot recover money from principal in Mumbai; elsewhere he can recover.
 - If agent wins, must pay principal the winnings.
- Commercial transactions vs wagering:
 - If delivery of goods is intended → valid contract.
 - If only differences are paid → wagering contract, unenforceable.
- Mutuality: Gain of one party must be loss to the other on occurrence of uncertain event.

Void Agreements

The following types of agreements are void under Indian Contract Act:

- a. Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract – Section 11.
- b. Agreement made under a mistake of fact, material to the agreement on the part of the both the parties – Section 20.
- c. An agreement of which the consideration or object is unlawful – Section 23.

- d. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void – Section 24.
- e. An agreement made without consideration subject to three exceptions provided to Section 25.
- f. An agreement in restraint of marriage – Section 26.
- g. An agreement in restraint of trade – Section 27.
- h. An agreement in restraint of legal proceedings – Section 28.
- i. Agreements, the meaning of which is not certain, or capable of being made certain – Section 29.
- j. Agreement by way of wager – Section 30.
- k. An agreement to enter into an agreement in the future.
- l. An agreement to do an act impossible in itself – Section 56(1)

When contract becomes void

- Void ab initio: An agreement not enforceable by law is void from the beginning – Section 2(g).
- Becomes void later: A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable – Section 2(j).
- Impossibility of performance: Contract becomes void when performance becomes impossible due to an event promisor could not prevent (e.g., destruction of subject-matter after formation).
- Subsequent illegality: Contract becomes void if it becomes illegal after formation (e.g., war prohibits supply of goods).
- Contingent contracts: Contingent contract becomes void if the uncertain future event becomes impossible.
- Voidable contracts: Contract becomes void when the aggrieved party exercises the option to avoid it.

Restitution

- Non-performance of void contract: When a contract becomes void, neither party is required to perform it.
- Restitution of benefits: If a party has received any benefit under a void contract, they must restore it or compensate the other party.
 - Example: A receives Rs. 500 advance from B for gold; contract becomes void due to prohibition → A must return Rs. 500.
- Section 65: Restitution is provided when an agreement is discovered to be void.
 - Example: A pays Rs. 500 for B's promise to marry A's daughter C; C is dead → B must return Rs. 500.
- Exception – wholly incompetent parties: If parties are wholly incompetent to contract (e.g., minor), there is no restitution.
 - Example: Minor borrows Rs. 1,000 → cannot be asked to repay (Mohori Bibee case).

CERTAIN RELATIONS RESEMBLING THOSE OF CONTRACT (QUASI CONTRACTS)

- A valid contract requires offer, acceptance, capacity, consideration, and free consent.
- Sometimes, the law implies a promise even when there is no offer, acceptance, consensus ad idem, agreement, or promise.
- Such cases are not contracts in the strict sense but are recognised as relations resembling contracts and enforced as if they were contracts → quasi-contracts.
- A quasi-contract is based on the equitable principle that a person shall not unjustly enrich himself at the expense of another.
- It is not a contract, but an obligation created by law when a person is in possession of another's money or its equivalent under circumstances where, in equity and good conscience, he ought not to retain it.
- The duty arises from justice and fairness, not from agreement or intention.
- Example: Money paid under mistake must be returned.

Quasi-Contracts or Implied Contracts under the Indian Contract Act

The following types of quasi-contracts have been dealt within the Indian Contract Act—

- Necessaries supplied to person incapable of contracting or to anyone whom he is illegally bound to support - Section 68.
- Suit for money had and received - Section 69 and 72.
- Quantum Meruit.
- Obligations of a finder of goods - Section 71.
- Obligation of person enjoying benefit of a non-gratuitous act - Section 70.

Example

R and S enter a contract under which R agrees to deliver Groceries at S's residence and S promises to pay Rs. 15,000 end of the month. However, R erroneously delivers the groceries at T's residence instead of S's.

When T gets home he assumes that the groceries was send by his uncle and consumed. In this case, even there is no contract between T and R, it may be treated as Quasi contract and T is Liable to pay for the groceries.

Necessaries

- Contracts by minors and persons of unsound mind are void.
- Section 68: Their estates are liable to reimburse the trader who supplies them with necessities of life.

Suit for Money Had and Received

- Right to file a suit arises:
 1. Plaintiff paid money to defendant:
 - (i) under a mistake,
 - (ii) pursuant to a contract whose consideration has failed,
 - (iii) under coercion, oppression, extortion, or similar means.

- A debtor may recover over-payment made to creditor by mistake (mistake of fact or law).
- Payment to third-party of money which another is bound to pay:
 - Example: A pays money to save his goods wrongfully attached to realize B's arrears → A can recover from B.
- Money obtained by defendant from third-parties:
 - Example: Agent obtains secret commission or fraudulent payment from third-party → Principal can recover from agent.

Quantum Meruit

- Literal meaning: "as much as earned" or reasonable remuneration.
- Used when a person claims reasonable remuneration for services without an express promise to pay.
- Law implies reasonable compensation if circumstances show services are to be paid for.
- General rule: If a party has not fully performed the contract, he cannot sue for payment; contract must be indivisible and payment is due only on completion.
- Exception: If one party is prevented by the other from completing the contract, he may sue on quantum meruit for the value of what he has done.
- Claim arises when:
 - One party abandons the contract, or
 - Work is done under a void contract.
- Party in default may sue on quantum meruit if:
 - Contract is divisible, and
 - Other party has benefited from part performed.
- If contract is not divisible, party at fault cannot claim the value of what he has done.

Obligations of Finder of Lost Goods

- Finder of goods is liable as a bailee.
- Must take care of the goods as a man of ordinary prudence would for his own goods.
- Must not appropriate the goods for personal use.
- If the owner is traced, goods must be returned.
- Finder is entitled to:
 - Reward offered by the owner, and
 - Expenses incurred in protecting/preserving the property.

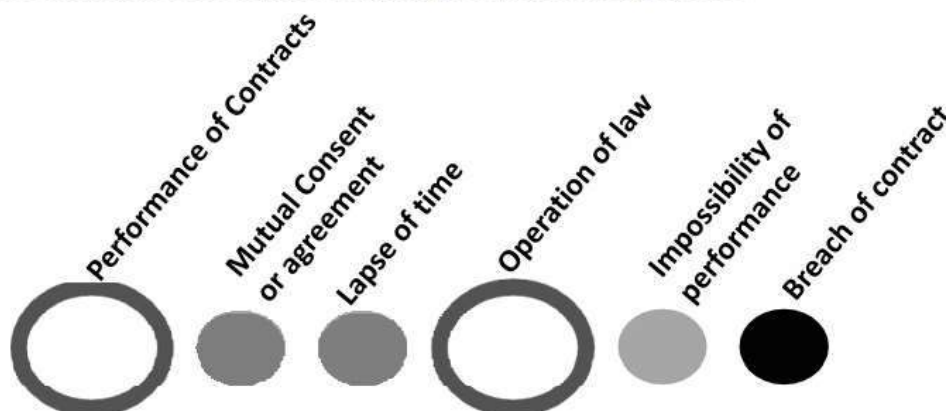
Obligation of Person Enjoying Benefit of Non-Gratuitous Act

- Under Section 70, if a person lawfully does something for another without intending it gratuitously and the other accepts/enjoys the benefit, they must:
 - Compensate the former, or
 - Restore the thing delivered.
- Examples:
 - One joint tenant paying full rent can claim compensation from co-tenant.
 - Goods left at B's house by mistake: if B treats them as his own, he must pay A.

DISCHARGE OR TERMINATION OF CONTRACTS

A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished.

Contracts may be discharged or terminated by any of the following modes:



Performance of Contracts (Section 37)

- Parties must perform or offer to perform their respective promises.
- Performance may be dispensed with or excused under law.
- Death of promisor: Representatives are bound to perform unless contrary intention appears.

Tender of Performance (Section 38)

- Discharge by tender: Promisor performs, but if performance is rejected, he is discharged and may sue for breach.
- Conditions for valid tender:
 1. Must be unconditional.
 2. Must be at a proper time and place.
 3. Must enable the other party to see promisor is able and willing to perform.
 4. For delivery of goods, promisee must have reasonable opportunity to inspect.
 5. Tender to one joint promisee has same effect as tender to all.

Who can demand performance?

- Stranger cannot sue.
- Promisee or assignee of rights may demand performance.

Effect of refusal to perform wholly (Section 39)

- Promisee may end the contract if promisor refuses or disables himself from performing entirely.
- Exception: Promisee signifies acquiescence.

By whom contract must be performed (Section 40)

- If contract intended to be performed by promisor himself, he must perform personally.
- Otherwise, promisor or representatives may employ a competent person.
- Examples:

- Payment of money: Promisor or representative may pay personally or through another.
- Painting a picture: Must be performed personally by promisor.

Devolution of Joint Liabilities (Sections 42–44)

- Section 42: Joint promisors perform promise; if one dies, representatives perform jointly with survivors.
- Section 43:
 - Promisee may compel any one or more joint promisors to perform the whole promise.
 - Joint promisors may compel others to contribute equally unless contrary intention.
 - If one defaults, remaining promisors share loss equally.
- Section 44:
 - Release of one joint promisor does not discharge others.
 - Released promisor still responsible to co-promisors.

Devolution of Joint Rights

- Promise to two or more persons creates joint promisees.
- Rights to claim performance rest with all joint promisees.
- On death of one promisee, representatives jointly with surviving promisee may demand performance.
- On death of all promisees, representatives of all may demand performance.

Assignment of Contract Rights

- Promisee may assign rights and benefits of a contract.
- Assignee is entitled to demand performance by the promisor.
- Assignment must be in writing to be complete and effectual.

Non-Assignable Obligations

- Obligations or liabilities under a contract cannot be assigned.
- Example: A owes B Rs. 500; A cannot transfer liability to C without B's consent.

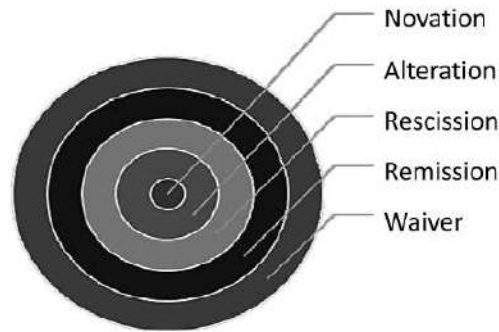
Novation

- If B consents to accept performance by C, a new contract substitutes the old one.
- Old contract is discharged and all rights and liabilities under it are extinguished.

(b) Discharge by Mutual Agreement or Consent (Sections 62 and 63)

A contract may be discharged by the agreement of all parties to the contract, or by waiver or release by the party entitled to performance

Methods stipulated under Sections 62 and 63 of the Indian Contract Act for discharging a contract by mutual consent are:



- Novation – when a new contract is substituted for existing contract either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.
- Alteration – change in one or more of the material terms of a contract.
- Rescission – by agreement between the parties at any time before it is discharged by performance or in some other way.
- Remission – acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made.
- Waiver – deliberate abandonment or giving up of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

(c) Discharge by Lapse of Time

- The Limitation Act can act as a defence against suits for breach of contract.
- It may terminate the contract by depriving a party of legal remedy.
- Example: If a debtor fails to repay a loan on the due date, the creditor must file a suit within three years of default.
- If the three-year limitation period expires, the creditor is barred from remedy, and the debtor is discharged from liability.

(d) Discharge by Operation of Law

1. By Merger:
 - When an inferior contract is incorporated into a superior contract.
2. By Unauthorized Alteration:
 - If a party materially alters a written contract without the knowledge or consent of the other, the other party can avoid the contract.
3. By Insolvency:
 - Under the Insolvency Act, discharge occurs in specific circumstances.
 - Example: If a court orders the discharge of an insolvent, it exonerates him from liabilities for debts incurred prior to adjudication.

(e) Discharge by Impossibility or Frustration (Section 56):

- Contracts to perform impossible acts are void.
- Example: Agreement to discover treasure by magic is void.
- Subsequent impossibility: If performance becomes impossible after the contract is made, the contract is discharged.

- Example: A singer contracts to sing but becomes ill; contract becomes void.
- Section 56, Para 2: Contract becomes void if performance becomes impossible or unlawful due to events beyond promisor's control.
- Section 56, Para 3: If impossibility was known only to the promisor, he must compensate the promisee for losses due to non-performance, even though the contract is void.

Case Law:

Satyabarta Ghose v. Mugnurang (1954)

- Issue: Interpretation of "impossible" under Section 56 (frustration of contract).
- Facts: A agreed to sell land to B. Before development, the government temporarily requisitioned the land. A offered to return the earnest money; B sued for specific performance.
- Court's Observation:
 - "Impossible" under Section 56 does not mean only literal impossibility.
 - It can include acts that are impracticable or useless due to changed circumstances affecting the contract's purpose.
- Decision: Section 56 did not apply because requisition was temporary and there was no fixed time for performance; the core purpose of the contract was not destroyed.

Takeaway: Impossibility under Section 56 requires a radical change that destroys the contract's foundation, not just temporary or minor hindrances.

(f) Discharge by Supervening Impossibility

A contract will be discharged by subsequent or supervening impossibility in any of the following ways:

- a. Where the subject-matter of the contract is destroyed without the fault of the parties, the contract is discharged.
- b. When a contract is entered into on the basis of the continued existence of a certain state of affairs, the contract is discharged if the state of things changes or ceases to exist.
- c. Where the personal qualifications of a party is the basis of the contract, the contract is discharged by the death or physical disablement of that party.

(g) Discharge by Supervening Illegality

- A contract illegal at the time of formation is void.
- If a contract is legal when made but later law changes or an authority acts to prevent performance, the contract is discharged.
- Discharge occurs because performance becomes prohibited by law.
- Example:
 - A contracts with B to cut trees.
 - Later, law requires a license for cutting trees.
 - License is refused → contract is discharged.

Cases in which there is no supervening impossibility

In the following cases contracts are not discharged on the ground of supervening impossibility—

- a. Difficulty of performance: The mere fact that performance is more difficult or expensive than the parties anticipated does not discharge the duty to perform.
 - b. Commercial impossibilities do not discharge the contract. A contract is not discharged merely because expectation of higher profits is not realised.
 - c. Strikes, lockouts and civil disturbance like riots do not terminate contracts unless there is a clause in the contract providing for non-performance in such cases.
- Supervening impossibility or illegality is known as frustration under English Law.

(h) Discharge by Breach

- Breach occurs when the promisor:
 - Does not perform, or
 - Does not tender performance, or
 - Performs defectively.
 - Types of Breach:
 1. Actual Breach – occurs at the time performance is due or during performance.
 2. Anticipatory Breach – occurs before performance is due.
- Anticipatory Breach arises when:
- Occurs before the time for performance is due.
 - Arises when a party:
 - Renounces the contract clearly, showing intention not to perform, or
 - Does an act making performance impossible.
 - Rights of the other party (promisee):
 - a. Sue immediately for damages after repudiation.
 - b. Wait until the performance date to sue:
 - Keeps the contract alive for both parties.
 - Allows the promisor to still complete performance.
 - Permits promisor to use any legal excuse for non-performance arising before the due date.

(i) Hochester v. De La Tour (1853):

- A hired B starting June 1, but repudiated in May.
- Held: B could sue immediately; no need to wait until June.

2. Avery v. Bowden (1856):

- B repudiated a contract to transport goods; A delayed suing.
- War broke out, frustrating the contract.
- Held: A lost right to sue due to delay.

3. Frost v. Knight (1872):

- If a party signals refusal to perform:
 - Promisee can wait until performance date or sue immediately.
 - Waiting keeps the contract alive for both parties and allows promisor to complete the contract or use valid excuses for non-performance.

Easy takeaway Case Laws:

- Immediate action is allowed for anticipatory breach.
- Delay can risk losing the right to sue.
- Waiting keeps the contract alive but carries some risk.

REMEDIES FOR BREACH OF CONTRACT

- Where a contract is broken, the injured party has several courses of action open to him. The appropriate remedy in any case will depend upon the subject-matter of the contract and the nature of the breach.

(i) Remedies for Breach of Contract

In case of breach of contract, the injured party may:

- a. Rescind the contract and refuse further performance of the contract;
 - b. Sue for damages;
 - c. Sue for specific performance;
 - d. Sue for an injunction to restrain the breach of a negative term; and
 - e. Sue on quantum meruit.
- When a party to a contract has broken the contract, the other party may treat the contract as rescinded and is absolved from all obligations under the contract.
 - Under Section 65, when a party treats the contract as rescinded, he is liable to restore any benefits he has received under the contract to the party from whom such benefits were received.
 - Under Section 75 of the Indian Contract Act, if a person rightfully rescinds a contract, he is entitled to compensation for any damage sustained through the non-fulfilment of the contract by the other party.
 - Section 64 deals with consequences of rescission of voidable contracts, where there is a flaw in the consent of one party to the contract.
 - When a person at whose option a contract is voidable rescinds, the other party need not perform any promise in which he is the promisor.
 - The party rescinding a voidable contract shall, if he has received any benefit thereunder, restore such benefit as far as may be to the person from whom it was received.

(ii) Damages for Breach of Contract

- Under Section 73 of the Indian Contract Act, when a contract is broken, the party suffering from the breach is entitled to compensation from the party who broke the contract.
- Compensation is for any loss or damage that naturally arises in the usual course of things from the breach or that the parties knew, at the time of making the contract, was likely to result from the breach.
- Compensation is not given for remote or indirect loss or damage caused by the breach.
- The foundation of the claim for damages is based on the case *Hadley v. Baxendale* (1854) 9 Ex. 341.
- Facts of the case:
 - A's mill shaft broke and was delivered to B, a carrier, to take to a manufacturer for copying.
 - A did not inform B that delay would cause loss of profits.
 - B delayed delivery due to neglect, causing the mill to be idle longer than usual.
 - B was held not liable for loss of profits as he was unaware that delay would cause such loss.
- Principle from the judgment:
 - Damages should fairly and reasonably arise either:

- Naturally from the breach itself, or
- As may reasonably have been in the contemplation of both parties at the time of making the contract.
- If special circumstances causing additional loss were communicated to the party breaching the contract, damages could reflect such special circumstances.
- If special circumstances were unknown to the breaching party, damages are limited to what would generally arise in ordinary cases.
- Known special circumstances could have allowed parties to provide for damages explicitly, and it would be unjust to deprive them of that advantage.

Liquidated and Unliquidated damages: Where the contracting parties agree in advance the amount payable in the event of breach, the sum payable is called liquidated damages.

Where the amount of compensation claimed for a breach of contract is left to be assessed by the Court, damages claimed are called unliquidated damages.

Unliquidated Damages

Those are of the following kinds:

- a. general or ordinary damages,
- b. special damages,
- c. exemplary or punitive damages, and
- d. nominal damages.

Type of Damages	Definition / Explanation	Example / Notes
Ordinary Damages	Pecuniary compensation to put injured party in the position if contract had been performed. Covers proximate consequences; remote consequences are generally not regarded.	In sale of goods, damages = difference between contract price and market price at date of breach.
Special Damages	Result from breach under peculiar circumstances; party must have notice of special circumstances at contract formation.	Goods delivered to railway for exhibition; delay caused special loss. Party entitled to claim it.
Exemplary Damages	Awarded to punish defendant; generally not granted for breach of contract.	(i) Breach of promise to marry – damages depend on injury to feelings. (ii) Wrongful dishonour of cheque – smaller cheque, larger damages.
Nominal Damages	Small token award when contractual rights are infringed but no actual loss suffered.	Example: Rupee or 25 paise to establish right to decree for breach of contract.
Liquidated Damages / Penalty	Contracting parties fix damages at time of contract. English law differentiates: liquidated = genuine pre-estimate of loss; penalty = intended to frighten. Indian law	Example: A borrows Rs. 500, promises Rs. 1,000 if not repaid; on default, court awards reasonable compensation ≤ Rs. 1,000.

(Section 74) allows reasonable compensation up to stipulated amount.

(iii) Specific Performance

- Specific Performance means the actual carrying out of a contract by the parties.
- Courts may, at their discretion, order a party who fails to perform the contract to carry out their undertaking according to the terms of the contract.
- A decree for specific performance may be granted in addition to or instead of damages.
- Usually granted in contracts connected with land, e.g., purchase of a particular plot or house, or to take debentures in a company.
- In case of sale of goods, specific performance is granted only if the goods are unique and cannot be purchased in the market.
 - Example: a particular race horse, or goods of special personal/family value such as an heirloom.

Specific performance will not be ordered:

- (a) where monetary compensation is an adequate remedy;
- (b) where the Court cannot supervise the execution of the contract, e.g., a building contract;
- (c) where the contract is for personal service; and
- (d) where one of the parties is a minor

(iv) Injunction

- Injunction is a court order restraining a person from doing a particular act.
- It is used to secure specific performance of a negative term of a contract (i.e., where a party promises not to do something).
- The Court may, at its discretion, restrain the defendant from doing what he promised not to do.
- Types of Injunction:
 - Prohibitory: restrains the commission of a wrongful act.
 - Mandatory: restrains the continuance of a wrongful act.
- Case Example – Lumley v. Wagner (1852) 90 R.R. 125:
 - W agreed to sing at L's theatre and nowhere else.
 - W breached the contract by agreeing to sing for Z.
 - Held: W could not be forced to sing at L's theatre, but could be restrained by injunction from singing for Z.

CONTRACT OF INDEMNITY AND GUARANTEE (SECTIONS 124 TO 147)

Meaning of Indemnity

- A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person (Section 124).

Example

A contracts to indemnify B against the consequence of legal proceedings which C may take against B in respect of 3 lakh rupees. This is a contract of indemnity. The contract of indemnity may be express or implied.

- The person who promises to indemnify or make good the loss is called the indemnifier.
- The person whose loss is made good is called the indemnified or the indemnity holder.
- A contract of insurance is an example of a contract of indemnity under English law.
- In a contract of insurance, in consideration of a premium, the insurer promises to make good the loss suffered by the assured due to destruction of property by fire.
- Under the Indian Contract Act, a contract of indemnity is restricted to cases where the loss reimbursed is caused by the conduct of the promisor or any other person.
- Loss caused by events or accidents not depending on the conduct of any person cannot be reimbursed under a contract of indemnity.

Rights of Indemnity Holder when Sued

Under Section 125, the promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- a. all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- b. all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as if it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit; and
- c. all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit

Meaning of Contract of Guarantee

- A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of default.
- The person who gives the guarantee is called the Surety.
- The person for whom the guarantee is given is called the Principal Debtor.
- The person to whom the guarantee is given is called the Creditor (Section 126).
- A guarantee may be oral or written.
- Under English law, a guarantee must be in writing.

Illustration

Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is sufficient for surety. Section 127 provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustration

- (i) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.
- (ii) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is sufficient consideration for C's promise.

- A contract of guarantee must satisfy all the essential elements of a valid contract.
- Special feature regarding consideration: the consideration received by the principal debtor is sufficient for the surety.
- Section 127: Anything done or any promise made for the benefit of the principal debtor is sufficient consideration for the surety to give the guarantee.

Feature	Contract of Indemnity	Contract of Guarantee
Number of Parties	Two: Indemnifier and Indemnified	Three: Surety, Principal Debtor, and Creditor
Nature of Liability	Primary liability of the indemnifier	Secondary liability of the surety; liable only if principal debtor defaults
Request of Debtor	Indemnifier need not act at the request of the debtor	Surety gives guarantee only at the request of the principal debtor
Existence of Debt/Duty	Covers the contingency of loss happening	There is an existing debt or duty whose performance is guaranteed by the surety
Right to Proceed Against Third Party	Cannot sue third parties in own name; must sue in the name of the indemnified, unless assignment	Surety, after paying debt due to principal debtor's default, can proceed against principal debtor in his own right

Example

Indemnity – X agree to Pay Y Rs. 50000/- in case of loss to any property of later during the use by former.

Guarantee – Z agree to Pay Y in case of loss to any property of later during the use by X.

Extent of Surety's Liability

- The liability of the surety is co-extensive with that of the principal debtor unless the contract provides otherwise (Section 128).
- A creditor is not bound to proceed against the principal debtor and can sue the surety directly.
- The surety becomes immediately liable as soon as the principal debtor defaults.
- Until default, the creditor cannot call upon the surety to pay.
- The nature of the surety's liability is secondary.
- Section 128 explains the quantum of surety's obligation when the contract terms do not limit it.
- A surety is not discharged merely because the contract between the principal debtor and creditor was voidable and avoided by the principal debtor.

- If the agreement between principal debtor and creditor is void (e.g., due to minority of principal debtor), the surety is liable as a principal debtor, since the surety's contract is then a principal contract, not collateral (*Kashiba v. Shripat* (1894) 19 Bom. 697).

Kinds of Guarantees

- A contract of guarantee may be for an existing debt or a future debt.
- It may be a specific guarantee or a continuing guarantee.
- **Specific guarantee:**
 - Given for a single debt.
 - Ends when the debt guaranteed is paid.
- **Continuing guarantee:**
 - Extends to a series of transactions (Section 129).
 - Surety's liability extends to all transactions until revocation of the guarantee.
- Example of continuing guarantee:
 - S promises C to be responsible for Rs. 5,000 for the due collection and payment by P of rents collected for C's Zamindari.

Revocation of Continuing Guarantee

A continuing guarantee can be revoked in the following ways:

(a) By notice of revocation by the surety (Section 130):

- Notice revokes liability for future transactions.
- Surety remains liable for transactions entered into prior to the notice (*Offord v. Davies* (1862) 6 L.T.S. 79).

(b) By the death of the surety (Section 131):

- Death operates as a revocation for future transactions (*Lloyds v. Harper* (188) 16 Ch. D. 290).
- Surety's estate remains liable for transactions made before death.

Rights of Surety

(a) Rights against the creditor (Section 141):

- Entitled to the benefit of every security which the creditor has against the principal debtor at the time of the suretyship, whether the surety knows of it or not.
- If the creditor loses or parts with such security without consent, the surety is discharged to the extent of the value of the security.

(b) Rights against the principal debtor (Sections 140 and 145):

- After discharging the debt, the surety is subrogated to all rights of the creditor against the principal debtor.
- Can sue the principal debtor for amounts paid on the debtor's default.
- Has remedies before payment in certain circumstances, e.g., can seek injunction if the debtor disposes of property to avoid payment (*Mamta Ghose v. United Industrial Bank*, AIR 1987 Cal. 180).
- Can compel the debtor to exonerate him by paying the debt once due.

(c) Rights against co-sureties (Sections 146 and 147):

- If a surety pays more than his share, he has a right to contribution from co-sureties.
- Example: If A, B, and C are sureties for Rs. 3,000 and any pays more than Rs. 1,000, he can claim contribution from the others.
- If a co-surety becomes insolvent, the remaining sureties contribute the unpaid amount equally.

Discharge of Surety

A surety may be discharged from liability under the following circumstances:

- a. Notice of revocation: Surety can revoke a continuing guarantee for future transactions by giving notice (Section 130).
- b. Death of surety: Revokes liability for future transactions in a continuing guarantee, unless contract states otherwise (Section 131).
- c. Variation in contract: Any change in terms between creditor and principal debtor without surety's consent discharges the surety for transactions after the variation (Section 133).
- d. Release of principal debtor: Surety is discharged if creditor releases the principal debtor or acts/omits anything resulting in discharge of principal debtor (Section 134).
 - Exception: Failure to sue within limitation period does not discharge the surety.
- e. Composition or indulgence: If creditor, without surety's consent, arranges composition, gives time, or promises not to sue principal debtor, the surety is discharged (Section 135).
- f. Acts against surety's rights: Creditor's act/omission that impairs surety's eventual remedy against principal debtor discharges the surety (Section 139).
- g. Loss or release of security: If creditor loses or parts with security given by debtor without surety's consent, surety is discharged to the value of security, irrespective of whether surety knew of the security (Section 141).

CONTRACT OF BAILMENT AND PLEDGE**• Bailment:**

- A bailment is a transaction whereby one person delivers goods to another person for some purpose, upon a contract that they are, when the purpose is accomplished, to be returned or otherwise disposed of according to the directions of the person delivering them (Section 148).
- The person who delivers the goods is called the bailor.
- The person to whom the goods are delivered is called the bailee.
- Bailment is a voluntary delivery of goods for a temporary purpose on the understanding that they are to be returned in specie in the same or altered form.
- The ownership of the goods remains with the bailor; the bailee gets only the possession.
- Delivery of goods may be actual or constructive, e.g., where the key of a godown is handed over to another person, it amounts to delivery of goods in the godown.

• Gratuitous Bailment:

- A gratuitous bailment is one in which neither the bailor nor the bailee is entitled to any remuneration.

- It may be for the exclusive benefit of the bailor, e.g., when A leaves his dog with a neighbour to be looked after in A's absence on a holiday.
- It may be for the exclusive benefit of the bailee, e.g., where you lend your book to a friend of yours for a week.
- In neither case any charge is made.
- A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).
- Under Section 159, the lender of a thing for use may at any time require its return if the loan was gratuitous, even though he lent it for a specified time or purpose.
- If, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower the amount in which the loss so occasioned exceeds the benefit so derived.

• **Bailment for Reward:**

- This is for the mutual benefit of both the bailor and the bailee.
- Example: A lets out a motor-car for hire to B. A is the bailor and receives the hire charges and B is the bailee and gets the use of the car.
- Example: A hands over his goods to B, a carrier for carriage at a price. A is the bailor who enjoys the benefit of carriage and B is the bailee who receives remuneration for carrying the goods.

Duties of Bailee

- Care of goods: Bailee must take as much care of the goods as a man of ordinary prudence would take of his own goods of the same bulk, quality, and value (Section 151). If such care is taken, he is not liable for loss, destruction, or deterioration (Section 152). Special care may be agreed, but loss by act of God or public enemies is not the bailee's liability.
- Unauthorized use: Bailee must not use the goods in an unauthorized manner or for an unauthorized purpose (Section 153). Bailor can terminate bailment and claim damages for unauthorized use (Section 154).
- Keeping goods separate: Bailee must keep goods separate from his own (Sections 155–157).
 - If mixed without consent, the bailor and bailee have interests in the mixture.
 - If separable, property remains with respective owners; bailee bears separation expenses and damages.
 - If inseparable, bailor is entitled to compensation for loss.
- Adverse title: Bailee must not set up an adverse title to the goods.
- Return of goods: Bailee must return goods without demand on expiry of time or when purpose is accomplished (Section 160). Failure to return makes him liable for any loss, destruction, or deterioration even without negligence (Section 161).
- Accrued benefits: Bailee must return any increase or profits from the goods in absence of contract to the contrary (Section 163). Example: calf born to a cow in custody of bailee must also be delivered to bailor.

Bailee's Particular Lien (Section 170):

- Applies where goods are bailed for a particular purpose and bailee, in due performance, expends skill and labour.
- In absence of an agreement to the contrary, bailee has a lien on the goods.
- Bailee can retain the goods until charges for labour and skill used on the goods are paid by the bailor.
- Example: A gives cloth to B, a tailor, to make a suit. B can retain the suit until paid for his services.
- Section reflects the Common Law principle: a person who improves an article by his trouble and expenses has the right to detain it until payment is made.
- Right of lien arises only where labour and skill have been used to confer additional value on the article.

Example

A gave clothes to B for Laundry. A denies to make full payment. B denied to return the clothes. Can B deny to return the goods?

Yes, he can deny to return the goods as a bailee.

Particular and General Lien:

- Lien is of two kinds: Particular lien and General lien.

Particular Lien:

- Available only against the property on which skill and labour have been exercised.
- A bailee's lien is a particular lien.
- Right to retain the property only for charges on account of labour or expenses bestowed upon the identical property.

General Lien:

- Right to detain any property belonging to another in the possession of the person exercising the lien.
- Can be exercised in respect of any payment lawfully due to him.
- Right to retain property of another for a general balance of accounts.
- Expressly given by Section 171 of the Indian Contract Act to bankers, factors, warfingers, attorneys of High Court, and policy-brokers, unless there is an agreement to the contrary.

Duties of Bailor

- Disclosure of faults: The bailor must disclose all the known faults in the goods; if he fails to do so, he will be liable for any damage resulting directly from the faults (Section 150).
 - Example: A delivers explosives to B, a carrier, without warning. If handled without proper care and explodes, A is liable for all resulting damage.
- Liability in bailment for hire: In the case of bailment for hire, the bailor is liable even if he did not know of the defects (Section 150).
 - Example: A hires a carriage of B. The carriage is unsafe, though B is unaware. If A is injured, B is responsible.
- Payment of extraordinary expenses: The bailor must pay any extraordinary expenses incurred by the bailee (Section 158).

- Example: A horse is lent for a journey. Feeding expenses are normally borne by the bailee, but if the horse becomes ill and treatment is needed, the bailor must pay.
- Indemnification: The bailor is bound to indemnify the bailee for any costs incurred because of the defective title of the goods bailed (Section 164).

Termination of Bailment:

- Wrongful use or disposal: If the bailee wrongfully uses or disposes of the goods bailed, the bailor may determine the bailment (Section 153).
- Expiry or accomplishment of purpose: Bailment ends as soon as the period of bailment expires or the object of the bailment is achieved; the bailee must return the goods to the bailor (Section 160).
- Destruction or change of subject matter: Bailment is terminated when the subject matter is destroyed or, by change in its nature, becomes incapable of use for the purpose of bailment.
- Termination of gratuitous bailment by bailor: A gratuitous bailment can be terminated by the bailor at any time, even before the agreed period, provided that if such termination causes loss exceeding the benefit, the bailor must compensate the bailee (Section 159).
- Death: A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

Finder of Lost Goods:

- Status: The finder of lost goods has the position of a bailee.
- Rights regarding reward:
 - The finder can sue the owner for any reward offered.
 - The finder may retain the goods until the reward is received.
- Particular lien when no reward:
 - If no reward is offered, the finder has a particular lien.
 - He can detain the goods until compensated for troubles and expenses incurred in preserving the property and finding the true owner.
 - The finder cannot file a suit to recover this compensation (Section 168).
- Obligations to true owner: As against the true owner, the finder acts as a bailee, keeping the goods in trust for the real owner.
- Rights against others: As against everyone else, property in the goods vests in the finder upon taking possession.

The finder has a right to sell the property—

- a. where the owner cannot with reasonable diligence be found, or
- b. when found, he refuses to pay the lawful charges of the finder and—
 - i. if the thing is in danger of perishing or losing greater part of its value, or
 - ii. when the lawful charges of the finder for the preservation of goods and the finding out of the owner amounts to two-thirds of the value of the thing (Section 169).

Carrier as Bailee:

- Common Carrier:
 - Undertakes to carry goods of all persons willing to pay usual or reasonable rates.
 - Undertakes to carry goods safely and make good all losses, except those caused by act of God or public enemies.

- Includes land carriers (including railways) and inland navigation carriers.
- Carriers by sea for hire are not common carriers and can limit liability.
- Railways in India are considered common carriers.
- Inn-keepers (Hotel Keepers):
 - Liability is governed by Sections 151 and 152 of the Contract Act.
 - Held to the standard of an ordinary bailee with respect to guests' property.
 - Example: If a hotel room is insecure and theft occurs, the hotel-keeper is liable if reasonable steps to secure the room were not taken (*Jan & San v. Caneron*, 1922, 44 All. 735).

b) Pledge (Pawn)

- Pledge or pawn is a contract in which an article is deposited with a lender of money or promisee as security for repayment of a loan or performance of a promise.
- The bailor/depositor is called the Pawnor.
- The bailee/depositee is called the Pawnee (Section 172).
- Since pledge is a branch of bailment, the Pawnee must take reasonable care of the goods pledged.
- Any kind of goods, valuables, documents, or securities may be pledged.
- Government securities (e.g., promissory notes) must be pledged by endorsement and delivery.

The following are the essential ingredients of a pledge:

- i. The property pledged should be delivered to the pawnee.
- ii. Delivery should be in pursuance of a contract.
- iii. Delivery should be for the purpose of security.
- iv. Delivery should be upon a condition to return.

Rights of the Pawnee

- No property in the goods pawned passes to the pawnee.
- The pawnee acquires a special property to retain possession, even against the true owner, until:
 - Payment of the debt,
 - Interest on the debt, and
 - Any other expenses incurred for possession or preservation of the goods pledged (Section 173).
- The pawnee must return the goods to the pawnor on tender of all dues.
- The pawnee cannot confer a good title upon a bona fide purchaser for value.

Should the pawnor make a default in payment of the debt or performance of the promise at the stipulated time, the pawnee may-

- (i) file a suit for the recovery of the amount due to him while retaining the goods pledged as collateral security; or
- (ii) sue for the sale of the goods and the realisation of money due to him; or
- (iii) himself sell the goods pawned, after giving reasonable notice to the pawnor, sue for the deficiency, if any, after the sale.

If the sale is made in execution of a decree, the pawnee may buy the goods at the sale. But he cannot sell them to himself in a sale made by himself under (iii) above. If after sale of the goods, there is surplus, the pawnee must pay it to the pawnor (Section 176).

Rights of Pawnor

On default by pawnor to repay on the stipulated date, the pawnee may sell the goods after giving reasonable notice to the pawnor. If the pawnee makes an unauthorised sale without giving notice to the pawnor, the pawnor has the following rights—

- (i) He can file a suit for redemption of goods by depositing the money treating the sale as if it had never taken
- (ii) place; or He can ask for damages on the ground of conversion.

Pledge by Non-owners

- General rule: Normally, only the owner can pledge goods, but under certain circumstances, a non-owner in possession may validly pledge them.
1. Mercantile agent:
 - If a mercantile agent, with the owner's consent, possesses goods or documents of title, a pledge made in the ordinary course of business is valid.
 - Validity requires the pawnee to act in good faith and have no notice that the agent lacks authority (Section 178).
 2. Seller or buyer in possession after sale:
 - A seller left in possession after sale can validly pledge the goods if the pawnee acts in good faith and has no notice of the sale (Section 30, Sale of Goods Act 1930).
 3. Pawnor with limited interest:
 - If the pawnor has only a limited interest (e.g., mortgagee or lienholder), the pledge is valid to the extent of that interest.
 4. Co-owner in possession:
 - One of several co-owners may validly pledge the goods with assent of the other co-owners.
 5. Person in possession under a voidable contract:
 - A person who obtained possession under a voidable contract (due to fraud, misrepresentation, etc.) may pledge the goods before the contract is avoided (Section 178A).

LAW OF AGENCY

Definition of Agent (Section 182):

- An agent is a person employed to bring his principal into contractual relations with third parties.
- The agent acts as a connecting link between the principal and third parties.
- While acting for the principal, the agent possesses the capacity of the principal.

Creation of Agency

- A contract of agency may be express or implied (Section 186).
- Consideration is not essential in a contract of agency (Section 185).
- Agency may also arise by estoppel, necessity, or ratification.

(a) Express Agency

- Can be made orally or in writing.
- Power of Attorney is the usual written form, giving authority to act on behalf of the principal as per its terms.
- For transferring immovable property, the power of attorney must be registered.
- Power of attorney may be general (several powers) or special (single act).

(b) Implied Agency

- Arises by conduct, situation of parties, or necessity.

(i) Agency by Estoppel (Section 237):

- Occurs when a person is precluded from denying the truth of a representation made to third parties.
- Example: If P allows third parties to believe A is his authorised agent, P cannot deny the agency if third parties contract with A, even without actual authority.

(ii) Wife as Agent:

- Wife is presumed to have the husband's authority to pledge his credit for necessities of life suitable to their standard.
- Husband is not liable if he proves:
 1. He expressly warned the tradesman not to supply goods on credit.
 2. He expressly forbade the wife to pledge his credit.
 3. Wife was already sufficiently supplied.
 4. She was supplied with a sufficient allowance.
- Similarly, a person held out as an agent can create liability for the ostensible agent.
- Partners are agents of each other in ordinary partnership business.

(iii) Agency of Necessity (Sections 188 and 189):

- Arises when a person entrusted with another's property may have to incur unauthorised expenses to protect or preserve it.
- Such an agency is called an agency of necessity.
- Example: A sends a horse by railway; on arrival, no one is there to receive it. The railway company, being bound to take reasonable steps to keep the horse alive, is an agent of necessity of A.
- A wife deserted by her husband and forced to live separately can pledge her husband's credit to buy all necessities of life according to his position, even against his wishes.

(iv) Agency by Ratification (Sections 169-200):

- Arises where a person having no authority purports to act as agent, or a duly appointed agent exceeds his authority.
- The principal is not bound by the contract unless he ratifies the agent's transaction.
- Ratification makes the contract binding on the principal as if the agent had been authorised beforehand.
- Also known as ex post facto agency — agency arising after the event.
- Ratification relates back to the original making of the contract; agency is considered to have existed from the moment the agent first acted, not from the date of ratification.

Ratification is effective only if the following conditions are satisfied –

- a. The agent must expressly contract as agent for a principal who is in existence and competent to contract.
- b. The principal must be competent to contract not only at the time the agent acted, but also when he ratified the agents act.
- c. The principal at the time of ratification has full knowledge of the material facts, and must ratify the whole contract, within a reasonable time.
- d. Ratification cannot be made so as to subject a third-party to damages, or terminate any right or interest of a third person.
- e. Only lawful acts can be ratified.

Classes of Agents

• Special Agent:

- Appointed to do a specified act or perform a specified function.
- Has no authority outside the special task.
- Third-parties cannot assume unlimited authority.
- Any act beyond the authority does not bind the principal.

• General Agent:

- Appointed to do anything within the authority given by the principal in all transactions, or in all transactions relating to a specified trade or matter.
- Third-parties may assume the agent has power to do all that is usual for a general agent in the business.
- Third-party is not affected by any private restrictions on the agent's authority.

Sub-Agent

- A sub-agent is a person appointed by the agent to whom the principal's work is delegated.
- Section 191: A sub-agent is employed by and acts under the control of the original agent in the agency business.
- Relationship with original agent:
 - Sub-agent is the agent of the original agent.
 - Bound by all duties of the original agent.
 - Responsible to the original agent, not directly to the principal, except in cases of fraud or wilful wrong.
 - Original agent is responsible to the principal for the acts of the sub-agent.
- Relationship with third parties:
 - Sub-agent represents the principal.
 - Principal is bound and responsible for all acts of the sub-agent as if the sub-agent were directly appointed.

Mercantile Agent

- Definition (Section 2(9), Sale of Goods Act, 1930): A mercantile agent is a person who, in the customary course of business as such agent, has authority to:
 - Sell goods or consign goods for the purposes of sale, or
 - Buy goods, or
 - Raise money on the security of goods.

- This definition includes factors, brokers, auctioneers, commission agents, etc.

Types of Mercantile Agents:

1. Factors:

- Employed to sell goods placed in his possession or contract to buy goods for the principal.
- Acts as the apparent owner of goods in his custody.
- Can sell in his own name and receive payment.
- Has insurable interest and a general lien for claims arising from the agency.

2. Brokers:

- Makes contracts for the sale and purchase of goods or securities without taking possession.
- Acts in the name of the principal.
- Receives commission (brokerage).
- Has no lien over goods.

3. Del Credere Agent:

- Guarantees that purchasers buying on credit will pay for goods.
- Receives extra remuneration for giving the guarantee.
- If a third-party fails to pay, the agent pays the principal the sum owed.

4. Auctioneers:

- Sells goods by auction to the highest bidder in public competition.
- Has no authority to warrant the principal's title to the goods.
- Acts as agent for the seller; after the sale, acts as agent for the buyer for evidence of sale.

5. Partners:

- In a partnership firm, every partner is an agent of the firm and of co-partners for the business of the firm.

6. Bankers:

- Relationship with the customer is primarily debtor and creditor.
- Acts as agent of customer in buying/selling securities, collecting cheques, bills, dividends, or promissory notes.
- Has a general lien on securities and goods in possession for the balance due.

Duties of the Agent

- Follow Authority & Instructions (Sec 211): Act within the authority and strictly follow principal's instructions.
- Follow Custom (Sec 211): In absence of instructions, act according to business custom.
- Skill & Diligence (Sec 212): Exercise reasonable skill and care; special skill expected if claimed.
- Disclosure of Material Info: Promptly inform principal of all material facts affecting contract.
- Confidentiality (Sec 213): Do not disclose principal's confidential information.
- Avoid Conflicts (Sec 215): Do not compete or allow personal interests to conflict with duty.
- Accounts: Maintain true accounts and render them on reasonable notice.
- No Secret Profit: Disclose any extra profit; principal may dismiss, recover profit, refuse remuneration, or repudiate contract.

- No Unauthorized Delegation (Sec 190–191): Cannot delegate authority, except:
 - Allowed by principal
 - Custom permits
 - Essential for performance
 - Emergency requires it
 - Work is ministerial
 - Principal is aware

Rights of Agents

- Where the services rendered by the agent are not gratuitous or voluntary, the agent is entitled to receive the agreed remuneration, or if none was agreed, a reasonable remuneration. The agent becomes entitled to receive remuneration as soon as he has done what he had undertaken to do (Section 219).
- Certain classes of agents, e.g., factors who have goods and property of their principal in their possession, have a lien on the goods or property in respect of their remuneration and expense and liabilities incurred.
- An agent has a right to stop the goods in transit where he is an unpaid seller.
- As the agent represents the principal, the agent has a right to be indemnified by the principal against all charges, expenses and liabilities properly incurred by him in the course of the agency (Sections 222–223).

Example

B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B (as an agent) for such damages, costs and expenses.

Extent of Agent's Authority

- The extent of the authority of an agent depends upon the terms expressed in his appointment or it may be implied by the circumstances of the case.
- The contractual authority is the real authority, but implied authority is to do whatever is incidental to carry out the real authority.
- Implied authority is also known as apparent or ostensible authority.
- An agent having authority to do an act has authority to do everything lawful which is necessary for the purpose or usually done in the course of conducting business.
- An agent has authority to do all such things which may be necessary to protect the principal from loss in an emergency and which he would do to protect his own property under similar circumstances.

Example

Where butter was becoming useless owing to delay in transit and was therefore sold by the station master for the best price available as it was not possible to obtain instructions from the principal, the sale was held binding upon the principal.

Responsibilities of Principal to Third-parties

The effect of a contract made by an agent varies according to the circumstances under which the agent contracted.

There are three circumstances in which an agent may contract, namely—

- a. the agent acts for a named principal;
- b. the agent acts for an undisclosed principal; and
- c. the agent acts for a concealed principal.

Liability of Principal and Agent

1. Disclosed Principal:

- Where the agent contracts as agent for a named principal, he generally incurs neither rights nor liabilities under the contract and drops out as soon as it is made.
- The contract is made between the principal and the third-party, and it is between these two that rights and obligations are created.
- Legal effect: Same as if the principal had contracted directly with the third-party.
- The principal is bound by all acts of the agent done within the scope of actual, apparent, or ostensible authority.
- Acts of a general agent are binding if within apparent authority, even if outside actual authority.
- Private or secret limitations of the agent's powers do not bind innocent third-parties.

2. Undisclosed Principal:

- Where the agent discloses that he is merely an agent but conceals the identity of his principal, he is not personally liable and drops out in the normal way.
- The principal, when discovered, will be responsible for the contract made by the agent.

3. Concealed Principal:

- Where an agent appears to contract on his own behalf, without disclosing either the agency or the principal, he becomes personally liable.
- The third-party may sue the principal (when discovered), or the agent, or both.
- If the third-party chooses to sue the principal and not the agent, he must allow the principal the benefit of all payments made to the agent before the agency was disclosed.
- The third-party is also entitled to the benefit of anything paid to the agent.
- If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, had he known the principal's identity or that the agent was not the principal, he would not have entered into the contract.

Principal Liable for Agent's Torts (Section 238)

If an agent commits a tort or other wrong (e.g., misrepresentation or fraud) during his agency, whilst acting within the scope of his actual or apparent authority, the principal is liable. But the agent is also personally liable, and he may be sued also. The principal is liable even if the tort is committed exclusively for the benefit of the agent and against the interests of the principal.

Personal Liability of Agent to Third-party

An agent is personally liable in the following cases:

- a. Where the agent has agreed to be personally liable to the third-party.
- b. Where an agent acts for a principal residing abroad.
- c. When the agent signs a negotiable instrument in his own name without making it clear that he is signing it only as agent.
- d. When an agent acts for a principal who cannot be sued (e.g., he is minor), the agent is personally liable.
- e. An agent is liable for breach of warranty of authority. Where a person contracts as agent without any authority there is a breach of warranty of authority. He is liable to the person who has relied on the warranty of authority and has suffered loss.
- f. Where authority is one coupled with interest or where trade, usage or custom makes the agent personally liable, he will be liable to the third-party.
- g. He is also liable for his torts committed in the course of agency.

Meaning of Authority Coupled with Interest (Section 202)

- An agency is coupled with an interest when the agent has an interest in the authority granted to him or an interest in the subject matter with which he is authorised to deal.
- Where the agent is appointed to enable him to secure some benefit already owed to him by the principal, the agency is said to be coupled with an interest.
- Examples:
 - Where a factor has made advances to the principal and is authorised to sell at the best price and recoup the advances made by him.
 - Where the agent is authorised to collect money from third parties and pay himself the debt due by the principal.
- A mere arrangement that the agent's remuneration is to be paid out of the rents collected by him does not give him any interest in the property, and such an agency is not coupled with an interest.
- An agency coupled with interest cannot be terminated (in the absence of a contract to the contrary) to the prejudice of such interest.

The principal laid down in Section 202 applies only if the following conditions are fulfilled:

- a. The interest of the agent should exist at the time of creation of agency and should not have arisen after the creation of agency.
- b. Authority given to the agent must be intended for the protection of the interest of the agent.
- c. The interest of the agent in the subject matter must be substantial and not ordinary.
- d. The interest of the agent should be over and above his remuneration. Mere prospect of remuneration is not sufficient interest.

Termination of Agency

An agency comes to an end or terminates—

- a. By the performance of the contract of agency; (Section 201)
- b. By an agreement between the principal and the agent;
- c. By expiration of the period fixed for the contract of agency;
- d. By the death of the principal or the agency; (Section 201)

- e. By the insanity of either the principal or the agent; (Section 201)
- f. By the insolvency of the principal, and in some cases that of the agent; (Section 201)
- g. Where the principal or agent is an incorporated company, by its dissolution;
- h. By the destruction of the subject-matter; (Section 56)
- i. By the renunciation of his authority by the agent; (Section 201)
- j. By the revocation of authority by the principal. (Section 201)

When Agency is Irrevocable

Revocation of an agency by the principal is not possible in the following cases:

- a. Where the authority of agency is one coupled with an interest, even the death or insanity of the principal does not terminate the authority in this case (Section 202).
- b. When agent has incurred personal liability, the agency becomes irrevocable.
- c. When the authority has been partly exercised by the agent, it is irrevocable in particular with regard to obligations which arise from acts already done (Section 204).

Example

1. A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

2. A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

When Termination Takes Effect

- 1. Termination of an agency takes effect or is complete as regards the agent when it becomes known to the agent.
- 2. If the principal revokes the agent's authority, the revocation will take effect when the agent comes to know of it.
- 3. As regards third parties, the termination takes effect when it comes to their knowledge (Section 208).
- 4. Thus, if an agent whose authority has been terminated to his knowledge enters into a contract with a third-party who deals with him bona fide, the contract will be binding on the principal as against the third-party.
- 5. The termination of an agent's authority also terminates the authority of the sub-agent appointed by the agent (Section 210).
- 6. The revocation of agency as regards the agent and as regards the principal takes effect at different points of time.
- 7. Section 209 charges the agent with the duty to protect the principal's interest where the principal dies or becomes of unsound mind.
- 8. It provides that when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interest entrusted to him.

9. Therefore, it is the duty of the agent to take all steps to protect the interest of his deceased principal on his death.

JOINT VENTURE/ FOREIGN COLLABORATION/MULTINATIONAL AGREEMENTS

• Modes of Entry:

International business professionals use the term “*modes of entry*” to describe the different methods and approaches available to enter markets and conduct business in other countries.

• Joint Venture Definition:

A joint venture is a cooperative effort where two or more organizations join together to further their business goals.

• Importance of Joint Venture Agreements:

- The joint venture agreement forms the basis of understanding between the parties.
- It ensures that all parties understand their roles, rights, responsibilities, and remedies in the conduct of the venture.
- The documents are critical to the success of the joint venture and are closely scrutinized if disputes arise.

• Purpose of Joint Venture Agreements:

- To cover critical elements step by step.
- To define aspects such as equity participation, operational control, technical participation, and intellectual property rights.
- To ensure that the goals and objectives of the parties are clearly reflected in the agreement.

• Selection of Partner:

- The selection of a good local partner is key to success.
- Personal interviews and proper due diligence should be conducted before selection.

• Preliminary Documentation:

- Once a partner is selected, the parties generally sign a Memorandum of Understanding (MOU) or a Letter of Intent (LOI) highlighting the basis of the future joint venture.

• Negotiation and Discussion:

- Before signing the joint venture agreement, terms should be thoroughly discussed to avoid misunderstanding later.
- Negotiations require an understanding of the cultural and legal background of the parties.

• Terms and Conditions:

- It is difficult to prepare a fixed set of terms and conditions.
- The conditions differ according to the requirements of each joint venture.

While drafting a foreign collaboration agreement, the following factors should be kept in mind:

- Capability of the collaborator and the requirements of the party are clearly indicated.
- Clear definitions of technical terms are given.
- Specify if the product shall be manufactured/sold on exclusive or non-exclusive basis.

- Terms and conditions regarding nature of technical know-how, disclosure of drawings, specifications and other documents, furnishing of technical information in respect of processes with flow charts etc., plant outlay list of equipment, machinery and tool with specification have to be provided.
- Provisions for making available the engineers and/or skilled workers of the collaborator on payment of expenses relating to their stay per diem etc. are given.
- Details regarding specification and quality of the product to be manufactured are given.
- Quality control and trademarks to be used are also specified.
- Responsibility of the collaborator in establishing or maintaining assembly plants should be clearly determined and provided for.
- If sub-contracting of the work is involved, clarify if there would be any restrictions.
- The rate of royalty, mode of calculation and payment etc. Also, make provision as to who will bear the taxes/cess on such payments.
- Use of information and industrial property rights should also be provided for in the agreement.
- A clause on force majeure should be included.
- A clause that the collaborating company has to train the personnel of Indian company within a specified period should be incorporated. The clause should also specify the terms and conditions of such assistance, place of training, period of training and fees payable.
- A comprehensive clause on arbitration containing a clear provision as to the kind of arbitrator and place of arbitration should be included.
- There should be provision in the agreement for payment of interest on delayed payments.

E-CONTRACT

1. Nature of Electronic Contracts:

- Electronic contracts are not paper-based but are in electronic form.
- They have emerged due to the need for speed, convenience, and efficiency.

2. Execution Process:

- In the electronic age, the entire transaction can be completed in seconds.
- Both parties affix their digital signatures to an electronic copy of the contract.

3. Initial Apprehension:

- Initially, there was apprehension among legislatures to recognize this modern technology.

4. Legal Recognition:

- Many countries have now enacted laws to recognize electronic contracts.

5. Limitations of Conventional Law:

- The traditional contract law is not sufficient to address all issues arising from electronic contracts.

6. Role of Information Technology Act, 2000:

- The Information Technology Act, 2000 addresses some peculiar issues relating to the formation and authentication of electronic contracts.

As in every other contract, an electronic contract also requires the following necessary ingredients:

- An offer needs to be made

- The offer needs to be accepted
- There has to be lawful consideration
- There has to be an intention to create legal relations
- The parties must be competent to contract
- There must be free and genuine consent
- The object of the contract must be lawful
- There must be certainty and possibility of performance.

Basic Type of e-contracts

1. Shrink wrap agreements:

- In these type of agreements the product is wrapped.
- Terms and Conditions are placed with the product itself.
- These are End user Licence Agreements.
- Example: purchase of Anti Virus.

2. Clickwrap Agreements:

- These agreements requires the users to accept the proposal by clicking the “I agree”. User agree by clicking on the agree button.
- Example: Creation of email id.

3. Browse Wrap Agreements:

- These agreements are entered by continued use of the website. By using the website, the user is deemed to have accepted the conditions.
- Example: Sale and Purchase on online platforms.

4. Scroll Wrap Agreements:

- In these agreements, Where users are required to scroll to the complete terms and conditions of the documents and give their implied consent.
- Example: Few mobile applications requires the user to scroll down.

5. Sign-In Wrap Agreements:

- In these agreements, user agree by signing in to a particular website or mobile application.
- User agree with the terms and conditions by Signing in.

Case Laws:

1. Trimex International FZE Ltd. Dubai vs. Vedanta Aluminium Ltd., India (2010):

- This case established that a contract can be concluded through the exchange of emails.
- The court held that once the acceptance email was opened and read, the contract became irrevocable.
- The acceptance was absolute and unconditional, fulfilling Section 7 of the Indian Contract Act, 1872.
- Thus, email communication can form a valid and binding contract.

2. Maharashtra State Electricity Distribution Co. Ltd. v. Ratnagiri Gas and Power Pvt. Ltd. (2023):

- The case dealt with liability to pay fixed charges under a Power Purchase Agreement (PPA).
- The Supreme Court upheld CERC and APTEL's decisions, holding the appellant liable.
- The Court observed that a commercial document must be interpreted based on the true intent and purpose of the parties.
- Implied terms can only be read into a contract in rare and justified circumstances.
- The ruling emphasized that clear contractual provisions must be respected in commercial agreements.

LESSON-18

Law relating to

Negotiable Instruments

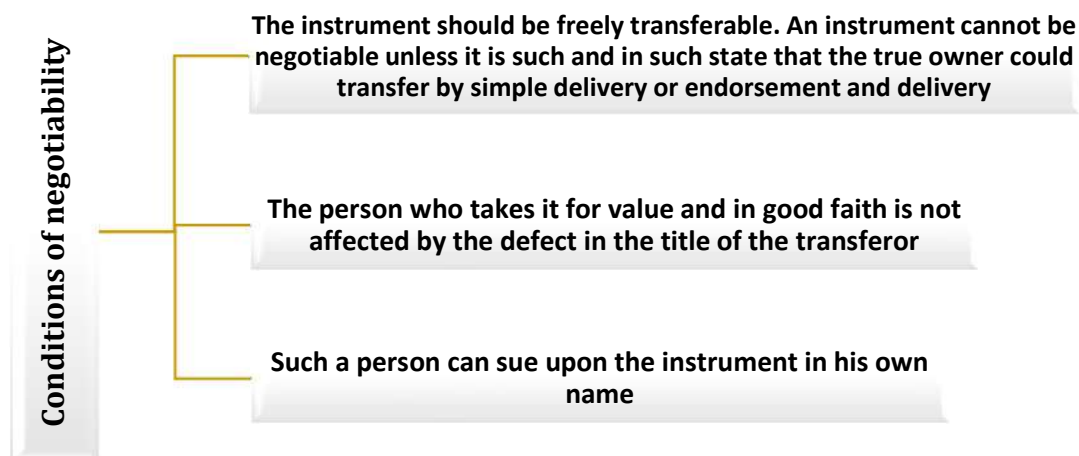
REGULATORY FRAMEWORK

- Negotiable Instruments Act, 1881

DEFINITION OF A NEGOTIABLE INSTRUMENT

- A negotiable instrument is an instrument whose property (ownership) can be acquired by any person who takes it bona fide (in good faith) and for value.
- This acquisition is valid notwithstanding any defect of title in the person from whom it was taken.
- It follows that an instrument cannot be negotiable unless:
 - a. It is of such a nature, and
 - b. In such a state,

that the true owner can transfer the contract or engagement contained in it by simple delivery of the instrument.



Negotiability involves two elements:

- Transferability free from equities and
- Transferability by delivery or endorsement (Mookerjee J. In Tailors Priya vs. Gulab Chand, AIR 1965 Cal).
- The Negotiable Instruments Act, 1881 recognises only three types of negotiable instruments:
 - Promissory Note
 - Bill of Exchange
 - Cheque
- However, this does not mean that other instruments cannot be negotiable, provided they satisfy the following conditions of negotiability:
- The instrument should be freely transferable by the custom of trade, either by:
 - Delivery, or

- Endorsement and delivery.
- A person who obtains it in good faith and for consideration:
 - Gets it free from all defects of title, and
 - Can sue upon it in his own name.
- The holder has the right to transfer it, and
 - The negotiability continues till maturity.
- The Act does not affect customs or local usage relating to instruments in oriental languages, such as a Hundi.

The term “negotiable instrument” means a document transferable from one person to another. However the Act has not defined the term. It merely says that “A negotiable instrument” means a promissory note, bill of exchange or cheque payable either to order or to bearer. [Section 13(1)]

Effect of Negotiability

- The general principle of law relating to the transfer of property is that no one can pass a better title than he himself has (*nemo dat quod non habet*).
- Exceptions to this rule arise either:
 - a. By virtue of statute, or
 - b. By custom.
- A negotiable instrument is one such exception, originally created by mercantile custom.
 - a. Therefore, a bona fide transferee of a negotiable instrument who takes it:
 - a. For consideration, and
 - b. Without notice of any defect of title,

Acquires the instrument free from any defect, i.e., he obtains a better title than that of the transferor.

IMPORTANT CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

The holder of the instruments is presumed to be the owner of the property contained in it

Freely transfereable

The holder in due course is entitled to sue on the instrument in his own name

Transferable till maturity and in case of cheques till it become stale

Certain equal presumed are applicable to all negotiable instruments unless the contrary is proved

Classification of Negotiable Instruments

Type of Instrument	Definition / Meaning	Key Points / Conditions	Example / Section
1. Bearer Instruments	A promissory note, bill of exchange, or cheque is payable to bearer when it is expressed to be so payable, or the only/last endorsement is in blank.	- The holder (person in possession) can obtain payment.- Transferable by delivery.	A bearer cheque that may be encashed from a bank the person in possession is a bearer Instrument.
2. Order Instruments	A promissory note, bill of exchange, or cheque is payable to order when it is expressed to be so payable, or payable to a particular person without words prohibiting transfer.	- Payable to a specific person or as directed by that person.- Transferable by endorsement and delivery.	—
3. Inland Instruments (<i>Section 11</i>)	Instruments drawn or made in India and payable in India, or drawn upon a person resident in India.	- Includes: (i) Drawn and payable in India, or (ii) Drawn in India on a person resident in India, even if payable abroad.- An inland promissory note is one made payable in India.	Section 11, Negotiable Instruments Act, 1881
4. Foreign Instruments	Instruments not being inland instruments.	- Either: (i) Drawn outside India and payable inside or outside India, or (ii) Drawn in India, payable outside India, and drawn on a person resident outside India.	—
5. Demand Instruments (<i>Section 19</i>)	A promissory note or bill of exchange in which no time for payment is specified.	- Payable on demand (immediate payment).	Section 19, Negotiable Instruments Act, 1881
6. Time Instruments	Instruments payable at a future time.	- Payable after a fixed period, after sight, on a specified date, or on the happening of a certain event.-	—

		“After sight” means: → For promissory note: after being shown to maker. → For bill of exchange: after acceptance, noting, or protest for non-acceptance.	

Ambiguous Instruments (Section 17)

Topic	Details
Definition (Section 17)	An ambiguous instrument is one which, by its form, may be treated by the holder either as a bill of exchange or as a promissory note.
Provision under English Law (Section 5(2) of the Bills of Exchange Act)	Where in a bill: - The drawer and drawee are the same person, or - The drawee is fictitious or incompetent to contract, the holder may treat the instrument, at his option, as either a bill of exchange or a promissory note.
Examples of Ambiguous Instruments	- Bill drawn to or to the order of the drawee. - Bill drawn by an agent on his principal. - Bill drawn by one branch of a bank on another. - Bill drawn by direction of a company or their cashier.
Special Cases	- A promissory note addressed to a third person may be treated as a bill if that person accepts it. - A bill not addressed to anyone may be treated as a promissory note.
Not Considered Ambiguous	When the drawer and payee are the same person, e.g., A draws a bill payable to A's order, it is not ambiguous and cannot be treated as a promissory note.
Irrevocability of Choice	Once an instrument has been treated either as a bill or as a note, it cannot be treated differently afterwards.

Inchoate or Incomplete Instrument (Section 20)

Meaning:

- An inchoate (incomplete) instrument is a signed and delivered paper that is:
 - Wholly blank, or
 - Partially incomplete, but stamped in accordance with the law relating to negotiable instruments.

Authority Given:

- By signing and delivering such a paper, the person gives prima facie authority to the holder to:
 - Fill in the blanks, or
 - Complete the instrument, or any amount specified, not exceeding the amount covered by the stamp.

Liability of the Person Signing:

- The person who signs and delivers the inchoate instrument is liable upon it, in the capacity in which he signs (e.g., maker, drawer, or acceptor).
- He is liable to any holder in due course for the amount completed, provided it is within the stamped limit.

Limitation for Ordinary Holder:

- A person who is not a holder in due course (i.e., an ordinary holder) can recover only the amount actually intended to be paid by the person who signed the instrument.

Right of Holder in Due Course:

- A holder in due course can recover the entire amount filled in, as long as:
 - (1) The amount is covered by the stamp, even if it exceeds the amount originally authorised by the signer.

Who Can Fill the Instrument:

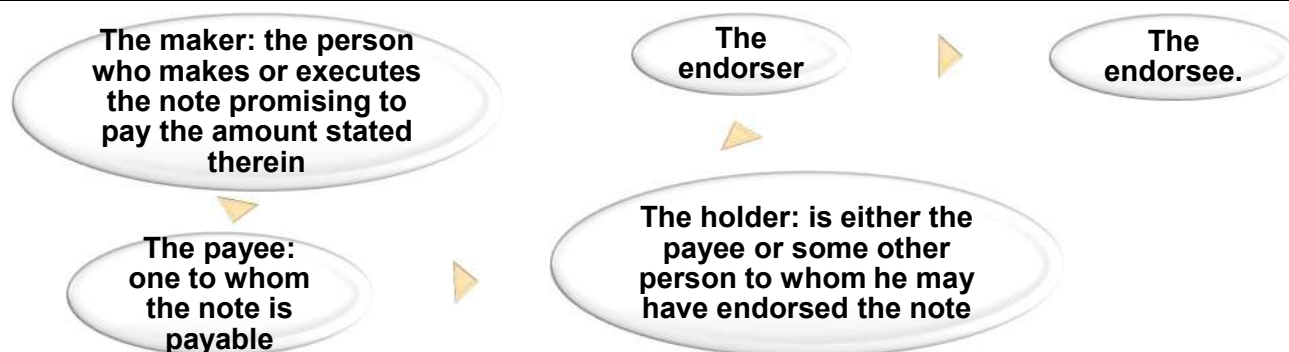
- The authority to fill up the blank or incomplete instrument may be exercised by any holder, not just the first holder to whom it was originally delivered.

Example

A blank cheque is an inchoate instrument. It comes with the option of writing the amount by the first holder

KINDS OF NEGOTIABLE INSTRUMENTS**(i) Promissory Notes (Section 4)**

1. An instrument in writing (not being a bank note or a currency note)
2. containing an unconditional undertaking
3. signed by the maker to pay a certain sum of money to, or to the order of, a certain person, or only to bearer of the instrument.

Parties to a Promissory Note**Essentials of a Promissory Note**

- It must be in writing:
 - An oral promise to pay is not valid.
 - The instrument must be in written form.

- It must contain an express promise or clear undertaking to pay:
 - The promise must be explicit, not implied.
 - A mere acknowledgment of debt (e.g., “I owe you Rs. 500”) is not sufficient to constitute a promissory note.
- The promise must be unconditional:
 - It should not depend on a condition like “when able” or “after your marriage”.
 - However, payment after a fixed time or on the happening of an inevitable event (e.g., “ten days after B’s death”) is considered unconditional.
- The maker must sign the promissory note:
 - The signature of the maker indicates his undertaking to pay the amount stated.
- The maker must be a certain person:
 - The instrument must clearly show who is making the promise to pay.
 - The identity of the maker should be definite.
- The payee must be certain:
 - The promise must be to pay a specific person or persons, identifiable by name or designation, or to their order.
- The sum payable must be certain:
 - The amount must be definite and not subject to variation by future events.
 - Example: “Rs. 100 and all other sums which shall become due” is not a valid promissory note.
- Payment must be in legal money of the country:
 - The payment must be in cash (legal tender), not partly in goods.
 - Example: “Rs. 500 and 10 quintals of rice” is not valid as a promissory note.
- It must be properly stamped:
 - The instrument must bear the proper stamp as per the Indian Stamp Act, 1899.
 - Each stamp must be duly cancelled by the maker’s signature or initials.
- It should contain the place, number, and date:
 - These details are desirable but not essential for validity.
 - Eg: If undated, it is deemed dated on the date of delivery.

Question

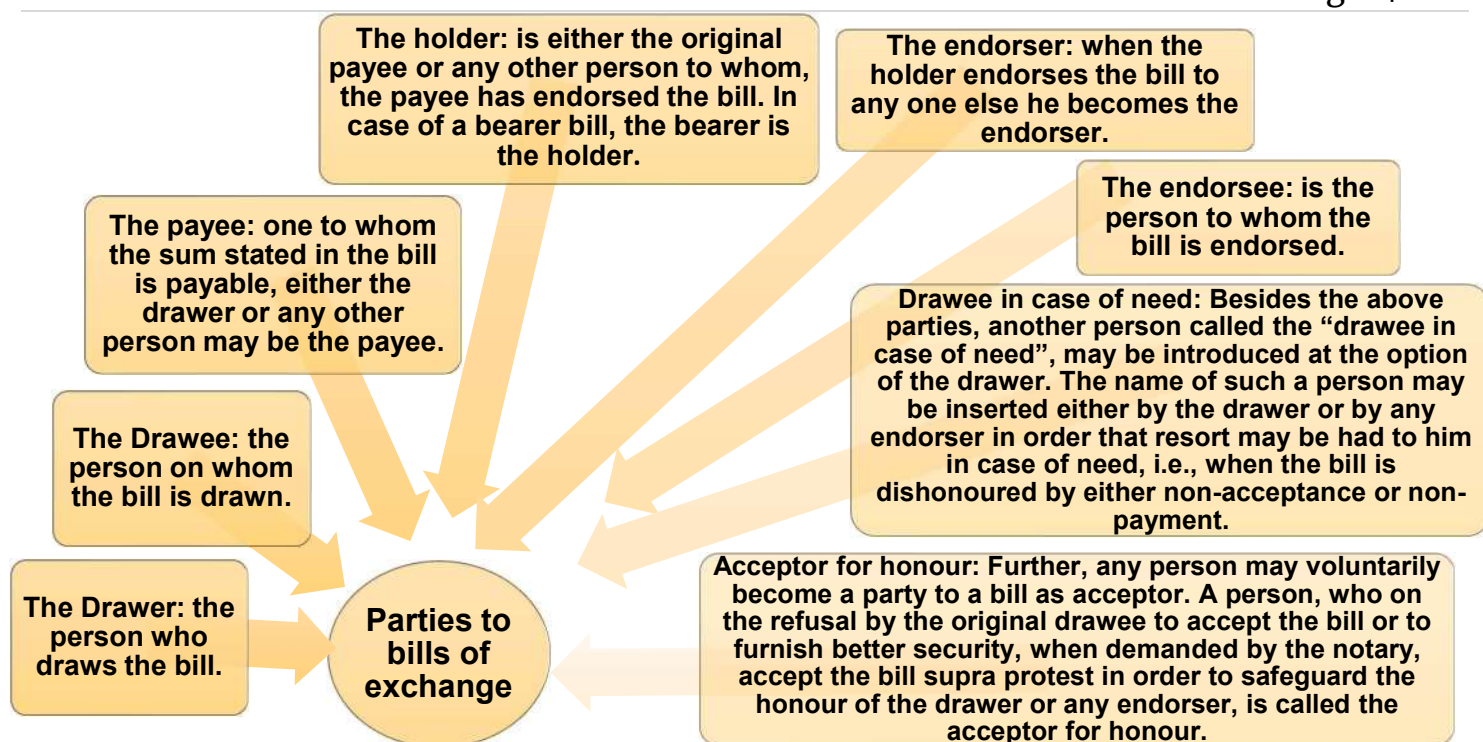
X made a promissory note for Rs. 50,000/- to be paid to Y on 31st December, 2022. Y endorse the bill Z. Find out who is maker, payee, holder, endorser and endorsee.

Note : A promissory note cannot be made payable or issued to bearer, no matter whether it is payable on demand or after a certain time (Section 31 of the RBI Act, 1934).

(ii) Bills of Exchange

1. An instrument in writing containing an unconditional order
2. signed by the maker
3. directing a certain person to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument. (Section 5)

Most of the cases the rules which apply to promissory notes are in general applicable to bills.



Essentials of a Bill of Exchange:

- It must be in writing.
- It must contain an unconditional order to pay money only and not merely a request.
- It must be signed by the drawer.
- The parties must be certain.
- The sum payable must also be certain.
- It must comply with other formalities e.g. stamps, date, etc

Point of Distinction	Bill of Exchange	Promissory Note
1. Number of Parties	Involves three parties – Drawer, Drawee, and Payee. (However, any two capacities may be filled by the same person.)	Involves two parties – Maker (debtor) and Payee (creditor).
2. Payable to Maker/Drawer	Drawer and Payee may be the same person.	Cannot be made payable to the maker himself.
3. Nature of Instrument	Contains an unconditional order by the drawer to the drawee to pay as directed.	Contains an unconditional promise by the maker to pay the payee or his order.
4. Acceptance	A bill payable after sight must be accepted by the drawee (or his agent) before payment.	No acceptance is needed; it is presented directly for payment by the maker.
5. Liability	Liability of the drawer is secondary and conditional upon dishonour by the drawee.	Liability of the maker is primary and absolute.

6. Protest for Dishonour	A foreign bill must be protested for dishonour.	No such protest is required in case of a promissory note.
7. Notice of Dishonour	Notice of dishonour must be given to the drawer and endorsers.	No notice of dishonour is necessary.
8. Payable to Bearer	Can be drawn payable to bearer, provided it is not payable on demand.	Cannot be made payable to bearer, even if payable otherwise than on demand.

How Bill of Exchange Originates—Forms of Bills of Exchange

Bills of exchange were originally used for payment of debts by traders residing in one country to another country with a view to avoid transmission of coin. Now-a-days they are used more as trade bills both in connection with domestic trade and foreign trade and are called inland bills and foreign bills respectively.

Inland Bills (Sections 11 and 12)

- A bill of exchange is considered an inland instrument if it satisfies either of the following conditions:
 - (i) It is drawn or made and payable in India, or
 - (ii) It is drawn in India upon any person who is a resident in India, even if it is payable in a foreign country.
- A promissory note is considered an inland note only if it is both drawn and payable in India, since a promissory note has no drawee.
- The two essential conditions for an instrument to be considered inland are:
 - (i) The instrument must have been drawn or made in India; and
 - (ii) The instrument must be payable in India or the drawee must be in India.

Example

A bill drawn in India, payable in USA, upon a person resident in India is an inland instrument. A bill drawn in India and payable in India but drawn on a person in USA is also an inland instrument.

Foreign Bills

All bills which are not inland are deemed to be foreign bills. Normally foreign bills are drawn in sets of three copies.

Trade Bill

A bill drawn and accepted for a genuine trade transaction is termed as a trade bill. When a trader sells goods on credit, he may make use of a bill of exchange.

Example

A sells goods worth Rs. 1,000 to B and allows him 90 days time to pay the price, A will draw a bill of exchange on B, on the following terms: "Ninety days after date pay A or order, the sum of

one thousand rupees only for value received". A will sign the bill and then present it to B for acceptance. This is necessary because, until a bill is accepted by the drawee, nobody has either rights or obligations. If B agrees to obey the order of A, he will accept the bill by writing across its face the word "accepted" and signing his name underneath and then delivering the bill to the holder. B, the drawee, now becomes the acceptor of the bill and liable to its holders. Such a bill is a genuine trade bill.

Accommodation Bill

Meaning:

- Not all bills are genuine trade bills; some are drawn to accommodate or oblige a party without any genuine trade transaction.
- An Accommodation Bill is a bill where a person lends or gives his name to another person to help him financially.

Definition:

- A bill that is drawn, accepted, or endorsed without consideration is called an Accommodation Bill.

Parties Involved:

- The person who lends his name to help another is called the accommodating (or accommodation) party.
- The person who is helped or benefited is called the party accommodated.

Liability:

- The accommodation party is not liable on the instrument to the party accommodated, since there is no consideration between them.
- However, the accommodation party is liable to a holder for value who takes the bill for consideration, even if that holder is not a holder in due course.

Example:

1. Suppose A needs money and approaches his friends B and C.
2. Instead of lending money directly, B and C draw an Accommodation Bill in A's favour for ₹1,000.
3. If B and C have good credit, A can discount the bill with his banker and obtain money immediately.

Nature of Liability in the Example:

- The real debtor is A (the payee), who promises to reimburse C before the bill's maturity (three months).
- A is the principal debtor, while B and C are sureties.

Definition (based on liability inversion):

An Accommodation Bill exists when, between the original parties, the person who appears to be the principal is actually the surety, whether he is the drawer, acceptor, or endorser.

"Three months after date pay A or order, the sum of Rupees one thousand only".

B.

To

C.

Bills in Sets (Sections 132 and 133)

- Foreign bills are usually drawn in sets to avoid the danger of loss.
- They are generally drawn in sets of three, each part being called a "Via" (e.g., First via, Second via, Third via).
- When any one part of the set is paid, the other parts become inoperative.
- All the parts together form one bill.
- The drawer must sign and deliver all parts of the bill to the payee.
- The stamp is affixed only on one part of the bill.
- Only one part of the bill needs to be accepted by the drawee.
- If the drawee mistakenly accepts all parts of the same bill, he becomes liable on each part accepted as if each were a separate bill.

Right to Duplicate Bill

- If a bill of exchange is lost before it becomes overdue, the holder of the bill may apply to the drawer for a duplicate bill of the same tenor.
- Only the holder of the instrument can request a duplicate bill, promissory note, or cheque.

Bank Draft

- A bill of exchange is sometimes referred to as a draft.
- It is called a bank draft when a bill of exchange is drawn by one bank on another bank, or by a bank on its own branch.
- A bank draft is a negotiable instrument.
- It is similar to a cheque but differs in certain respects.
- A bank draft can be drawn only by a bank, while a cheque can be drawn by any account holder.
- A bank draft cannot be easily countermanded (stopped), unlike a cheque.
- A bank draft cannot be made payable to bearer.

Specimen of a Bank Draft

A.B.C. Bank

X.Y.Z. Branch

No.....

Date.....

On demand pay 'A' or order the sum of rupees one thousand five hundred only for value received.

Rs.1,500/-

Sd./- Manager

To

'B' Branch, (Place)

In the above demand draft, the drawer is X.Y.Z. Branch, the drawee is 'B' branch and the payee is 'A'.

(iii) Cheques

- a) The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 and the Negotiable Instruments (Amendment) Act, 2015 have broadened the definition of a cheque.
- b) The definition now includes:
 - The electronic image of a truncated cheque, and
 - A cheque in electronic form.
- c) Section 6 of the Negotiable Instruments Act defines a cheque as:
 - A bill of exchange drawn on a specified banker,
 - Not expressed to be payable otherwise than on demand, and
 - Includes both truncated and electronic cheques.
- d) Example:
 - After the amendment, banks can now send an electronic copy of a cheque to another bank for payment clearance.
 - This change has reduced cheque clearing time significantly.
- e) Despite the amendment, the basic definition of a cheque remains the same; it has only been expanded to cover electronic forms.

Explanation (as per Section 6)

“Cheque in the electronic form” means:

- A cheque drawn in electronic form using a computer resource, and
- Signed in a secure system with a digital signature (with or without biometric signature) and asymmetric crypto system or with an electronic signature.

“Truncated cheque” means:

- A cheque that is truncated (stopped from physical movement) during the clearing cycle,
- Either by the clearing house or by the bank (paying or receiving),
- Immediately upon generation of its electronic image for transmission.
- *(Physical movement of the cheque is replaced by the electronic image.)*

“Clearing house” means:

- A clearing house managed by the Reserve Bank of India (RBI) or
- One recognized as such by the RBI.

Explanation III:

Terms like “asymmetric crypto system,” “computer resource,” “digital signature,” “electronic form,” and “electronic signature” have the same meanings as given in the Information Technology Act, 2000.

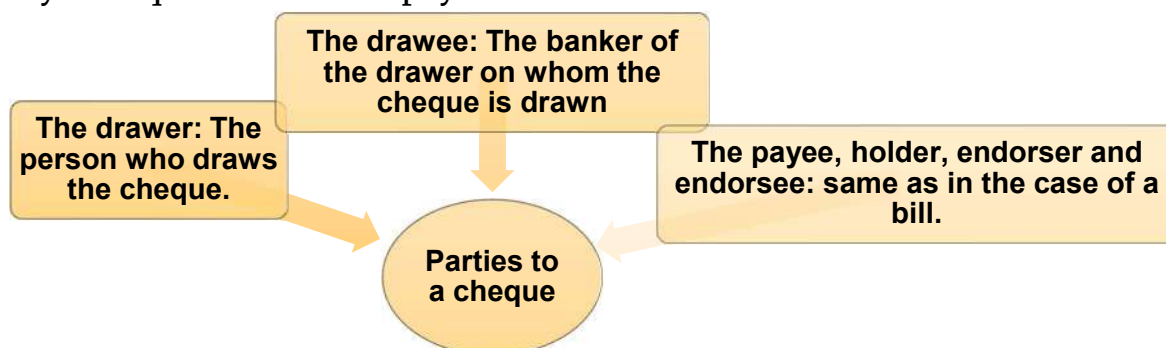
Essential Characteristics of a Cheque

- A cheque is a bill of exchange that is:
 - Drawn on a banker, and
 - Always payable on demand.
- Since a cheque is a type of bill of exchange, it must satisfy all the essential features of a bill.
- However, a cheque does not require acceptance by the drawee bank.

Note (Section 31 of the RBI Act):

1. As per Section 31 of the Reserve Bank of India Act:

- No bill of exchange or hundi can be made payable to bearer on demand.
 - No promissory note or bank draft can be made payable to bearer, whether on demand or after a specified time.
 - Only a cheque can be made payable to bearer on demand.



Essentials of a Cheque

- It is always drawn on a banker.
- It is always payable on demand.
- It does not require acceptance. There is, however, a custom among banks to mark cheques as good for purposes of clearance.
- A cheque can be drawn on bank where the drawer has an account.
- Cheques may be payable to the drawer himself. It may be made payable to bearer on demand unlike a bill or a note.
- The banker is liable only to the drawer. A holder has no remedy against the banker if a cheque is dishonoured.
- A cheque is usually valid for fix months. However, it is not invalid if it is post dated or ante-dated.
- No Stamp is required to be affixed on cheques.

Point of Distinction	Cheque	Bill of Exchange
1. Drawer and Drawee	A cheque is always drawn on a banker.	A bill may be drawn on any person, including a banker.
2. Payability	A cheque is always payable on demand.	A bill may be payable on demand or after a specified period (after sight or date).
3. Acceptance	A cheque does not require acceptance and is meant for immediate payment.	A bill payable after sight must be accepted before payment can be demanded.
4. Days of Grace	No grace period is allowed for payment of a cheque.	A grace period of 3 days is allowed in the case of time bills.
5. Effect of Non-presentment	The drawer of a cheque is discharged only if he suffers damage due to delay in presentment.	The drawer of a bill is discharged if the bill is not presented for payment when due.
6. Notice of Dishonour	Notice of dishonour is not necessary.	Notice of dishonour is necessary to charge the drawer and endorsers.

7. Revocability	A cheque is a revocable mandate; payment may be countermanded or stopped, and authority ends on death or insolvency of the drawer.	A bill of exchange is not revocable by countermanding payment or by death/insolvency of the drawer.
8. Crossing	A cheque may be crossed to ensure payment through a banker.	A bill cannot be crossed.

1. A cheque is a bill of exchange
2. drawn on a specified banker and always payable on demand.
3. A cheque is always drawn on a particular banker and is always payable on demand.
4. Consequently, all cheques are bills of exchange but all bills are not cheques.

Specimen of a Cheque

A.B.C. Bank
X.Y.Z. Branch

Date.....

Pay 'A' or the bearer sum of rupees only.

A/c No..... LF.....

Rs. /-

No..... Sd/-

Banker

1. A banker is one who carries on the business of banking.
2. Section 5(b) of the Banking Regulation Act, 1949 defines *banking* as:
“Accepting, for the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft or otherwise.”
3. This definition highlights two main points:
 - The primary function of a banker is to accept deposits for the purpose of lending or investing the same.
 - The deposited amount is repayable to the depositor on demand or according to agreement.
 - The demand for repayment can be made by cheque, draft, or otherwise, and not merely by verbal order.

Customer

- The term “customer” is not defined in either Indian or English law.
- Generally, a customer is:
 - A person who has an account with the bank, or
 - A person who uses the services of the bank.

Legal Relationship between Banker and Customer

Obligations of a Banker:

1. To honour cheques drawn by customers (if sufficient funds exist).

2. To collect cheques and drafts on behalf of customers.
3. To keep proper records of all transactions with customers.
4. To comply with standing instructions given by customers.
5. To maintain confidentiality — not to disclose the state of a customer's account to others.
6. To give reasonable notice to the customer before closing the account.

Rights of a Banker:

- i. Right of lien – to retain goods and securities of the customer for a general balance of account.
- ii. Right of set-off and appropriation – to adjust mutual debts between banker and customer.
- iii. Right to claim incidental charges and interest – as per the bank's rules and regulations, communicated to the customer at the time of opening the account.

Liability of a Banker

- By opening a current account for a customer, the banker becomes liable to his debtor to the extent of the amount received in that account.
- The banker undertakes to honour cheques drawn by the customer as long as he holds sufficient funds to the customer's credit.
- If a banker, without justification, fails to honour his customer's cheque, he is liable to compensate the drawer for any loss or damage suffered.
- The payee or holder of the cheque has no cause of action against the banker because the obligation to honour a cheque exists only towards the drawer.
- The banker must maintain proper and accurate accounts of credits and debits.
- The banker must honour a cheque that is presented in due course.
- However, in certain circumstances, the banker must refuse to honour a cheque, and in some others, he may do so.

When Banker must Refuse Payment

In the following cases the authority of the banker to honour customer's cheque comes to an end, he must refuse to honour cheques issued by the customer:

- When a customer countermands payment i.e., where or when a customer, after issuing a cheque issues instructions not to honour it, the banker must not pay it.
- When the banker receives notice of customer's death.
- When customer has been adjudged an insolvent.
- When the banker receives notice of customer's insanity.
- When an order (e.g., Garnishee Order) of the Court, prohibits payment.
- When the customer has given notice of assignment of the credit balance of his account.
- When the holder's title is defective and the banker comes to know of it.
- When the customer has given notice for closing his account.

When Banker may Refuse Payment

In the following cases the banker may refuse to pay a customer's cheque:

- When the cheque is post-dated.
- When the banker has no sufficient funds of the drawer with him and there is no communication between the bank and the customer to honour the cheque.
- When the cheque is of doubtful legality.
- When the cheque is not duly presented, e.g., it is presented after banking hours.
- When the cheque on the face of it is irregular, ambiguous or otherwise materially altered.
- When the cheque is presented at a branch where the customer has no account.
- When some persons have joint account and the cheque is not signed jointly by all or by the survivors of them.
- When the cheque has been allowed to become stale, i.e., it has not been presented within six months of the date mentioned on it.

Example

A issued an account payee cheque in the name of B on 30th October, 2022. The date on cheque was 30th November, 2022. The cheque presented for payment on 29th November, 2022. In this case, The bank may deny to make the payment to B.

Protection of Paying Banker (Sections 10, 85, and 128)

1. Section 85 provides that when a cheque payable to order is purportedly endorsed by or on behalf of the payee, the banker is discharged by payment in due course.
2. The banker can debit the customer's account with the cheque amount even if:
 - The endorsement was later found to be forged, or
 - The payee's agent endorsed without authority.
3. The term payee in this context includes the endorsee.
4. This protection exists because a banker cannot be expected to know the signatures of all persons; the banker is only bound to know the signatures of his own customers.
5. Forgery of the drawer's signature will not ordinarily protect the banker, but the banker may debit the account if:
 - The forgery is closely connected with the negligence of the customer, and
 - It is the proximate cause of the loss.
6. For bearer cheques:
 - The rule is "once a bearer cheque, always a bearer cheque".
 - If a cheque was originally payable to bearer, the banker may ignore any endorsement and is discharged by payment in due course.
 - A cheque that becomes bearer by a subsequent endorsement in blank is not covered by this section.
7. A banker is discharged from liability on a crossed cheque if he makes payment in due course.

Payment in due Course (Section 10)

Any person liable to make payment under a negotiable instrument, must make the payment of the amount due thereunder in due course in order to obtain a valid discharge against the holder.

A payment in due course means a payment in accordance with the apparent tenor of the instrument, in good faith and without negligence to any person in possession thereof.

A payment will be a payment in due course if:

- it is in accordance with the apparent tenor of the instrument, i.e., according to what appears on the face of the instrument to be the intention of the parties;
- it is made in good faith and without negligence, and under circumstances which do not afford a ground for believing that the person to whom it is made is not entitled to receive the amount;
- it is made to the person in possession of the instrument who is entitled as holder to receive payment;
- payment is made under circumstances which do not afford a reasonable ground believing that he is not entitled to receive payment of the amount mentioned in the instrument; and
- payment is made in money and money only.

Under Sections 10 and 128, a paying banker making payment in due course is protected.

Collecting Banker

- A Collecting Banker is a banker who collects the proceeds of a cheque for a customer.
- Although collection is primarily a service, the Negotiable Instruments Act, 1881 imposes statutory obligations on the collecting banker.
- Section 126 of the Act specifies:
 - A cheque with a general crossing must not be paid to anyone other than a banker.
 - A cheque with a special crossing must not be paid to anyone other than the banker to whom it is crossed.
- A paying banker must pay a generally crossed cheque only to a banker, meaning it should be collected by another banker.
- While collecting cheques, a banker may receive proceeds of a cheque to which the customer has no title.
 - In such cases, the true owner may sue for conversion.
 - A banker cannot be expected to verify all endorsement signatures on the cheque; he is only required to know the signatures of his customer.
 - If a cheque collected by a banker is later found to have a forged endorsement, the banker should not be held liable, as he only collected the proceeds.
 - A banker who, in good faith and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself is not liable to the true owner if the customer's title proves defective.
 - Explanation: A banker is considered to have received payment for a customer even if he credits the customer's account before actually receiving payment.
- Amendment Act, 2002 (Explanation II to Section 131):

- A banker receiving payment based on an electronic image of a truncated cheque must verify the prima facie genuineness of the cheque.
- He must check for any fraud, forgery, or tampering apparent on the instrument using due diligence and ordinary care.

Requisites for Claiming Protection under Section 131

- Good Faith and Absence of Negligence:
 - The collecting banker must act honestly.
 - Good faith can be rebutted if there is recklessness or lack of proper care.
 - Burden of proof lies on the banker to show the cheque was collected in good faith and without negligence.
 - Examples of negligence:
 - Failure to verify regularity of endorsements.
 - Collecting a cheque payable to a company but crediting it to a director's account.
- Cheque Must Be Crossed:
 - The banker must have collected a crossed cheque.
 - The cheque should be crossed before it comes for collection.
- Collection for a Customer:
 - The proceeds of the cheque should be collected for a customer, i.e., a person who has an account with the banker.
- Acting as Agent, Not Holder for Value:
 - The banker must act only as an agent of the customer.
 - If the banker becomes a holder for value, protection under Section 131 is lost.
 - Example: Allowing the customer to withdraw the cheque amount before collection.
 - Example: Accepting the cheque in reduction of an overdraft.
 - Explanation: Mere crediting of the cheque amount to the customer's account does not make the banker a holder for value, as it may be done for accounting convenience before proceeds are realized.

Overdue, Stale, or Out-of-date Cheques

- Overdue Cheque:
 - A cheque becomes overdue or statute-barred after three years from its due date of issue.
 - After this period, the holder cannot sue on the cheque.
- Presentation within Reasonable Time:
 - A cheque must be presented for payment within a reasonable time.
 - Cheques are not meant for indefinite circulation.
- Stale Cheque:
 - In India, a cheque in circulation for more than six months is regarded by bankers as stale.
 - If delay in presenting a cheque causes the drawer to suffer loss (e.g., bank failure), the drawer is discharged from liability to the holder to the extent of the damage.

Liability of Endorser:

- To hold an endorser liable, the cheque must be presented for payment within a reasonable time of delivery by the endorser.

Example

'A' endorses and delivers a cheque to B, and B keeps it for an unreasonable length of time, and then endorses and delivers it to C. C presents it for payment within a reasonable time after its receipt by him, and it is dishonoured. C can enforce payment against B but not against A, as qua A, the cheque has become stale.

Rights of Holder against Banker

- A banker is liable to his customer for wrongful dishonour of a cheque.
- The banker is not liable to the payee or holder of the cheque, except in two cases:
 - If the holder does not present the cheque within a reasonable time and, as a result, the drawer suffers damage due to bank failure in liquidation.
 - If a banker pays a crossed cheque by mistake over the counter, he is liable to the owner for any loss caused.

Crossing of Cheques

- Cheques can be open or crossed:
 - Open cheque: Can be presented and paid over the counter.
 - Crossed cheque: Cannot be paid over the counter; must be collected through a banker.
- Purpose of Crossing:
 - Directs the paying banker to pay the money only to a banker or a specified banker.
 - Ensures the payment can be traced to the person receiving the cheque.
- Restricting Negotiability:
 - Add words "Not Negotiable" or "Account Payee Only" to restrain negotiability.
- Negotiation:
 - Crossed bearer cheque: Can be negotiated by delivery.
 - Crossed order cheque: Can be negotiated by endorsement and delivery.
- Benefit:
 - Crossing provides security and protection to the holder of the cheque.

Modes of Crossing (Sections 123–131A)

- **Types of Crossing**
 - General Crossing
 - Special Crossing
 - Restrictive Crossing (added type)
- **General Crossing**
 - Cheque bears two parallel transverse lines across its face.
 - May include the words "and Co." or "not negotiable".
 - Payment: The paying banker will pay to any banker only; not over the counter.

- Effect of words:
 - “and Co.” → no legal significance.
 - “not negotiable” → restricts negotiability; transferee cannot obtain better title than transferor.
- Essential feature: Two parallel transverse lines.

• Special Crossing

- Cheque bears the name of a banker, with or without “not negotiable.”
- Payment: Only to the banker named on the cheque or their collecting agent.
- Parallel lines: Not essential; name of banker is the distinguishing mark.
- Condition: Paying banker must honour the cheque through the specified bank or its agent.

• Account Payee’s Crossing

- Restricts negotiability; directs that proceeds are credited only to the account of the payee or named party/agent.
- Collecting banker:
 1. Must credit the proceeds to the proper account.
 2. Failing to do so = negligence, losing protection under Section 131.
- Paying banker: Not responsible for verifying account; duty lies only with collecting banker.

Not Negotiable Crossing

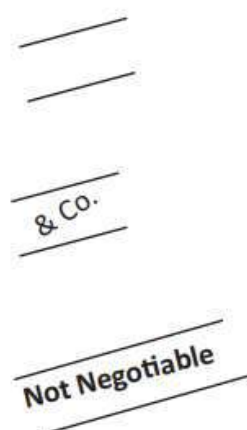
- i. A cheque may be crossed “Not Negotiable”:
 - a. General crossing: words “Not Negotiable” within two transverse parallel lines.
 - b. Special crossing: words “Not Negotiable” along with the name of a banker.
- ii. Section 130 of the Negotiable Instruments Act:
 - a. A person taking a cheque crossed generally or specially with “Not Negotiable” cannot acquire or give a better title than the transferor.
- iii. Crossing “Not Negotiable” does not make the cheque non-transferable.
- iv. It deprives the instrument of negotiability:
 - a. Normally, a holder-in-due-course acquires an indisputable title free from defects.
 - b. A cheque crossed “Not Negotiable” is treated like any other chattel.
- v. Effect on transferees:
 - a. Transferee gets the same title as the transferor.
 - b. Transferee cannot claim the rights of a holder-in-due-course.
 - c. If the transferor’s title is defective, all subsequent transferees’ titles are tainted.
- vi. Purpose of the Section:
 - a. Protects the drawer or holder transmitting the cheque against dishonesty or loss in transit.
 - b. Serves as a warning to endorsees to verify the cheque’s title.
- vii. Example:
 - a. Bearer cheque crossed generally and marked “Not Negotiable” is lost or stolen.
 - b. If X takes it in good faith and collects through bank:
 - i. Paying and collecting bankers are protected under Sections 128 and 131.
 - ii. X cannot claim holder-in-due-course rights.

iii. True owner's rights override the rights of subsequent holders.

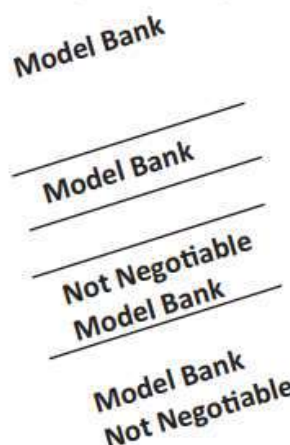
viii. Key consequence:

- a. "Not Negotiable" restricts negotiability, not transferability.
- b. Cheques bearing "Not Negotiable" lack negotiability and are not negotiable instruments in the true sense.

Specimen of a general crossing



Specimen of a special crossing



Maturity

- **Definition of Maturity:**
 - The date on which the payment of an instrument falls due.
 - For promissory notes or bills of exchange, maturity is when they fall due (Section 22).
- **Payment on Demand vs. Specified Date:**
 - Cheques: always payable on demand.
 - Promissory notes or bills: may be payable on a specified date, after a certain period, or after an event.
- **Payable "at sight" or "on presentment":**
 - Considered payable on demand.
 - Maturity arises only for instruments payable "after date," "after sight," or after a certain period.
- **Days of Grace:**
 - Instruments payable after a specified period are entitled to 3 days of grace.
 - Must be presented for payment on the last day of grace.
 - If dishonoured, suit can be filed the next day.
 - Each instalment of an instrument payable by instalments is also entitled to 3 days of grace.
 - Cheques do not have days of grace.
- **Determining Maturity Date for Months:**

- If payable after a number of months, the period ends on the day corresponding to the date of the instrument or acceptance.
- If the month has no corresponding day, the last day of the month is used.
- **Maturity on Public Holiday:**
 - a) If maturity falls on a public holiday, payment is due on the preceding business day.
 - b) Example: if maturity is on Sunday, it is due on Saturday, not Monday.
- **Presentation for Payment:**
 - Instruments must be presented on the last day of grace.
 - Payment cannot be demanded before the maturity date.

Holder (Section 8)

- A holder is a person entitled in their own name:
 - To possess the instrument.
 - To receive or recover its amount from the parties liable.
- Not every possessor of an instrument is a holder.
- To be a holder, the person must be:
 - Named as the payee, or
 - Named as the endorsee, or
 - The bearer of the instrument.
- A person obtaining an instrument by theft or forged endorsement is not a holder.
- The holder is a legal holder (de jure), not merely a possessor (de facto).
- An agent holding an instrument for a principal is not a holder, even if receiving payment.

Holder in Due Course (Section 9)

1. A holder in due course is a person who:
 - For consideration, obtains a negotiable instrument payable to bearer, or
 - As payee or endorsee, obtains a negotiable instrument payable to order, before maturity, and
 - Without reason to believe there is a defect in the title of the transferor.
2. Holder in due course enjoys a privileged position:
 - Protected against all defects in the title of previous parties.
 - Ensures subsequent holders are also protected.
3. A holder in due course can recover the amount from all previous parties, regardless of defects or lack of consideration.
4. Once an instrument passes through a holder in due course, it is purged of all defects and treated like current coin.

In order to be a holder in due course, a person must satisfy the following conditions:

1. He must be the holder of the instrument.
2. He should have obtained the instrument for value or consideration.
3. He must have obtained the negotiable instrument before maturity.
4. The instrument should be complete and regular on the face of it.
5. The holder should take the instrument in good faith.

Capacity of Parties to a Negotiable Instrument

1. Capacity to incur liability on a negotiable instrument is the same as capacity to contract.
2. Section 26: Every person capable of contracting under the law may bind themselves and be bound by:
 - Making
 - Drawing
 - Acceptance
 - Endorsement
 - Delivery
 - Negotiation of a promissory note, bill of exchange, or cheque.
3. Persons incapable of contracting do not incur liability:
 - Minors
 - Lunatics or idiots
 - Drunken persons
 - Persons disqualified by personal law
4. The incapacity of one or more parties does not reduce the liabilities of competent parties.
5. If a minor is an endorser or payee, all parties who accept the instrument are liable in case of dishonour.

Liability of Parties to Negotiable Instruments

1. Liability of Drawer (Section 30)

- Drawer is liable to compensate the holder if the drawee or acceptor dishonours the instrument.
- Liability arises only due after notice of dishonour is given or received.
- Drawer undertakes:
 1. Instrument will be accepted and paid on due presentation.
 2. In case of dishonour, he will compensate holder/endorser.
- No notice required for accommodation bills.
- Drawer's liability is secondary; primary liability lies with the drawee.

2. Liability of Drawee of Cheque (Section 31)

- Drawee (banker) must pay the cheque if sufficient funds are available and properly applicable.
- As a cheque is a bill of exchange, drawn on a specified banker, the drawee of a cheque must always be a banker. The banker, therefore, is bound to pay the cheque of the drawer, i.e., customer, if the following conditions are satisfied:
 1. The banker has sufficient funds to the credit of customer's account.
 2. The funds are properly applicable to the payment of such cheque, e.g., the funds are not under any kind of lien etc.
 3. The cheque is duly required to be paid, during banking hours and on or after the date on which it is made payable.
- If the banker is unjustified in refusing to honour the cheque of its customer, it shall be liable for damages.

3. Liability of “Maker” of Note and “Acceptor” of Bill (Section 32)

- In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount at maturity according to the apparent tenor of the note or acceptance.
- The acceptor of a bill at or after maturity is bound to pay the amount to the holder on demand.
- Liability of the acceptor corresponds to that of the maker of a note and is absolute and unconditional.
- Liability may be excluded or modified by a contract to the contrary (e.g., accommodation bills) or by a collateral agreement.
- Payment must be made to the party named in the instrument and at maturity, not before.

4. Liability of Endorser (Section 35)

- i. Every endorser incurs liability to subsequent parties.
- ii. Whoever endorses and delivers a negotiable instrument before maturity is bound to every subsequent holder in case of dishonour by drawee, acceptor, or maker.
- iii. Endorser must compensate the holder for any loss or damage caused by dishonour provided:
 - a. No contract to the contrary exists.
 - b. Endorser has not expressly excluded, limited, or made conditional his liability.
 - c. Due notice of dishonour has been given to or received by the endorser.
- iv. Every endorser after dishonour is liable as if the instrument is payable on demand.
- v. Endorser is bound by endorsement notwithstanding any previous alteration of the instrument (Section 88).

5. Liability of Prior Parties (Section 36)

- Every prior party is liable to a holder in due course until the instrument is duly satisfied.
- Prior parties may include maker, drawer, acceptor, and all intervening endorsers.
- Liability of prior parties to a holder in due course is joint and several.
- Holder in due course may hold any or all prior parties liable for the amount of the dishonoured instrument.

6. Liability inter se

- Various parties to a negotiable instrument who are liable thereon stand on a different footing with respect to the nature of liability of each one of them.

7. Liability of Acceptor of Forged Endorsement (Section 41)

- An acceptor of a bill of exchange already endorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill.

8. Acceptor’s Liability on a Bill drawn in a Fictitious Name

- An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer’s order is not relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer’s signature, and purporting to be made by the drawer.

Negotiation (Section 14)

- a) A negotiable instrument may be transferred by negotiation or assignment.
- b) Negotiation is the transfer of an instrument (note, bill, or cheque) from one person to another in a manner that conveys title and makes the transferee the holder of the instrument.
- c) In negotiation, the rights of the transferee may rise higher than those of the transferor, depending on circumstances.
- d) In assignment, the assignee has only the rights possessed by the assignor.
- e) Assignment involves transfer of ownership via a written and registered document.

Negotiability and Assignability Distinguished

- Negotiation requires mere delivery of a bearer instrument or endorsement and delivery of an order instrument; assignment requires a written document signed by the transferor.
- Assignment requires notice of transfer to the debtor; negotiation does not require notice.
- In assignment, the transferee takes the claim subject to defects, equities, and defenses against the assignor; in negotiation, the transferee as holder-in-due-course takes the instrument free from defects in the title of the transferor.

Importance of Delivery

1. Negotiation is effected by:
 - Mere delivery of a bearer instrument.
 - Endorsement and delivery of an order instrument.
2. This shows that delivery is essential in negotiable instruments.
3. Section 46 provides that acceptance or endorsement is not complete until delivery (actual or constructive) of the instrument.
4. Delivery must be voluntary and with the intention of passing property in the instrument to the person receiving it.

Negotiation by Mere Delivery

1. A bill or cheque payable to bearer is negotiated by mere delivery.
2. An instrument is payable to bearer:
 - Where it is made so payable.
 - Where it is originally payable to order, but the only or last endorsement is in blank.
 - Where the payee is fictitious or non-existing.
3. These instruments do not require the signature of the transferor.
4. The person who takes them is a holder and can sue in his own name.
5. A bearer who negotiates by mere delivery is not liable to any party if the instrument is dishonoured.
6. His obligations are only to his immediate transferee.
7. A cheque originally drawn payable to bearer remains bearer even if subsequently endorsed in full.
8. Rule: Once a bearer cheque, always a bearer cheque.

Negotiation by Endorsement and Delivery

1. Instruments payable to a specified person or to order are payable to order.
2. Such instruments can be negotiated only by endorsement and delivery.
3. Holder must sign the endorsement; otherwise, the transferee does not become a holder.
4. Delivery without endorsement is merely an assignment, not negotiation.
5. The holder of an unendorsed order instrument cannot claim rights of a holder in due course or negotiate it further.

Endorsement (Sections 15 and 16)

- a) Endorsement occurs when the maker or holder signs the instrument for the purpose of negotiation:
 - On the back or face of the instrument.
 - On an Allonge (a slip of paper annexed).
 - On a stamped paper intended as a negotiable instrument.
- b) The person to whom the instrument is endorsed is the endorsee.
- c) Endorsement means writing on the back to transfer right, title, and interest to another person.

Classes of Endorsement

- a) Blank or General
 - Endorser merely writes his signature on the back of the instrument.
 - Instrument becomes payable to bearer, even if originally payable to order.
 - Example: Bill payable to “Mohan or order”; Mohan writes only “Mohan” → endorsement in blank.
 - Holder can convert blank endorsement into full endorsement by adding a direction to pay to another person.
 - Example: Bill payable to Lokesh; Lokesh signs → endorsement in blank.
- b) Special or Full
 - Endorser signs name and adds a direction to pay the amount to, or to the order of, a specified person.
 - Example: Bill payable to Mohan or order, endorsed “pay to the order of Sohan” → special endorsement.
 - A blank endorsement can be converted into special endorsement by adding an order to make it payable to a transferee.
- c) Restrictive
 - Endorsement prohibits or restricts further negotiation of the instrument.
 - Examples:
 - “Pay A only”
 - “Pay A for my use”
 - “Pay A on account of B”
 - “Pay A or order for collection”
- d) Partial
 - Transfers only part of the amount payable on the instrument.

- Does not operate as negotiation of the instrument.
- Example: Holder of Rs. 1,000 bill endorses “Pay B or order Rs. 500” → partial and invalid endorsement.

e) Conditional or Qualified Endorsement

- An endorsement is conditional or qualified if it limits or negatives the liability of the endorser.
- An endorser may limit liability in the following ways:
 1. Sans recourse endorsement:
 - Endorser makes it clear he does not incur liability to the endorsee or subsequent holders.
 - Words used: “sans recourse” or “without recourse”.
 - Example: “Pay A or order sans recourse”.
 2. Liability dependent on a specified event:
 - Endorser’s liability arises only if a specified event occurs, which may never happen.
 - Example: “Pay A or order on his marrying B” → endorser not liable until the event happens.
- Reference to Section 52, Negotiable Instruments Act, 1881:
 - Endorser may expressly exclude liability or make liability depend upon the happening of a specified event, even if it may never happen.

Example

X being the payee, transfers the instrument to Z, by an endorsement “without recourse” and Z endorses it to Y, who endorses it to X. X does not only has his former rights back, but has the rights of an endorsee against Y and Z.

Negotiation Back

- When an endorser negotiates an instrument and again becomes its holder, it is called negotiation back.
- In such a case, none of the intermediary endorsees are liable to the endorser.
- This rule prevents a circuitry of action.
- If an endorser excludes his liability and later becomes the holder, then all intermediate endorsers are liable to him.
- The text notes that the italicised portion of the Section is important.

Example

A, the holder of a bill endorses it to B, B endorses to C, and C to D, and endorses it again to A. A, being a holder in due course of the bill by second endorsement by D, can recover the amount thereof from B, C, or D and himself being a prior party is liable to all of them. Therefore, A having been relegated by the second endorsement to his original position, cannot sue B, C and D.

Example

A is the payee of a negotiable instrument. He endorses the instrument 'sans recourse' to B, B endorses to C, C to D, and D again endorses it to A. In this case, A is not only reinstated in his former rights but has the right of an endorsee against B, C and D.

Negotiation of Lost Instrument or Obtained by Unlawful Means

1. If a negotiable instrument is lost or obtained by offence, fraud, or unlawful consideration, no possessor or endorsee claiming through such person is entitled to receive payment from any prior party.
2. Exception: A possessor or endorsee can claim payment if they, or someone through whom they claim, is a holder in due course.

Forged Endorsement

1. An instrument endorsed in full cannot be negotiated except by an endorsement signed by the person to whom it is payable.
2. If an instrument is negotiated through a forged endorsement, the endorsee acquires no title, even if they are a purchaser for value and in good faith.
3. Forgery conveys no title.
4. If the instrument is a bearer instrument or endorsed in blank, it can be negotiated by mere delivery, and the holder derives title independent of any forged endorsement.
5. Such a holder can claim the amount from any of the parties to the instrument.

Example

A bill is endorsed, "Pay A or order". A endorses it in blank, and it comes into the hands of B, who simply delivers it to C, C forges B's endorsement and transfer it to D. Here, D, as the holder does not derive his title through the forged endorsement of B, but through the genuine endorsement of A and can claim payment from any of the parties to the instrument in spite of the intervening forged endorsement.

Acceptance of a Bill of Exchange

- The drawee has no liability on a bill addressed to him for acceptance or payment.
- Refusal to accept or pay gives the holder no rights against the drawee.
- The drawee becomes liable only after acceptance.
- Acceptance requires the drawee to write "accepted" on the bill and sign below it.
- The acceptor is primarily liable on the bill.
- Acceptance indicates the drawee's assent to the order of the drawer.
- Acceptance may be general or qualified:
 - General acceptance: absolute; as a rule, acceptance must be general.
 - Qualified acceptance: made subject to conditions or qualifications; holder may refuse to take it or treat the bill as dishonoured by non-acceptance and sue the drawer.

Acceptance for Honour

1. If a bill is noted or protested for non-acceptance, any person not already liable may, with holder's consent, accept it for honour of a party.
2. The acceptor for honour declares in writing that they accept the protested bill for the honour of the drawer or any particular endorser named.
3. The acceptor for honour is liable to pay only if:
 - The bill has been presented at maturity to the drawee for payment.
 - The drawee has refused to pay.
 - The bill has been noted and protested for non-payment.
4. Any person may pay supra protest for the honour of a party liable on an accepted bill.
5. Payment supra protest causes the bill to cease to be negotiable.
6. The stranger paying for honour acquires all the rights of the holder for whom they pay.

Presentment for Acceptance

- Only bills of exchange require presentment for acceptance, and only certain kinds.
- Bills payable on demand or on a fixed date need not be presented.
- A bill payable after a certain event may or may not be presented for acceptance.
- The following bills must be presented for acceptance, otherwise parties are not liable:
 - (a) Bill payable after sight – presentment is necessary to fix maturity.
 - (b) Bill with express stipulation to be presented for acceptance before payment.
- Presentment must be made to the drawee or his duly authorised agent.
- If the drawee is dead, present to his legal representative.
- If the drawee is insolvent, present to the official receiver or assigner.
- Presentment must be:
 - Before maturity.
 - Within a reasonable time after the bill is drawn or within stipulated period, if any.
 - On a business day, within business hours, at the drawee's business or residence.
 - By exhibiting the bill to the drawee; mere notice of possession is not sufficient.
- When presentment is compulsory and the holder fails to present, the drawer and all endorsers are discharged from liability.

The following are the persons to whom a bill of exchange should be presented:

- The drawee or his duly authorised agent.
- If there are many drawees, bill must be presented to all of them.
- The legal representatives of the drawee if drawee is dead.
- The official receiver or assignee of insolvent drawee.
- To a drawee in case of need, if there is any. This is necessary when the original drawee refuses to accept the bill.
- The acceptor for honour. In case the bill is not accepted and is noted or protested for non-acceptance, the bill may be accepted by the acceptor for honour. He is a person who comes forward to accept the bill when it is dishonoured by non-acceptance.

Presentment for Acceptance when Excused

Compulsory presentment for acceptance is excused and the bill may be treated as dishonoured in the following cases:

- Where the drawee cannot be found after reasonable search.
- Where drawee is a fictitious person or one incapable of contracting.
- Where although the presentment is irregular, acceptance has been refused on some other ground

Presentment for Payment

1. Section 64(1): All notes, bills, and cheques must be presented for payment by or on behalf of the holder.
2. Presentment must be during the usual hours of business of the maker or acceptor, and if at a banker, within banking hours.
3. The definition of cheque includes:
 - Electronic image of a truncated cheque
 - Cheque in electronic form
4. Drawee bank may demand the original truncated cheque if not satisfied about the instrument.
5. Section 64(2): When an electronic image of a truncated cheque is presented, the drawee bank can demand further information from the bank holding the truncated cheque if there is reasonable suspicion about:
 - Genuineness of the instrument's apparent tenor
 - Fraud, forgery, tampering, or destruction
6. If such suspicion exists, the drawee bank is entitled to demand presentment of the truncated cheque itself for verification.
7. If payment is made after such demand, the drawee bank retains the truncated cheque.

Presentment for Payment when Excused

No presentment is necessary and the instrument may be treated as dishonoured in the following cases:

- Where the maker, drawer or acceptor actively does something so as to intentionally obstruct the presentment of the instrument, e.g., deprives the holder of the instrument and keeps it after maturity.
- Where his business place is closed on the due date.
- Where no person is present to make payment at the place specified for payment.
- Where he cannot, after due search be found. (Section 61)
- Where there is a promise to pay notwithstanding non-presentment.
- Where the presentment is express or impliedly waived by the party entitled to presentment.
- Where the drawer could not possibly have suffered any damage by non-presentment.
- Where the drawer is a fictitious person, or one incompetent to contract.
- Where the drawer and the drawee are the same person.
- Where the bill is dishonoured by non-acceptance.

- Where presentment has become impossible, e.g., the declaration of war between the countries of the holder and drawee.
- Where though the presentment is irregular, acceptance has been refused on some other grounds.

Dishonour by Non-Acceptance

Section 91 provides that a bill is said to be dishonoured by non-acceptance:

- When the drawee does not accept it within 48 hours from the time of presentment for acceptance.
- When presentment for acceptance is excused and the bill remains unaccepted.
- When the drawee is incompetent to contract.
- When the drawee is a fictitious person or after reasonable search can not be found.
- Where the acceptance is a qualified one

DISHONOUR AND ITS REMEDIES

Dishonour by Non-payment (Section 92)

- A promissory note, bill of exchange, or cheque is dishonoured by non-payment when the:
 - Maker of the note,
 - Acceptor of the bill, or
 - Drawee of the cheque defaults in payment upon being duly required to pay.
- A negotiable instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument remains unpaid when overdue.
- If a bill is dishonoured by non-acceptance or non-payment, the drawer and all endorsers are liable to the holder, provided notice of dishonour is given.
- The drawee is liable only in case of dishonour by non-payment.

Notice of Dishonour (Sections 91–98 and 105–107)

- When a negotiable instrument is dishonoured by non-acceptance or non-payment, the holder or liable party must give notice of dishonour to all other parties he seeks to hold liable.
- Each party receiving notice must, to render prior parties liable, give notice of dishonour to such prior parties within a reasonable time.
- The purpose of notice is not to demand payment but to inform the notified party of his liability and, in case of the drawer, to protect himself against the drawee or acceptor who dishonoured the instrument.
- Omission to give notice discharges all parties other than the maker or acceptor, in respect of both the instrument and the original consideration.
- Notice may be oral or in writing, but it must be actual formal notice given within a reasonable time of dishonour.

Notice of Dishonour Unnecessary

No notice of dishonour is necessary:

- When it is dispensed with or waived by the party entitled thereto, e.g., where an endorser writes on the instrument such words as “notice of dishonour waived”.
- When the drawer has countermanded payment.
- When the party charged would not suffer damage for want of notice.
- When the party entitled to notice cannot after due search be found.
- When the omission to give notice is caused by unavoidable circumstances, e.g., death or serious illness of the holder.
- Where the acceptor is also a drawer, e.g., where a firm draws on its branch.
- Where the promissory note is not negotiable. Such a note cannot be endorsed.
- Where the party entitled to notice promises to pay unconditionally.

NOTING AND PROTEST (SECTIONS 99-104 A)

Noting

- When a note or bill is dishonoured, the holder can sue the drawer and endorsers after giving due notice of dishonour.
- Section 99 provides a method to authenticate dishonour by “Noting”.
- The holder may have the dishonour noted by a notary public on the instrument, on an attached paper, or partly on each.
- The noting/minute must be recorded by the notary within a reasonable time after dishonour.
- The noting must include:
 - Fact of dishonour
 - Date of dishonour
 - Reason for dishonour, if any
 - Reasons why the holder treats it as dishonoured if not expressly dishonoured
 - Notary’s charges

Protest

- Protest is the formal notarial certificate attesting the dishonour of the bill, based on the noting.
- After noting, the formal protest is drawn up by the notary and relates back to the date of noting.
- If the acceptor becomes insolvent, suspends payment, or his credit is publicly impeached before maturity, the holder may have the bill protested for better security.
- The notary demands better security, and refusal results in a “protest for better security”.
- Foreign bills must be protested for dishonour if required by the law of the place where drawn; foreign promissory notes need not be protested.
- When law requires a protest, notice of protest must be given by the notary public instead of ordinary notice of dishonour.
- A valid protest must include:
 - Names of parties for and against whom protest is made
 - Fact and reasons for dishonour
 - Place and time of dishonour

- Signature of the notary public
- Protest provides authentic evidence of dishonour to the drawer and endorsee.

Discharge

- Discharge in relation to negotiable instruments may be either:
 - Discharge of the instrument
 - Discharge of one or more parties from liability

Discharge of the Instrument

A negotiable instrument is discharged:

- by payment in due course;
- when the principal debtor becomes the holder;
- by an act that would discharge simple contract;
- by renunciation; and
- by cancellation.

Discharge of a Party or Parties

- When any particular party or parties are discharged, the instrument continues to be negotiable and the undischarged parties remain liable on it.
- For example, the non-presentment of a bill on the due date discharges the endorsers from their liability, but the acceptor remains liable on it.

A party may be discharged in the following ways :

- By cancellation by the holder of the name of any party to it with the intention of discharging him.
- By release, when the holder releases any party to the instrument
- Discharge of secondary parties, i.e., endorsers.
- By the operation of the law, i.e., by insolvency of the debtor.
- By allowing drawee more than 48 hours to accept the bill, all previous parties are discharged.
- By non-presentment of cheque promptly the drawer is discharged.
- By taking qualified acceptance, all the previous parties are discharged.
- By material alteration.

MATERIAL ALTERATION (SECTION 87)

- An alteration is material if it alters the operation of the instrument or the liabilities of the parties.
- Any change that causes the instrument to speak a different legal effect or changes its legal character is material.
- A material alteration renders the instrument void, but only affects parties who were already part of it at the date of alteration.
- Section 88: An acceptor or endorser is bound by their acceptance/endorsement despite any previous alteration.

Examples of Material Alteration:

- Alteration of the date
- Alteration of the sum payable
- Alteration in the time of payment
- Alteration of the place of payment
- Alteration of the rate of interest
- Addition of a new party
- Tearing the instrument in a material part

Cases that are NOT Material Alterations:

- Correction of a mistake
- To carry out the common intention of the parties
- Alteration before issuance with the consent of the parties
- Crossing a cheque
- Addition of the words “on demand” where no time of payment is stated

Protection to Payor (Section 89)

- Protection is given to a person who pays an altered note, bill, or cheque.
- Conditions for claiming protection:
- The alteration should not be apparent
- Payment must be made in due course
- Payment must be by a person or banker liable to pay

Amendments for Electronic Cheques / Truncated Cheques:

- a) Banks or clearing houses receiving a transmitted electronic image of a truncated cheque must verify that the image matches the original.
- b) Any difference in apparent tenor between the image and the original is a material alteration.
- c) Banks/clearing houses must ensure exactness when truncating and transmitting the image.
- d) If the bank fails in this duty, the payment is not regarded as good and protection is denied.

Retirement of a Bill under Rebate

- An acceptor may pay a bill before maturity; the bill is then said to be retired.
- A retired bill is not discharged and must not be cancelled except by the acceptor when it comes into his hands.
- It is customary to allow interest on the money for the remaining time of the bill.
- This interest allowance is called a rebate.

Hundis

- Hundis are negotiable instruments written in an oriental language.
- They can be bills of exchange or promissory notes.
- Hundis are not covered under the Negotiable Instruments Act, 1881.
- They are generally governed by customs and usages of the locality.
- If custom is silent, the Negotiable Instruments Act, 1881 applies.

- Historically, “hundi” referred to native bills of exchange, while promissory notes were called “teep”.
- Hundis were in circulation in India before 1881.
- The usages attached to hundis varied with locality.
- Generally, hundi includes all indigenous negotiable instruments, whether bills of exchange or promissory notes.
- A hundi must be:
 - Capable of being sued by the holder in his own name
 - Transferable like cash by delivery according to custom
- Customs relating to hundis were varied and sometimes oral acceptance was vague.

Type of Hundi	Description
Shah Jog Hundi	- “Shah” means a respectable and responsible person or a man of worth in the bazar. - Payable only to a respectable holder, as opposed to a hundi payable to bearer. - Drawee must satisfy himself that the payee is a ‘SHAH’.
Jokhmi Hundi	- Always drawn on or against goods shipped on the vessel mentioned in the hundi. - Money is paid only in the event of arrival of the goods against which the hundi is drawn. - In the nature of a policy of insurance. - Money is paid beforehand and is to be recovered if the ship arrives safely.
Jawabee Hundi	- Used for remitting money from one place to another. - A person desirous of making a remittance writes to the payee and delivers the letter to a banker. - Banker either endorses it to his correspondents near the payee’s place or negotiates its transfer. - On arrival, the letter is forwarded to the payee, who gives his receipt in the form of an answer. - The answer is forwarded by the same channel of the drawer or the order.
Nam Jog Hundi	- Payable to the party named in the bill or his order. - Name of the payee is specifically inserted in the hundi. - Can be negotiated like a bill of exchange. - Alteration into a Shah Jog hundi is a material alteration and renders it void.
Darshani Hundi	- Payable at sight. - Freely negotiable. - Price is regulated by demand and supply. - Payable on demand. - Must be presented for payment within a reasonable time after receipt by the holder.
Miadi Hundi	- Also called muddati hundi. - Payable after a specified period of time. - Money is usually advanced against these hundis by shroffs after deducting the advance for the period in advance.

	- There are other forms of hundis also.
Dhani Jog Hundi	- Payable to “dhani” i.e., the owner.
Firman Jog Hundi	- Payable to order. - Can be negotiated by endorsement and delivery.

PRESUMPTIONS OF LAW

A negotiable instrument is subject to certain presumptions. These have been recognised by the Negotiable Instruments Act under Sections 118 and 119 with a view to facilitate the business transactions. These are described below:

It shall be presumed that:

- Every negotiable instrument was made or drawn for consideration irrespective of the consideration mentioned in the instrument or not.
- Every negotiable instrument having a date was made on such date.
- Every accepted bill of exchange was accepted within a reasonable time before its maturity.
- Every negotiable instrument was transferred before its maturity.
- The instruments were endorsed in the order in which they appear on it.
- A lost or destroyed instrument was duly signed and stamped.
- The holder of the instrument is a holder in due course.
- In a suit upon an instrument which has been dishonoured, the Court shall presume the fact of dishonour, or proof of the protest.

However these legal presumptions are rebuttable by evidence to the contrary. The burden to prove to the contrary lies upon the defendant to the suit and not upon the plaintiff.

Payment of Interest in case of dishonour

- a) The Negotiable Instruments Act, 1881 was amended in 1988.
- b) The rate of interest under Sections 80 and 117 was revised from 6% to 18% per annum.
- c) Interest is payable on negotiable instruments from the due date if no rate of interest is specified.
- d) Interest is payable to an endorser from the date of payment on a negotiable instrument on its dishonour.
- e) The amendment aims to discourage the withholding of payment on negotiable instruments on due dates.

Penalties in case of dishonour of cheques

- Chapter XVII of the Negotiable Instruments Act provides for penalties in case of dishonour of certain cheques for insufficiency of funds.
- Sections 138 to 147 deal with these aspects.
- Chapter XVII was amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002:
- Provided the drawer with more time to send notice.
- Made the punishment for the offence more stringent.
- Gave power to the court for condonation of delay in filing of complaint.

- Excluded liability of government-nominated directors.
- Made provision for summary trial of cases and time-bound disposal.
- Relaxed the rules of evidence.
- Made the offences under the Act compoundable.

Further amendments were made by the Negotiable Instruments (Amendment) Act, 2015:

- Clarified jurisdiction issues for filing cases under Section 138.
- Cases can be filed only in a court within whose local jurisdiction the payee's bank branch is situated.
- For bearer cheques presented to the drawee bank, the local court of that branch gets jurisdiction.
- Provided retrospective validation for the new scheme of determining jurisdiction.
- Mandated centralisation of cases against the same drawer.

The Negotiable Instruments (Amendment) Act, 2018:

- Aimed to address undue delay in final resolution of cheque dishonour cases.
- Provides relief to payees of dishonoured cheques.
- Discourages frivolous and unnecessary litigation.
- Strengthens the credibility of cheques and supports trade and commerce.
- Allows lending institutions, including banks, to continue financing productive sectors.
- Inserted Section 143A: Power to direct interim compensation.
- Inserted Section 148: Power of Appellate Court to order payment pending appeal against conviction.

Dishonour of Cheque for Insufficiency, etc., of Funds in the Account (Section 138)

- Section 138 provides that if a cheque drawn by a person on an account maintained with a banker for payment of any amount of money to another person for the discharge, in whole or in part, of any debt or other liability, is returned unpaid, the drawer shall be deemed to have committed an offence.
- The cheque may be returned unpaid:
 - Because the amount of money in the account is insufficient to honour the cheque, or
 - Because it exceeds the amount arranged to be paid from that account by an agreement with the bank.
- The punishment for the offence includes:
 - Imprisonment for a term which may extend to two years, or
 - Fine which may extend to twice the amount of the cheque, or
 - Both imprisonment and fine.
- Conditions for applicability of Section 138:
 - The cheque must be presented to the bank within six months from the date on which it is drawn or within its period of validity, whichever is earlier.
 - The payee or holder in due course must make a demand for payment by giving a written notice to the drawer within thirty days of receiving information from the bank regarding the cheque's return as unpaid.
 - The drawer must fail to make the payment of the said amount to the payee or holder in due course within fifteen days of receiving the notice.

Example

Naresh draws a cheque of Rs 25,000 on his own account payable to Mukesh but only has Rs. 20,000 in his account. Mukesh presents the same to the bank within the time allowed under section 138 of the Negotiable Instruments Act, 1881. Cheque bounces due to insufficient funds in Naresh's account. Naresh is liable under section 138 of the Act. However, compliance with the proviso to section 138 is necessary.

Case Laws**Dayawati vs. Yogesh Kumar Gosain (2017, DEL HC)**

Court held that offences under Section 138 of the Negotiable Instruments Act can be referred for settlement through alternative dispute resolution mechanisms like mediation, conciliation, or arbitration, even though the statute does not explicitly provide for it.

Meters and Instruments Pvt. Ltd. vs. Kanchan Mehta (2017, SC)

Court clarified that Section 138 offences are primarily civil/regulatory. Even without the complainant's consent, the court can discharge the accused if the complainant is duly compensated, balancing the rights of both parties and ensuring speedy justice.

Presumption in Favour of Holder

- As per Section 139 of the Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.
- Once the execution of cheque is admitted, Section 139 creates a presumption that the holder of a cheque receives the cheque in discharge, in whole or in part, of any debt or other liability, *Basalingappa vs. Mudibassapa, 2019 SCC OnLine SC 491*.

Defence which may not be Allowed in any Prosecution under Section 138

- Section 140 states that it shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in section 138.

Offences by Companies

- According to Section 141(1) of the Act, if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.
- Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State

Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under Chapter XVII.

- Explanation:
- “company” means body corporate and includes a firm or other association of individuals;
- “director”, in relation to a firm, means a partner in the firm.
- Section 141(2) states that notwithstanding anything contained in sub-section(1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Case Law

A.R. Radha Krishna vs. Dasari Deepthi and Ors. (2019, SC)

- The Supreme Court held that a cheque bounce complaint against a company director can be quashed if the complaint does not show sufficient evidence that the director was in charge of or responsible for the company’s business at the relevant time.
- The High Court can exercise its powers under Section 482 CrPC to prevent abuse of court process when material on record shows the director could not have been responsible.

Susela Padmavathy Amma v. M/s Bharti Airtel Limited (2024, SC)

- The Court clarified that simply being a director does not automatically make a person responsible for the company’s daily affairs under Section 141 of the Negotiable Instruments Act.
- Liability depends on actual role and responsibilities. The position of managing director or joint managing director may carry inherent responsibility, but other directors must be shown to be in charge of day-to-day business to be held liable.
- Mere reproduction of Section 141 without stating how the director was responsible is not sufficient for liability.

Section 142(1) – Cognizance of Offences under Section 138

- a. No court can take cognizance of an offence under Section 138 except on a written complaint by the payee or holder in due course of the cheque.
- b. The complaint must be made within one month from the date the cause of action arises (i.e., when the drawer fails to pay within 15 days of receiving notice).
- c. The court may take cognizance after the prescribed period if the complainant shows sufficient cause for the delay.
- d. Only a Metropolitan Magistrate or Judicial Magistrate of the First Class can try an offence under Section 138.

Section 142(2) – Jurisdiction for Trial

- If the cheque is delivered for collection through an account, the court within whose local jurisdiction the payee’s or holder’s bank branch is situated will have jurisdiction.

- If the cheque is presented otherwise (not through an account), the court within whose local jurisdiction the drawer's bank branch is situated will have jurisdiction.
- Explanation: Delivery of the cheque to any branch of the payee's bank is deemed delivery to the branch where the payee maintains the account.

Validation for Transfer of Pending Cases (Section 142A)

- **Section 142A (1):**
 - Notwithstanding anything in the CrPC or any judgment, decree, order, or direction of any court, all cases transferred to the court having jurisdiction under Section 142(2), as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act.
 - It shall be as if that sub-section had been in force at all material times.
- **Section 142A (2):**
 - Notwithstanding anything in Section 142(2) or Section 142(1), where the payee or holder in due course has filed a complaint against the drawer of a cheque in the court having jurisdiction under Section 142(2) or the case has been transferred to that court under Section 142(1) and such complaint is pending in that court:
 - All subsequent complaints arising out of Section 138 against the same drawer shall be filed before the same court.
 - This applies irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.
- **Section 142A (3):**
 - If, on the date of commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course against the same drawer of cheques is pending before different courts:
 - Upon the fact being brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under Section 142(2), as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending.
 - This shall be as if that sub-section had been in force at all material times.

Power of Court to Try Cases Summarily (Section 143):

- **Section 143(1):**
 - Notwithstanding anything in the CrPC, all offences under Chapter XVII of the Act shall be tried by:
 - A Judicial Magistrate of the First Class, or
 - A Metropolitan Magistrate.
 - Sections 262 to 265 of the CrPC shall, as far as may be, apply to such trials.
 - In case of conviction in a summary trial:
 - Magistrate may pass a sentence of imprisonment not exceeding one year.
 - Fine may exceed five thousand rupees.
 - If at the commencement or during the summary trial, it appears that:

- A sentence of imprisonment exceeding one year may be required, or
- For any other reason, it is undesirable to try the case summarily,
 - Magistrate shall, after hearing the parties, record an order to that effect.
 - Magistrate shall recall any witness examined and proceed to hear or rehear the case under the CrPC.

• **Section 143(2):**

- Trial shall, as far as practicable and consistent with justice, continue from day to day until conclusion.
- Adjournment beyond the following day is allowed only for reasons recorded in writing.

• **Section 143(3):**

- Every trial under this section shall be conducted as expeditiously as possible.
- An endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

• **Section 143A (1) Negotiable Instruments Act:**

- Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 of the Negotiable Instrument Act, 1881 (Dishonour of cheque for insufficiency, etc., of funds in the account) may order the drawer of the cheque to pay interim compensation to the complainant—
- in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and
- in any other case, upon framing of charge.

• **Section 143A (2):**

- The interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.

• **Section 143A (3):**

- The interim compensation shall be paid within sixty days from the date of the order under subsection (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

• **Section 143A (4):**

- If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

• **Section 143A (5):**

- The interim compensation payable under section 143A may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973.

- **Section 143A (6):**

- The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation under this section.

Case Law

G.J. Raja vs. Tejraj Surana (2019) 19 SCC 469, SC

- Issue: Can Section 143A be applied to offences committed before its introduction?
- Held: No, Section 143A is prospective. It applies only to offences committed after its introduction.

Rakesh Ranjan Shrivastava v. State of Jharkhand & Anr. (2024 INSC 205, SC)

- Key points for exercising discretion under Section 143A:
- Court must prima facie evaluate merits of complainant's case and accused's defense; financial condition of accused may be considered.
- Interim compensation is granted only if a prima facie case is made out by the complainant.
- If the accused's defense appears prima facie plausible, court may refuse interim compensation.
- Court must consider quantum of interim compensation based on factors like nature of transaction and relationship between parties
- Other relevant factors may exist; these are not exhaustive.

Mode of Service of Summons (Section 144)

- 1) A Magistrate issuing a summons to an accused or witness may direct service at the place where they ordinarily reside, carry on business, or personally work for gain.
- 2) Service may be effected by speed post or courier services approved by a Court of Session.
- 3) If an acknowledgment signed by the accused/witness or an endorsement by postal/courier authorities indicating refusal to accept is received, the Court may declare the summons duly served.

Evidence on Affidavit (Section 145)

- Evidence of the complainant may be given by affidavit.
- Such affidavit evidence may be read in any enquiry, trial, or other proceeding under the CrPC, 1973, subject to just exceptions.
- The Court may summon and examine any person giving evidence on affidavit, if it thinks fit, or shall do so on application by prosecution or accused.

Bank's Slip Prima Facie Evidence (Section 146)

- On production of a bank's slip or memo with an official mark showing dishonour of the cheque, the Court shall presume the fact of dishonour, unless disproved.

Offences to be Compoundable (Section 147)

- Every offence punishable under the Negotiable Instrument Act shall be compoundable, notwithstanding anything in the CrPC, 1973.

Power of Appellate Court to Order Payment Pending Appeal (Section 148)

- Section 148(1): In an appeal by the drawer against conviction under Section 138, the Appellate Court may order the appellant to deposit a minimum of 20% of the fine or compensation awarded by the trial Court.
 - This is in addition to any interim compensation paid under Section 143A.
- Section 148(2): The amount shall be deposited within 60 days of the order, or within further period not exceeding 30 days on sufficient cause shown.
- Section 148(3): The Appellate Court may release the deposited amount to the complainant during the pendency of the appeal.
 - If the appellant is acquitted, the complainant must repay the amount with interest at the RBI bank rate, within 60 days or such extended period not exceeding 30 days on sufficient cause shown.

Case Law

Surinder Singh Deswal & Ors. vs. Virender Gandhi (AIR 2019 SC 2956)

Issue: Whether Section 148 (introduced by Amendment Act 20 of 2018) is retrospective.

Held: Section 148 is procedural, not substantive, and can be applied retrospectively to appeals against convictions under Section 138, even if the original complaint was filed before 01.09.2018.

Jamboo Bhandari vs. M.P. State Industrial Development Corporation Ltd. & Ors. (04.09.2023, SC)

Facts: Appellants convicted under Section 138, directed to pay cheque amount with 9% interest; appealed to Sessions Court.

Held:

- Appellate Court can normally impose 20% deposit condition under Section 148 when granting relief under Section 389 CrPC.
- Exception: If imposing 20% deposit is unjust or deprives right of appeal, Appellate Court may waive the condition, with reasons recorded.
- Concept: Section 148 allows Appellate Courts discretion to conditionally grant suspension of sentence, balancing the complainant's interest and the appellant's right to appeal.

National Electronic Funds Transfer (NEFT) and Real Time Gross Settlement (RTGS)

1. National Electronic Funds Transfer (NEFT):

- NEFT is a nation-wide payment system for one-to-one funds transfer.
- Allows individuals, firms, and corporates to transfer funds electronically from any bank branch to another participating bank branch in India.
- Operates on a Deferred Net Settlement (DNS) basis, settling transactions in batches.
- In DNS, settlement occurs for all transactions received till a cutoff time; transactions are netted (payable and receivables).
- Currently, NEFT operates in hourly batches; transactions after a designated settlement time wait for the next batch.

2. Real Time Gross Settlement (RTGS):

- RTGS stands for Real Time Gross Settlement.

- Settles funds transfers individually on an order-by-order basis (without netting).
- Real Time: Instructions are processed as soon as they are received.
- Gross Settlement: Each transfer is settled individually, not netted.
- Funds settlement occurs in the books of the Reserve Bank of India, making payments final and irrevocable.
- RTGS transactions are processed continuously throughout business hours, unlike NEFT batches.

Advantages of NEFT

- Round the clock availability on all days of the year.
- Near-real-time funds transfer to the beneficiary account and settlement in a secure manner.
- Pan-India coverage through large network of branches of all types of banks.
- The beneficiary need not visit a bank branch for depositing the paper instruments. Remitter can initiate the remittances from his / her home / place of work using internet banking, if his / her bank offers such service.
- Positive confirmation to the remitter by SMS / e-mail on credit to beneficiary account.
- Penal interest provision for delay in credit or return of transactions.
- No levy of charges by RBI from banks.
- No charges to savings bank account customers for online NEFT transactions.
- The transaction charges have been capped by RBI.
- Besides funds transfer, NEFT system can be used for a variety of transactions including payment of credit card dues to the card issuing banks, payment of loan EMI, inward foreign exchange remittances, etc.
- The transaction has legal backing.

Benefits of RTGS

- It is a safe and secure system for funds transfer.
- RTGS transactions / transfers have no amount cap set by RBI.
- The system is available on all days on 24x7x365 basis. There is real time transfer of funds to the beneficiary account.
- The remitter need not use a physical cheque or a demand draft.
- The beneficiary need not visit a bank branch for depositing the paper instruments.
- The beneficiary need not be apprehensive about loss / theft of physical instruments or the likelihood of fraudulent encashment thereof.
- Remitter can initiate the remittances from his / her home / place of work using internet banking, if his / her bank offers such service.
- The transaction charges have been capped by RBI.
- The transaction has legal backing.



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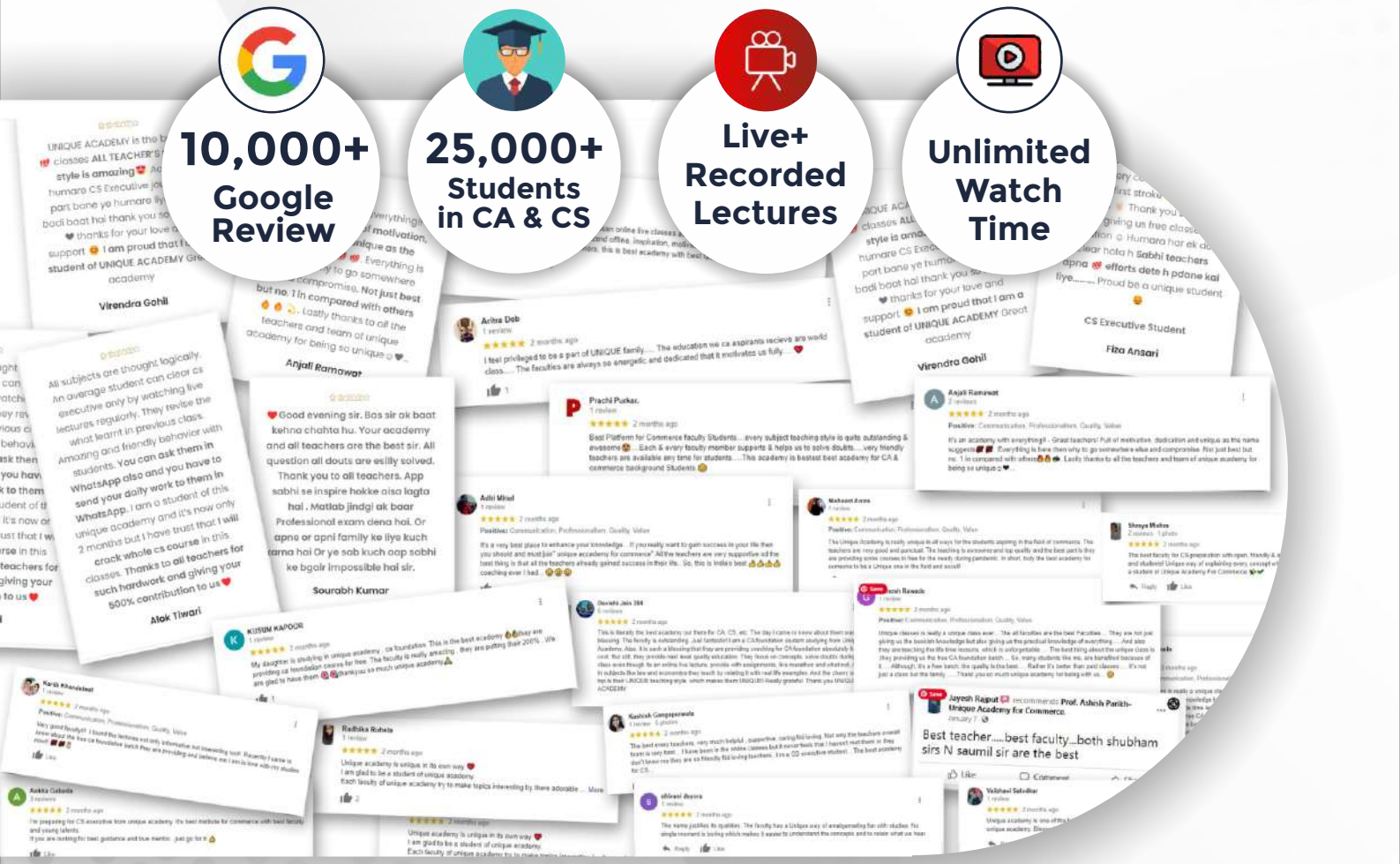
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