
STUDY MATERIAL

EXECUTIVE PROGRAMME

**JURISPRUDENCE,
INTERPRETATION AND
GENERAL LAWS**

MODULE 1

PAPER 1



**THE INSTITUTE OF
Company Secretaries of India**

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

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EXECUTIVE PROGRAMME

JURISPRUDENCE, INTERPRETATION AND GENERAL LAWS

This paper consists of three components, namely Jurisprudence, Interpretation and General Laws. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it.

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

The General Laws is an important pre-requisite for professional course like Company Secretary. Constitutional Law that deals with powers, functions and responsibilities of various organs of the State; Administrative law deals with day to day governance mechanism and Civil and Criminal Procedure Code, Right to Information Act, 2005 etc., spreads into approximately every phase of modern life.

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

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

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

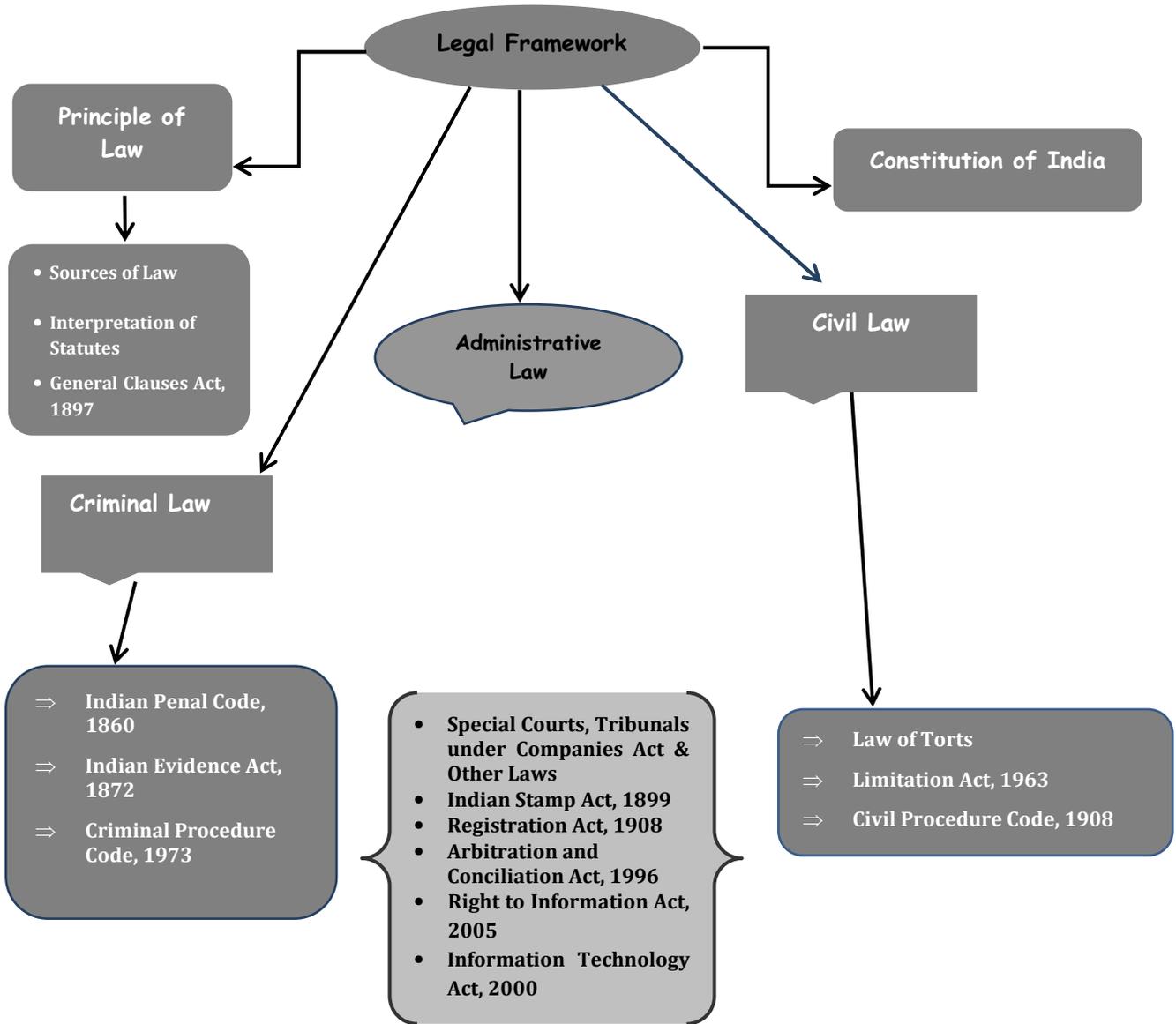
Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination.

In the event of any doubt, students may write to the Directorate of Professional Development, Perspective Planning & Studies of the Institute for clarification at academics@icsi.edu.

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

Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same is brought to its notice for issue of corrigendum in the e-bulletin 'Student Company Secretary'.

LEGAL AND REGULATORY FRAMEWORK



EXECUTIVE PROGRAMME

Module 1

Paper 1

Jurisprudence, Interpretation and General Laws (Max Marks 100)

SYLLABUS

Objectives

To provide understanding and working knowledge of sources of law, Constitution, legislative environment, interpretation of statutes and general laws.

Detailed Contents

- 1. Sources of Law:** Meaning of Law and its Significance; Relevance of Law to Civil Society; Jurisprudence & Legal Theory; Schools of Law propounded by Austin, Dean Roscoe Pound, Salmond, Kelsen and Bentham; Statutes, Subordinate Legislation, Custom, Common Law, Precedent, Stare decisis.
- 2. Constitution of India:** Broad Framework of the Constitution of India; Fundamental Rights, Directive Principles of State Policy and Fundamental Duties; Legislative framework and Powers of Union and States; Judicial framework; Executive/Administrative framework; Legislative Process; Money Bill; Finance Bill and Other Bills; Parliamentary Standing Committees and their Role; Writ Jurisdiction of High Courts and the Supreme Court; Different types of writs.
- 3. Interpretation of Statutes:** Need for interpretation of a statute; Principles of Interpretation; Aids to Interpretation; Legal Terminologies; Reading a Bare Act & Citation of Cases.
- 4. General Clauses Act, 1897:** Key Definitions; General Rule of Construction; Retrospective Amendments; Powers and Functions; Power as to Orders, Rules etc., made under Enactments.
- 5. Administrative Laws:** Conceptual Analysis; Source and Need of Administrative Law; Principle of Natural Justice; Administrative Discretion; Judicial Review & Other Remedies; Liability of Government, Public Corporation.
- 6. Law of Torts:** General conditions of Liability for a Tort; Strict and Absolute Liability; Vicarious Liability; Torts or wrongs to personal safety and freedom; Liability of a Corporate Entity/Company in Torts; Remedies in Torts.
- 7. Limitation Act, 1963:** Computation of the Period of Limitation; Bar of Limitation; Effect of acknowledgment; Acquisition of ownership by Possession; Classification of Period of Limitation.
- 8. Civil Procedure Code, 1908:** Structure and Jurisdiction of Civil Courts; Basic Understanding of Certain Terms - Order, Judgment and Decree, Stay of Suits, Cause of Action, *Res Judicata*, Summary Proceedings, Appeals, Reference, Review and Revision; Powers of Civil Court and their exercise by Tribunals; Institution of Suit; Summary Procedure.

9. **Indian Penal Code, 1860:** Introduction; Offences against Property-Criminal Misappropriation of Property, Criminal Breach of Trust, Cheating, Fraudulent Deeds and Dispositions of Property; Offences relating to Documents and Property Marks- Forgery; Defamation; Abetment and Criminal Conspiracy.
10. **Criminal Procedure Code, 1973:** Classes of Criminal Courts; Power of Courts; Arrest of Persons; *Mens Rea*; Cognizable and Non-Cognizable Offences; Bail; Continuing Offences; Compounding of Offences; Summons and Warrants; Searches; Summary Trial.
11. **Indian Evidence Act, 1872:** Statements about the facts to be proved; Relevancy of facts connected with the fact to be proved; Opinion of Third Persons ; Facts of which evidence cannot be given; Oral, Documentary and Circumstantial Evidence; Burden of proof; Presumptions; Estoppel; Witness; Improper admission & rejection of evidence.
12. **Special Courts, Tribunals under Companies Act & Other Legislations:** Constitution; Powers of Tribunals; Procedure before Tribunals; Powers of Special Courts; Power to punish for contempt; Overview of NCLT Rules; Quasi-Judicial Authorities.
13. **Arbitration and Conciliation Act, 1996:** Arbitration Law in India; Appointment of Arbitrators; Judicial Intervention; Award; Recourse against Award; Conciliation and Mediation.
14. **Indian Stamp Act, 1899:** Key Definitions; Principles of Levy of Stamp Duty; Determination, Mode and timing of Stamp Duty; Person responsible; Consequences of Non-Stamping and Under-Stamping; Adjudication; Allowance and Refund ; Concept of E-Stamping.
15. **Registration Act, 1908: *Registration of Documents*:** Compulsory, Optional; Time and Place of Registration; Consequences of Non-Registration; Prerequisites for Registration.
16. **Right to Information Act, 2005:** Key Definitions; Public Authorities & their Obligations; Role of Central/State Governments; Central Information Commission; State information Commission.
17. **Information Technology Act, 2000 :** Introduction, definition, important terms under the Act; Digital Signatures, Electronic Record, Certifying Authority, Digital Signature Certificate; Cyber Regulation Appellate Tribunal; Offences and Penalties; Rules relating to sensitive personal data under IT Act.

Case Laws, Case Studies & Practical Aspects



LESSON WISE SUMMARY

Jurisprudence, Interpretation and General Laws (JIGL)

Lesson 1 - Sources of Law

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

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

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

Lesson 2 - Constitution of India

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

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

- Understand Broad Framework of the Constitution of India;
- Fundamental Rights;
- Directive Principles of State Policy;
- Fundamental Duties;
- Powers of Union and States;
- Judicial framework;
- Legislative Process;
- Parliamentary Standing Committees and their Role;
- Writ Jurisdiction of High Courts and the Supreme Court; and
- Different types of writs.

Lesson 3 - Interpretation of Statutes

The primary object of the interpretation of statutes is to discover the true intention of the Legislature; and where the intention can be indubitably ascertained the courts are bound to give effect to it regardless of their opinion about its wisdom or folly. The phrase "Interpretation of Statutes" implies the judicial process of determining, in accordance with certain rules and presumptions, the true meaning of the Acts of the Parliament. In this context, the phrase would mean a process or manner that conveys one's understanding of the ideas of the creator, or understand as having a particular meaning or significance, explanation, explication or a clarification for a particular statute or law.

The lesson aims at:

- Familiarizing students with Need for interpretation of a statute;
- Help students learn the Principles of Interpretation; and
- Equip the students with the Aids to Interpretation.

Lesson 4 - General Clauses Act, 1897

The General Clauses Act 1897 belongs to the class of Acts which may be called as interpretation Acts. An interpretation Act lays down the basic rules as to how courts should interpret the provisions of an Act of Parliament. It also defines certain words or expressions so that there is no unnecessary repetition of definition of those words in other Acts. In other words, an Interpretation Act provides a standard set of definitions or extended definitions of words and expressions commonly used in legislation. It also provides a set of rules which regulate certain aspects of operation of other enactments. In addition there are other provisions which are not merely definitions or rules of construction but substantive rules of law.

The purpose of this lesson is to provide the students with:

- Fundamental knowledge of the Key Definitions;
- General Rule of Construction;
- Retrospective Amendments; and
- Powers and Functions under the Act.

Lesson 5 - Administrative Laws

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

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

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

Lesson 6 - Law of Torts

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

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

- Understand the general conditions of Liability for a Tort;
- Strict and Absolute Liability;
- Vicarious Liability;
- Torts or wrongs to personal safety and freedom; and
- Liability of a Corporate Entity/Company in Torts; Remedies in Torts.

Lesson 7 - Limitation Act, 1963

The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions. Limitation Act prescribes different periods of limitation for suits, petitions or applications. Court may also admit an application or appeal even after the expiry of the specified period of limitation if it is satisfied with the applicant or the appellant, as the case may be as to sufficient cause for not making it within time.

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

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

Lesson 8 - Civil Procedure Code, 1908

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law the latter prevails over the former. Where the special law is silent on a particular matter the Code applies, but consistent with the special enactment.

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

- Structure and jurisdiction of Civil Courts;
- Basic Understanding of Certain Terms Order, Judgment and Decree;
- Stay of Suits;
- Cause of Action;
- Res Judicata;

(x)

- Summary Proceedings;
- Appeals;
- Review and Revision; and
- Summary Procedure.

Lesson 9 - Indian Penal Code, 1860

The Indian Penal Code, 1860 is the substantive law of crimes. In India, the base of the crime and punitive provision has been laid down in Indian Penal Code, 1860. With the proliferation in juristic persons and a growth in their activities which increasingly touch upon the daily lives of ordinary people, criminal law has evolved to bring such persons within its ambit. For example, according to section 11 of the IPC, the word 'person' includes any Company or Association, or body of persons, whether incorporated or not. Thus companies are covered under the provisions of the IPC. Virtually in all jurisdictions across the world governed by the rule of law, companies can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The criminal intent of the 'alter ego' of the company/ body corporate, i.e., the person or group of persons that guide the business of the company, is imputed to the company.

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

- Offences against Property;
- Criminal Misappropriation of Property;
- Criminal Breach of Trust;
- Cheating;
- Forgery;
- Defamation; and
- Abetment and Criminal Conspiracy.

Lesson 10 - Criminal Procedure Code, 1973

The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person. The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass. It is an Act to consolidate and amend the law relating to the procedure to be followed in apprehending the criminals, investigating the criminal cases and their trial before the Criminal Courts.

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

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

Lesson 11 - Indian Evidence Act, 1872

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence. In general the rules of evidence are same in civil and criminal proceedings but there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, especially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt.

This lesson is designed to familiarize the students with:

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

Lesson 12 - Special Courts, Tribunals under Companies Act & Other Legislations

Tribunal is an administrative body established for the purpose of discharging quasi-judicial duties. Tribunals are the quasi-judicial bodies established to adjudicate disputes related to specified matters which exercise the jurisdiction according to the Statute establishing them. The Tribunal has to exercise its powers in a judicious manner by observing the principles of natural justice or in accordance with the statutory provisions under which the Tribunal is established. Companies Act, 2013 empowers the Central Government to constitute National Company Law Tribunal and National Company Law Appellate Tribunal, respectively to exercise and discharge such powers and functions as are, or may be, conferred on it by or under the Companies Act or any other law for the time being in force.

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

- Understand the Constitution and Powers of Tribunals;
- Familiarize with Procedure before Tribunals;
- Appeal to Supreme Court; and
- Know the Powers of Special Courts.

Lesson 13 - Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognizes the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts.

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

- Arbitration Law in India;
- Appointment of Arbitrators;

- Judicial Intervention;
- Arbitral Award; and
- Conciliation and Mediation.

Lesson 14-Indian Stamp Act, 1899

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

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

- Principles of Levy of Stamp Duty;
- Mode and timing of Stamp Duty method of Stamping;
- Person responsible;
- Consequences of Non-Stamping and Under-Stamping; and
- Concept of E-Stamping.

Lesson 15 - Registration Act, 1908: Registration of Documents

The Registration Act, 1908 is the law relating to registration of documents. The object and purpose of the Act among other things is to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud.

This lesson is designed to familiarize the students with:

- Registerable Documents;
- Documents whose registration is compulsory;
- Documents of which registration is optional; and
- Consequences of Non-Registration.

Lesson 16 - Right to Information Act, 2005

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

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

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

- Central Information Commission; and
- State information Commission.

Lesson 17 - Information Technology Act, 2000

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

It is considered necessary to give effect to the said resolution and to promote efficient delivery of Government services by means of reliable electronic records, Parliament enacted Information Technology Act, 2000 to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker’s Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

This lesson is designed to familiarize the students with:

- Digital Signatures;
- Electronic Record;
- Certifying Authority;
- Digital Signature Certificate;
- Appellate Tribunal; and
- Offences and Penalties.

LIST OF RECOMMENDED BOOKS

Paper 1: JURISPRUDENCE, INTERPRETATION AND GENERAL LAWS

1. Relevant Bare Acts.
2. N.D. Kapoor & Rajni Abbi : General Laws and Procedures; Sultan Chand & Sons. New Delhi
3. Durga Das Basu : Constitution of India; Prentice Hall of India, New Delhi
4. G.W. Paton : A Textbook of Juris Prudence
5. Jagdish Swarup : Legislation and Interpretation
6. M.P. Tandon : Civil Procedure Code; Allahabad Law Agency, Allahabad.
7. Ratanlal & Dhirajlal : The Indian Penal Code
8. Ramaswamy Iyer : The Law of Torts; N.M. Tripathi, Private Ltd., Bombay.
9. Dr. D.K. Singh (Ed.) : V.N. Shukla's the Constitution of India; Eastern Book Company, Lucknow
10. Lawman's : General Clauses Act
11. V.P. Sarathi : Elements of Law of Evidence, Eastern Book Company, Lucknow
12. V.G. Ramachandran : Law of Limitation; Eastern Book Company, Lucknow
13. G.P. Singh : Principles of Statutory Interpretation; Wadhwa Publishing Company, Nagpur.
14. S.K. Roy Chowdhary & H. K. Saharay : Law of Arbitration and Conciliation; Eastern Law House, Calcutta
15. Eastern Book Company : Code of Criminal Procedure
16. R.V. Kelkar : Lectures on Criminal Procedure, 4th Edn., Revised by Dr. K.N. Chandrasekharan Pillai, Eastern Book Company, Lucknow
17. B.M.Gandhi : Interpretation of Statutes; Eastern Book Company, 34, Lalbagh, Lucknow-226 001

Journals:

1. e-Bulletin ('Student Company Secretary') : The ICSI, New Delhi-110 003.
2. Chartered Secretary (Monthly) : The ICSI, New Delhi-110 003.
3. All India Reporter : All India Reporter Ltd., Congress Nagar, Nagpur.

Note:

1. Students are advised to read the above journals for updating the knowledge.
2. Students are advised to read/refer the latest editions of the recommended books.
3. Students are also advised to read legal glossary/legal terms given in Appendix.

ARRANGEMENT OF STUDY LESSONS

Module-1 Paper-1

Jurisprudence, Interpretation and General Laws

| Sr. No. | Lesson Title |
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| 1. | Sources of Law |
| 2. | Constitution of India |
| 3. | Interpretation of Statutes |
| 4. | General Clauses Act, 1897 |
| 5. | Administrative Law |
| 6. | Law of Torts |
| 7. | Limitation Act, 1963 |
| 8. | Civil Procedure Code, 1908 |
| 9. | Indian Penal Code, 1860 |
| 10. | Criminal Procedure Code, 1973 |
| 11. | Indian Evidence Act, 1872 |
| 12. | Special Courts, Tribunals under Companies Act & Other Legislations |
| 13. | Arbitration and Conciliation Act, 1996 |
| 14. | Indian Stamp Act, 1899 |
| 15. | Registration Act, 1908: Registration of Documents |
| 16. | Right to Information Act, 2005 |
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Lesson 1

Sources of Law

LESSON OUTLINE

- Learning objectives
- Nature of Law
- Meaning
- Significance of Law
- Relevance of Law to Modern Society
- Source of Indian Law
- Mercantile or Commercial Law
- Jurisprudence
- Legal Theory
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

At the heart of the legal enterprise lies an important concept that is LAW. Owing to the societal inclination of interest in favour of businesses, it is essential to understand the basics of law. Without an understanding of the concept of law, the orientation and motivation towards attainment of justice is found missing.

Moreover, without a comprehension of the cognitive and teleological foundations of the discipline, pedagogy becomes a mere teaching of the rules. The objective behind this is to present various statutes, cases, procedure, practices and customs as a systematic body of knowledge, and to be able to show the interconnection between these various branches of law, procedure and principles.

The introduction to law is the very foundation to acquaint students with the law and its terminologies which will enable them to have a better understanding while dealing with statutes. But primarily, it inducts the student into realm of question concerning law so that he is able to live with their perplexity or complexity and driven to seek out answers for himself.

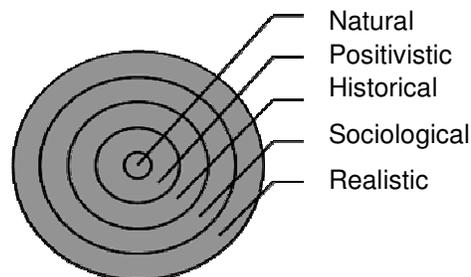
Law is the command of the sovereign, Law is an instrument to regulate human behaviour, be it social life or business life.

Jack Welch

INTRODUCTION

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

Hereinafter we shall refer to some representative definitions and discuss them. For the purpose of clarity and better understanding of the nature and meaning of law, we may classify various definitions into five broad classes:



Natural School

Under this school fall most of the ancient definitions given by Roman and other ancient Jurists.

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

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

Justinian’s Digest defines Law as “the standard of what is just and unjust.”

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

Ancient Hindu view was that ‘law’ is the command of God and not of any political sovereign. Everybody including the ruler, is bound to obey it. Thus, ‘law’ is a part of “Dharma”. The idea of “justice” is always present in Hindu concept of law.

Salmond, the prominent modern natural law thinker, defines law as “the body of principles recognised and applied by the State in the administration of justice.”

In other words, the law consists of rules recognised and acted upon by the courts of Justice. It may be noted that there are two main factors of the definition. First, that to understand law, one should know its purpose: Second, in order to ascertain the true nature of law, one should go to the courts and not to the legislature.

Vinogradoff described Law as “a set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things.”

Positivistic Definition of Law

According to **John Austin**, “Law is the aggregate of rules set by man as politically superior, or sovereign, to

men as political subject.” In other words, law is the “command of the sovereign”. It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the three elements of law.

Kelsen gave a ‘pure theory of law’. According to him, law is a ‘normative science’. The legal norms are ‘Ought’ norms as distinct from ‘Is’ norms of physical and natural sciences. Law does not attempt to describe what actually occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of hierarchy of normative relations. All norms derive their power from the ultimate norm called Grund norm.

Historical Definition of Law

Savigny’s theory of law can be summarised as follows:

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

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

Sociological Definition of Law

Duguit defines law as “essentially and exclusively as social fact.”

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

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

Realist Definition of Law

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

From the above definitions, it follows that law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases and thereby avoid the ruin by coordinating the divergent conflicting interests of individuals and of society which would, in its turn, enhance the potentialities and viability of the society as a whole.

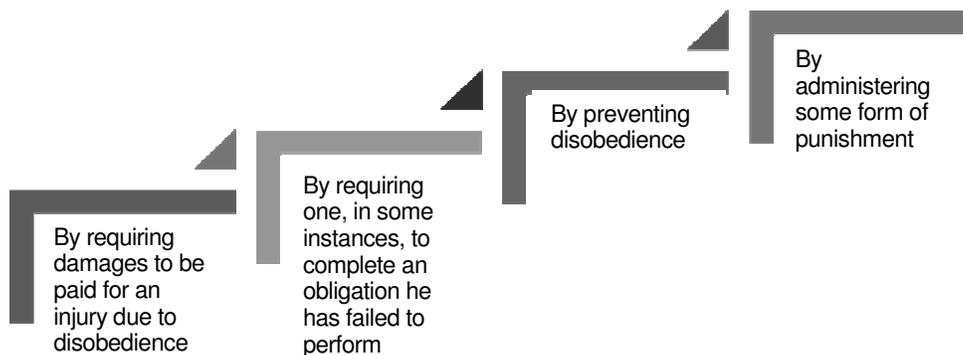
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To summarise, following are the main characteristics of law and a definition to become universal one, must incorporate all these elements:

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

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

Laws are made effective:



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

The State, in order to maintain peace and order in society, formulates certain rules of conduct to be followed by people. These rules of conduct are called 'laws'.

SIGNIFICANCE OF LAW

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

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

The object of law is order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the socio-economic structure and to play

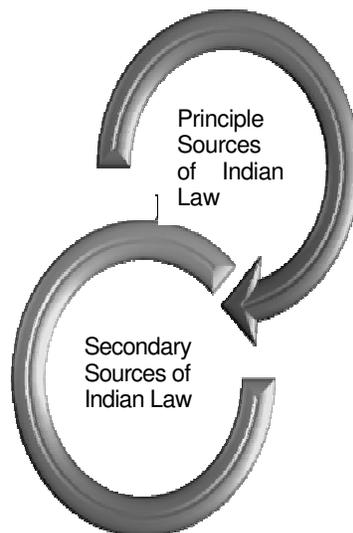
special role in the task of achieving various socio-economic goals enshrined in our Constitution. It has to serve as a vehicle of social change and as a harbinger of social justice.

SOURCES OF INDIAN LAW

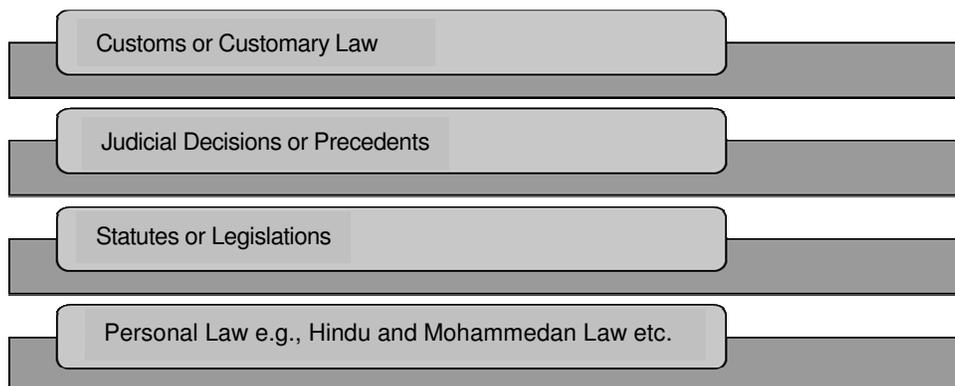
The expression “sources of law” has been used to convey different meanings. There are as many interpretations of the expression “sources of law” as there are schools and theories about the concept of law. The general meaning of the word “source” is origin. There is a difference of opinion among the jurists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

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

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



PRINCIPLE SOURCES OF INDIAN LAW



(i) Customs or Customary Law

Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent.

A study of the ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

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

Classification of Customs

The customs may be divided into two classes:

- Customs without sanction.
 - Customs having sanction.
- Customs without sanction are those customs which are non-obligatory and are observed due to the pressure of public opinion. These are called as “positive morality”.
 - Customs having sanction are those customs which are enforced by the State. It is with these customs that we are concerned here. These may be divided into two classes: (i) Legal, and (ii) Conventional.

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

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

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

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

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

- It must be shown that the convention is clearly established and it is fully known to the contracting parties. There is no fixed period for which a convention must have been observed before it is recognised as binding.
- Convention cannot alter the general law of the land.

- It must be reasonable.

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

Requisites of a Valid Custom

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

- (i) *Immemorial (Antiquity)*: A custom to be valid must be proved to be immemorial; it must be ancient. According to Blackstone, “A custom, in order that it may be legal and binding must have been used so long that the memory of man runs not to the contrary, so that, if any one can show the beginning of it, it is no good custom”. English Law places a limit to legal memory to reach back to the year of accession of Richard I in 1189 as enough to constitute the antiquity of a custom. In India, the English Law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient.
- (ii) *Certainty*: The custom must be certain and definite, and must not be vague and ambiguous.
- (iii) *Reasonableness*: A custom must be reasonable. It must be useful and convenient to the society. A custom is unreasonable if it is opposed to the principles of justice, equity and good conscience.
- (iv) *Compulsory Observance*: A custom to be valid must have been continuously observed without any interruption from times immemorial and it must have been regarded by those affected by it as an obligatory or binding rule of conduct.
- (v) *Conformity with Law and Public Morality*: A custom must not be opposed to morality or public policy nor must it conflict with statute law. If a custom is expressly forbidden by legislation and abrogated by a statute, it is inapplicable.
- (vi) *Unanimity of Opinion*: The custom must be general or universal. If practice is left to individual choice, it cannot be termed as custom.
- (vii) *Peaceable Enjoyment*: The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.
- (viii) *Consistency*: There must be consistency among the customs. Custom must not come into conflict with the other established customs.

(ii) Judicial Decision or Precedents

In general use, the term “precedent” means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions of the courts for future cases. Only such decisions which lay down some new rule or principle are called judicial precedents.

Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of *stare decisis*.

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. The practice

of following precedents creates confidence in the minds of litigants. Law becomes certain and known and that in itself is a great advantage. Administration of justice becomes equitable and fair.

High Courts

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

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

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

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

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

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

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

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

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

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

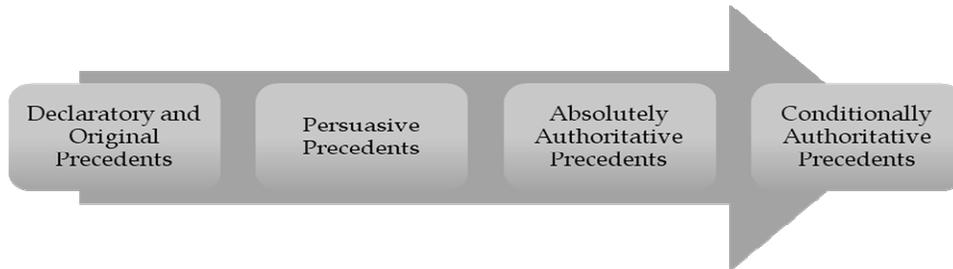
Supreme Court

The expression 'all courts' used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from unless there are extraordinary or special reasons to do so (AIR 1976 SC 410). If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it.

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

Kinds of Precedents

Precedents may be classified as:



(i) *Declaratory and Original Precedents:* According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same.

(ii) *Persuasive Precedents:* A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. A persuasive precedent, therefore, is not a legal source of law; but is regarded as a historical source of law. Thus, in India, the decisions of one High Court are only persuasive precedents in the other High Courts. The rulings of the English and American Courts are persuasive precedents only. *Obiter dicta* also have only persuasive value.

(iii) *Absolutely Authoritative Precedents:* An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong. Unlike a persuasive precedent which is merely historical, an authoritative precedent is a legal source of law.

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

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

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

Doctrine of *Stare Decisis*

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

established". It is a useful doctrine intended to bring about certainty and uniformity in the law. Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. In simple words, the principle means that like cases should be decided alike. This rule is based on public policy and expediency. Although generally the doctrine should be strictly adhered to by the courts, it is not universally applicable. The doctrine should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice.

Ratio Decidendi

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

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

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

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

Obiter Dicta

The *literal* meaning of this Latin expression is "said by the way". The expression is used especially to denote those judicial utterances in the course of delivering a judgement which taken by themselves, were not strictly necessary for the decision of the particular issue raised. These statements thus go beyond the requirement of a particular case and have the force of persuasive precedents only. The judges are not bound to follow them although they can take advantage of them. They some times help the cause of the reform of law.

Obiter Dicta are of different kinds and of varying degree of weight. Some obiter dicta are deliberate expressions of opinion given after consideration on a point clearly brought and argued before the court. It is quite often too difficult for lawyers and courts to see whether an expression is the ratio of judgement or just a causal opinion by the judge. It is open, no doubt, to other judges to give a decision contrary to such obiter dicta.

(iii) Statutes or Legislation

Legislation is that source of law which consists in the declaration or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called Jus scriptum (written law) as contrasted with the customary law or jus non-scriptum (unwritten law). Salmond prefers to call it as "enacted law". Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repealed, annulled or controlled by any other legislative authority.

Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature, a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws which are recognised and enforced by courts of law.

The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment. Where a dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgement whether any part of the rules so made is in excess of the power delegated by the parent Act.

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

(iv) Personal Law

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

- (a) The ***Shruti*** which includes four ***Vedas***.
- (b) The '***Smritis***' which are recollections handed down by the Rishi's or ancient teachings and precepts of God, the commentaries written by various ancient authors on these ***Smritis***. There are three main ***Smritis***; ***the Codes of Manu, Yajnavalkya and Narada***.

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

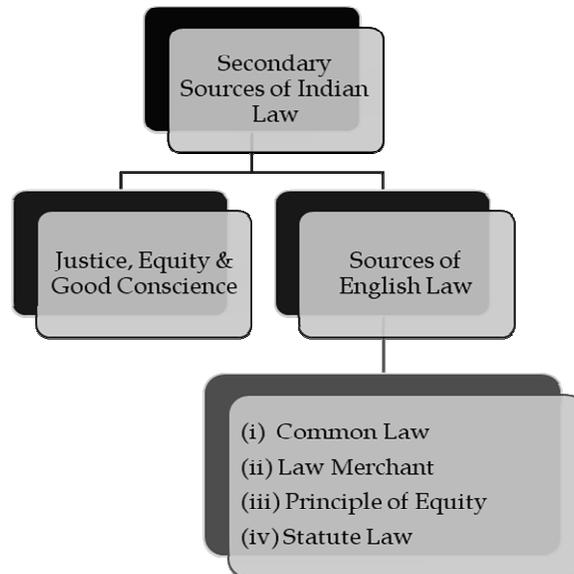
The personal law of Mohammedans is to be found in:—

- (a) The holy ***Koran***.
- (b) The actions, precepts and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as ***Hadis***.
- (c) ***Ijmas***, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.
- (d) ***Kiyas*** or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.
- (e) Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya which was composed in the 12th century and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all

matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre-emption.

SECONDARY SOURCE OF INDIAN LAW



(i) Justice, Equity and Good Conscience

The concept of “justice, equity and good conscience” was introduced by Impey’s Regulations of 1781. In personal law disputes, the courts are required to apply the personal law of the defendant if the point at issue is not covered by any statute or custom.

In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case what is known as “justice, equity and good conscience”, which may mean the rules of English Law in so far as they are applicable to Indian society and circumstances.

The Ancient Hindu Law had its own versions of the doctrine of justice, equity and good conscience. In its modern version, justice, equity and good conscience as a source of law, owes its origin to the beginning of the British administration of justice in India. The Charters of the several High Courts established by the British Government directed that when the law was silent on a matter, they should decide the cases in accordance with justice, equity and good conscience. Justice, equity and good conscience have been generally interpreted to mean rules of English law on an analogous matter as modified to suit the Indian conditions and circumstances. The Supreme Court has stated that it is now well established that in the absence of any rule of Hindu Law, the courts have authority to decide cases on the principles of justice, equity and good conscience unless in doing so the decision would be repugnant to, or inconsistent with, any doctrine or theory of Hindu Law: (1951) 1 SCR 1135.

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

(ii) Sources of English Law

The chief sources of English law are:

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

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

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

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

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

1. "He who seeks equity must do equity",
2. "He who comes to equity must come with clean hands".

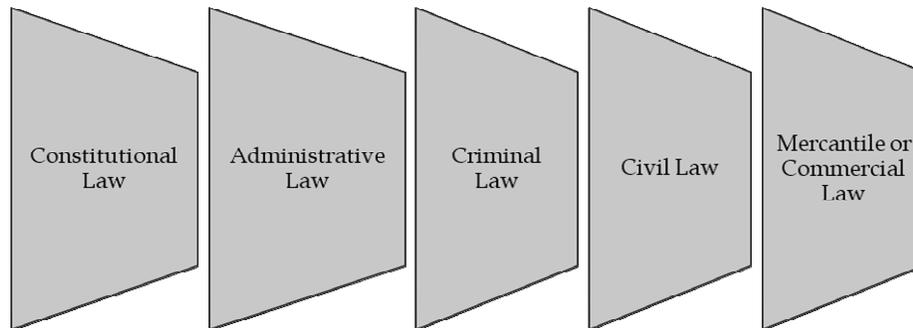
The Equity Courts had their separate existence from the Common Law Courts in England until the passing of the Judicature Act of 1873, when the separate existence of such courts was abolished and all High Courts were empowered to grant either or both the remedies (Common Law as well as Equity) according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

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

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

MERCANTILE OR COMMERCIAL LAW

There are many branches of law; viz.,

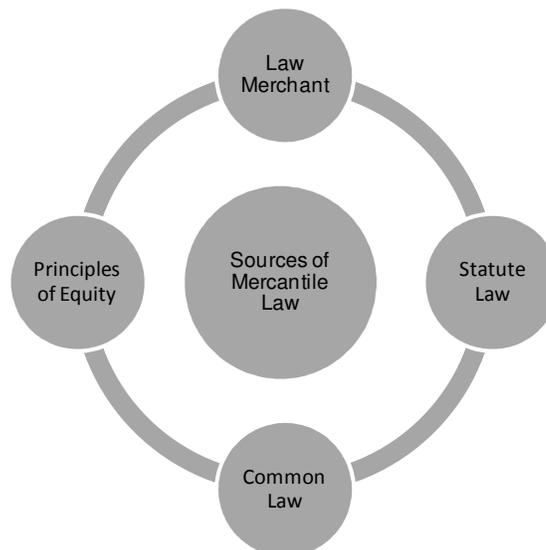


Mercantile Law is related to the commercial activities of the people of the society. It is that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions. Mercantile Law is a wide term and embraces all legal principles concerning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

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

Sources of Mercantile Law

The following are the main sources of Mercantile Law:



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

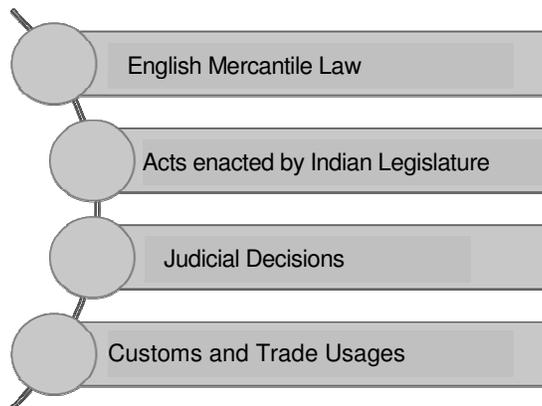
Mercantile Law in India

Prior to 1872, mercantile transactions were regulated by the law of the parties to the suit (i.e., Hindu

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

Sources of Indian Mercantile Law

The main sources of Indian Mercantile Law are:



(i) *English Mercantile Law*: The Indian Mercantile Law is mainly an adaptation of English Mercantile Law. However, certain modifications wherever necessary, have been incorporated in it to provide for local customs and usages of trade and to suit Indian conditions. Its dependence on English Mercantile Law is so much that even now in the absence of provisions relating to any matter in the Indian Law, recourse is to be had to the English Mercantile Law.

(ii) *Acts enacted by Indian Legislature or Statute Law*: The Acts enacted by the Indian legislature from time to time which are important for the study of Indian Mercantile Law include, (i) The Indian Contract Act, 1872, (ii) The Sale of Goods Act, 1930, (iii) The Indian Partnership Act, 1932, (iv) The Negotiable Instruments Act, 1881, (v) The Arbitration and Conciliation Act, 1996, (vi) The Insurance Act, 1938.

(iii) *Judicial Decisions*: Judges interpret and explain the statutes. Whenever the law is silent on a point, the judge has to decide the case according to the principles of justice, equity and good conscience. It would be accepted in most systems of law that cases which are identical in their facts, should also be identical in their decisions. That principle ensures justice for the individual claimant and a measure of certainty for the law itself. The English legal system has developed a system of judicial precedent which requires the extraction of the legal principle from a particular judicial decision and, given the fulfilment of certain conditions, ensures that judges apply the principle in subsequent cases which are indistinguishable. The latter provision being termed “binding precedents”. Such decisions are called as precedents and become an important source of law (See Judicial Precedents at p.7). Prior to independence, the Privy Council of Great Britain was the final Court of Appeal and its decisions were binding on Indian Courts. After independence, the Supreme Court of India is the final Court of Appeal. But even then, the decisions of English Courts such as Privy Council and House of Lords are frequently referred to as precedents in deciding certain cases and in interpreting Indian Statutes.

(iv) *Customs and Trade Usages*: Most of the Indian Law has been codified. But even then, it has not

altogether done away with customs and usages. Many Indian statutes make specific provisions to the effect that the rules of law laid down in a particular Act are subject to any special custom or usages of trade. For example, Section 1 of the Indian Contract Act, 1872, lays down that, "Nothing herein contained shall effect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act". Similarly Section 1 of the Negotiable Instruments Act, 1881, lays down that, "nothing herein contained... affects any local usage relating to any instrument in any oriental language". It may be noted that the whole law relating to Hundis and the Kachhi and Pakki Adat Systems of Agency is based on custom and usage of trade as recognised and given legal effect to by courts of law in India.

JURISPRUDENCE

The word Jurisprudence is derived from the word 'juris' meaning law and 'prudence' meaning knowledge. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it. According to *B.E. King*, jurisprudence is not concerned with the exposition of law but with disquisitions about law. For example, substantive laws teach us about our right, duties and obligations and the procedural laws talk about the legal process through which those rights can be enforced or obligations met but jurisprudence would go into the analysis of what rights, duties and obligations; how and why do they emerge in a society? Jurisprudence also improves the use of law by drawing upon insights from other fields of study.

Different jurists/ legal philosophers have used the term in different ways. The meaning of 'jurisprudence' has changed over a period of time as the boundaries of this discipline are not rigid. This amorphous nature is a subject of intense controversy among the scholars. In England, 'jurisprudence' came close to mean almost exclusively the analysis of the formal structure of law and its concepts because of the analytical exposition done by Bentham and Austin who were its pioneers. But as dissatisfaction with their conception of law grew in the later years and alternative conceptions were offered, the term 'jurisprudence' came to acquire a broader meaning but a concrete delineation of the boundary of the subject has proved elusive.

Howsoever the term jurisprudence is defined; it remains a study relating to law. The word 'law' itself is used to refer more than one thing. Hence one of the first tasks of jurisprudence is to attempt to throw light on the nature of law. However, various theorists define law in their own ways and this leads to a corresponding jurisprudential study. For example, law has two fold aspect: it is an abstract body of rules and also a social machinery for securing order in the community. However, the various schools of jurisprudence, instead of recognizing both these aspects, emphasize on one or the other.

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

Sociological jurisprudence highlights the limitations of pure science of law and says that since the very purpose for the existence of law is to furnish an answer to social problems, some knowledge of these problems is necessary if one seeks to understand the nature of law. One can understand what a thing is only if one examines what it does.

The teleological school of jurisprudence emphasizes that a mere collection of facts concerning social life is of no avail. Law is the product of human reason and is intimately related to the notion of purpose. Hence, this school seeks to find the supreme ends which law should follow.

According to Salmond in the widest of its applications the term jurisprudence means the science of law, using the word law in that vague and general sense, in which it includes all species of obligatory rules of

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

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

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

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

Legal Theory

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

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

- Laws are commands.

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- The analysis of legal concepts is (a) worth pursuing, (b) distinct from sociological and historical enquiries into law, and (c) distinct from critical evaluation.
- Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality.
- Moral judgments cannot be established or defended by rational argument, evidence or proof.
- The law as it is laid down should be kept separate from the law that ought to be.
- Positivism is most commonly understood as the fifth description above. Natural law theory claims that a proposition is 'law' not merely because it satisfies some formal requirement, but by virtue of an additional minimum moral content. According to it, an immoral rule cannot be 'law' even if it satisfies all the formal requirements.

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

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

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

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

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

Command

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

Sovereign

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

Sanction

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

Criticism of Austin's Command Theory of law

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

Roscoe Pound a distinguished American legal scholar was a leading jurist of 20th century and was one of the biggest proponents of sociological jurisprudence which emphasized taking into account of social facts in making, interpretation and application of laws.

Roscoe Pound drew a similarity between the task of a lawyer and an engineer and gave his theory of social engineering. The goal of this theory was to build such a structure of society where the satisfaction of maximum of wants was achieved with the minimum of friction and waste. Such a society according to Roscoe Pound would be an 'efficient' society. Realisation of such a social structure would require balancing of competing interests. Roscoe Pound defined interests as claims or wants or desires which men assert de facto, and about which law must do something, if organised societies are to endure. For any legal order to be successful in structuring an efficient society, there has to be:

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

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

1. Preparation of an inventory of interests and their classification.
2. Selection of the interests which should be legally recognized.
3. Demarcation of the limits of securing the interest so selected.
4. Consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited, and
5. Evolution of the principles of valuation of interests.

Roscoe Pound's classification of interests are as follows:

1. *Individual interest*: These are claims or demands determined from the standpoint of individual's life and concern. They are-
 - (i) Interest of personality: This includes physical integrity, freedom of will, honor and reputation, privacy and freedom of conscience.
 - (ii) Interest in domestic relations: This includes relationships of parents, children, husbands and wives.

- (iii) Interest of substance: This includes interests of property, freedom of association, freedom of industry and contract, continuity of employment, inheritance and testamentary succession.
2. *Public interest*: These interests are asserted by individual from the standpoint of political life. They are:
 - (i) Interests of the state as a juristic person: It includes integrity, freedom of action and honour of the state's personality, claims of the politically organized society as a corporation to property acquired and held for corporate purposes.
 - (ii) Interests of the state as guardian of social interest.
 3. Social interests: These are claims or demands thought of in terms of social life and generalized as claims of the social group. It is from the point of view of protecting the general interest of all members of the society. Social interests include-
 - (i) Social interest in the general security: This includes general safety, peace and order, general health, security of acquisition and transaction.
 - (ii) Social interest in the security of social institutions such as domestic, religious, political and economic institutions.
 - (iii) Social interest in general morals like laws dealing with prostitution, gambling, bigamy, drunkenness.
 - (iv) Social interest in the conservation of social resources like the natural and human resource. This social interest clashes to some extent with the individual interest in dealing with one's own property as on pleases.
 - (v) Social interest in general progress. It has three aspects- economic, political and cultural.
 - (vi) Social interest in individual life. It involves self-assertion, opportunity and conditions of life. Society is interested in individual life because individuals are its building blocks.

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

Criticism of Roscoe Pound's theory of law

1. Pound said that interest pre-exist laws and the function of legal system should be to achieve a balance between competing interests but we see that a lot of interests today are a creation of laws.
2. The theory does not provide any criteria for the evaluation of interest. It is not interests as such, but the yardstick with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself by a society, in which case it is not the interest as an interest, but as an ideal that will determine the relative importance between it and other interests.
3. Pound's theory of balancing interests can be effectuated most effectively by judges because the judges get to translate the activity involved in the cases before them in terms of interests and select the ideal with reference to which the competing interests are to be measured. Thus his theory gives more importance to judiciary in comparison to the legislature.
4. Pound's distinction between Public and Social interests is doubtful and even the distinction between

Individual and Social Interest is of minor significance. It is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed.

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

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

Salmond claimed that the purpose of law was the deliverance of justice to the people and in this sense he differed from *Bentham* and *Austin* who went into the analysis of law as it stood without going into its purpose. But *Salmond* also necessitated the presence of the state for implementation of laws just like *Bentham* and *Austin*.

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

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

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

Salmond argued that the administration of justice was the primary task of a state and the laws were made to achieve that objective. Administration of justice was thus antecedent to the laws. Laws thus are secondary, accidental, unessential. Law consists of the pre-established and authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion. *Salmond* further said that the administration of justice is perfectly possible without laws though such a system is not desirable. A court with an unfettered discretion in the absence of laws is capable of delivering justice if guided by equity and good conscience.

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

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

Criticism of *Salmond's* theory.

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

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

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

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

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

The legal order as conceived by *Kelsen* receives its unity from the fact that the multiple norms which make the legal system can be traced back to a final source. This final source is the basic norm or the Grundnorm which he defined as "the postulated ultimate rule according to which the norms of this order are established

and annulled, receive or lose their validity. For example, In India a statute or law is valid because it derives its legal authority from being duly passed by the Parliament and receiving the assent of the President, the Parliament and the President, derive their authority from a norm i.e., the Constitution. As to the question from where does the Constitution derive its validity there is no answer and, therefore, it is the Grundnorm, according to *Kelsen's* conception of pure theory of law.

Criticism of *Kelsen's* Pure Theory

1. It is difficult to trace 'grundnorm' in every legal system. Also, there is no rule or yardstick to measure the effectiveness of grundnorm. All that *Kelsen* maintained was that the grundnorm imparts validity as long as the 'total legal order' remains effective, which he later revised to 'by and large' effective. He did not give any measure of 'total' and 'by and large'.
2. The Pure Theory also did not give the timeframe for which the effectiveness should hold for the requirement of validity to be satisfied. Validity is a matter to be determined in the context of a given point of time and depends on what judges are prepared to accept at that moment as imparting law-quality.
3. *Kelsen's* theory ceases to be 'pure' the moment one tries to analyse the grundnorm because then one will have to draw upon subjects other than law like sociology, history and morality.
4. International law does not sit well with *Kelsen's* Pure theory. He advocated a monist view of the relationship between international and municipal law and declared that the grundnorm of the international system postulated the primacy of international law. The actual experience has been to the contrary and the countries of the world mostly give primacy to municipal laws over international laws.

Jeremy Bentham was the pioneer of analytical jurisprudence in Britain. According to him 'a law' may be defined as an assemblage of signs, declarative of volition, conceived or adopted by a sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or a class of persons, who in the case in question are or are supposed to be subject to his power. Thus, *Bentham's* concept of law is an imperative one.

Bentham was of the initial contributors on the function that laws should perform in a society. He claimed that nature has placed man under the command of two sovereigns- pain and pleasure. 'Pleasure' in *Bentham's* theory has a somewhat large signification, including altruistic and obligatory conduct, the 'principle of benevolence'; while his idea of 'interest' was anything promoting pleasure. The function of laws should be to bring about the maximum happiness of each individual for the happiness of each will result in the happiness of all. The justification for having laws is that they are an important means of ensuring happiness of the members of community generally. Hence, the sovereign power of making laws should be wielded, not to guarantee the selfish desires of individuals, but consciously to secure the common good.

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

1. *Source*: The source of a law is the will of the sovereign, who may conceive laws which he personally issues, or adopt laws previously issued by sovereigns or subordinate authorities, or he may adopt laws to be issued in future by subordinate authorities. Sovereign according to *Bentham* is any person or assemblage or person to whose will a whole political community is supposed to be in a disposition to pay obedience, and than in preference to the will of any other person.
2. *Subjects*: These may be persons or things. Each of these may be active or passive subjects, i.e., the agent with which an act commences or terminates.

3. *Objects*: The goals of a given law are its objects.
4. *Extent*: Direct extent means that a law covers a portion of land on which acts have their termination; indirect extent refers to the relation of an actor to a thing.
5. *Aspects*: Every law has 'directive' and a 'sanctional' part. The former concerns the aspects of the sovereign will towards an act-situation and the latter concerns the force of a law. The four aspects of the sovereign will are command, prohibition, non-prohibition and non-command and the whole range of laws are covered under it. These four aspects are related to each other by opposition and concomitancy.
6. *Force*: The motivation to obey a law is generated by the force behind the law.
7. Remedial appendage: These are a set of subsidiary laws addressed to the judges through which the judges cure the evil (compensation), stop the evil or prevent future evil.
8. *Expression*: A law, in the ultimate, is an expression of a sovereign's will. The connection with will raises the problem of discovering the will from the expression.

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

Criticism of *Bentham's* theory of law

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

LESSON ROUND-UP

- Law is not static as circumstances and conditions in a society change, laws are also changed to fit the requirements of the society. The object of law is to provide hope of security for the future. It serves as a vehicle of social change and as a harbinger of social justice.
- For the purpose of clarity and better understanding of the nature and meaning of law, definitions of law can classify into five broad classes (a) Natural (b) Positivistic (c) Historical (d) Sociological (e) Realistic.

- The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:
 - (a) Principle Sources of Indian Law
 - Customs or Customary Law
 - Judicial Decisions or Precedents
 - Statutes or Legislation
 - Personal Law e.g., Hindu and Mohammedan Law, etc.
 - (b) Secondary Sources of Indian Law
 - Justice, Equity and Good Conscience
 - Sources of English Law
 - ♣ Common Law
 - ♣ Law Merchant
 - ♣ Principle of Equity
 - ♣ Statute Law.
- Mercantile Law is a wide term and embraces all legal principles concerning business transactions. The most important feature of such a business transaction is the existence of a valid agreement, express or implied, between the parties concerned. The main sources of Indian Mercantile Law are (a) English Mercantile Law (b) Acts enacted by Indian Legislature (c) Judicial Decisions (d) Customs and Trade Usages.
- -Jurisprudence is derived from the word 'juris' meaning law and 'prudence' meaning knowledge. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it.

SELF-TEST QUESTIONS

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

1. Discuss the sources of Indian Law.
2. Distinguish between Declaratory Precedents and Original Precedents.
3. Define the term Obiter Dicta.
4. Explain Doctrine of Stare Decisis.
5. Write short note on:
 - (a) Austin's Command theory of law.
 - (b) Roscoe Pound's theory of law.
 - (c) Salmond's theory of law.
 - (d) Kelsen's Pure theory of law.
 - (e) Bentham's theory of law.

Lesson 2

Constitution of India

LESSON OUTLINE

- Learning Objectives
- Broad Framework of the Constitution
- Preamble
- Structure
- Fundamental Rights
- Definition of State
- Justifiability of Fundamental Rights
- Right to Constitutional Remedies
- Directive Principles of State Policy
- Fundamental Duties
- Ordinance Making Powers
- Legislative Powers of the Union and the States
- Power of Parliament to make Laws on State Lists
- Freedom of Trade, Commerce and Intercourse
- Constitutional Provisions relating to State Monopoly
- The Judiciary
- Writ Jurisdiction of High Courts and Supreme Court
- Types of Writs
- Separation of Power
- Legislative functions
- Parliamentary Committees
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

India is a Sovereign Socialist Secular Democratic Republic with a Parliamentary system of Government. The Republic is governed in terms of the Constitution. All our laws derive their authority and force from the Constitution and the Constitution derives its authority from the people. The preamble to the Constitution sets out the aims and aspirations of the people of India.

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.

Fundamental rights are envisaged in Part III of the Constitution. Directive Principles of State Policy contains certain directives which are the guidelines for the future Government to lead the Country. Constitution lays down that the executive power of the Union shall be vested in the President and 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. The Supreme Court, which is the highest Court in the Country is an institution created by the Constitution.

The subject of Constitutional law is of abiding interest and is constantly in the process of development. The basic objective of this lesson is to make the students understand the basic frame work of the Constitution and important provisions stipulated therein.

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:

(a) JUSTICE, social, economic and political;

(b) LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all;

(c) FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY THIS TWENTY-SIX DAY OF NOVEMBER, 1949, DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

BROAD FRAMEWORK OF THE CONSTITUTION

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

Preamble

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution (AIR 1973 SC 1961). The preamble declares India to be a Sovereign, Socialist, Secular, Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

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

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

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

Structure

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

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

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

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

- (a) In India, there are Governments at different levels, like Union and States.
- (b) Powers to make laws have been suitably distributed among them by way of various lists as per the

Seventh Schedule.

- (c) Both Union and States have to follow the Constitutional provisions when they make laws.
- (d) The Judiciary is independent with regard to judicial matters and judiciary can test the validity of independently. The Supreme Court decides the disputes between the Union and the States, or the States inter se.
- (e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in Article 368 of the Constitution itself.

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

Judicial View

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

Peculiar Features of Indian Federalism

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

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

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

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

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

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

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

FUNDAMENTAL RIGHTS

The Constitution seeks to secure to the people "liberty of thought, expression, belief, faith and worship;

equality of status and of opportunity; and fraternity assuring the dignity of the individual". With this object, the fundamental rights are envisaged in Part III of the Constitution.

The Concept of Fundamental Rights

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

The position in England: The Constitution of England is unwritten. No Code of Fundamental Rights exists unlike in the Constitution of the United States or India. In the doctrine of the sovereignty of Parliament as prevailing in England it does not envisage a legal check on the power of the Parliament which is, as a matter of legal theory, free to make any law. This does not mean, however, that in England there is no recognition of these basic rights of the individual. The object in fact is secured here in a different way. The protection of individual freedom in England rests not on constitutional guarantees but on public opinion, good sense of the people, strong common law, traditions favouring individual liberty, and the parliamentary form of Government. Moreover, the participation of U.K. in the European Union has made a difference.

The position in America: The nature of the Fundamental Rights in the U.S.A. has been described thus: The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the Courts.

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

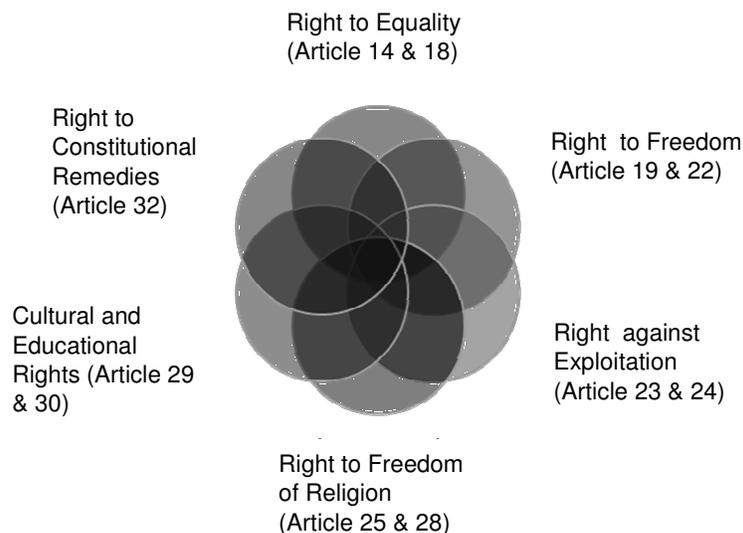
So, the American Bill of Rights (contained in first ten Amendments of the Constitution of the U.S.A.) is equally binding upon the legislature, as upon the executive. The result has been the establishment in the United States of a 'Judicial Supremacy', as opposed to the 'Parliamentary Supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights.

The position in India: As regards India, the Simon Commission and the Joint Parliamentary Committee had rejected the idea of enacting declaration of Fundamental Rights on the ground that abstract declarations are useless, unless there exists the will and the means to make them effective. The Nehru Committee recommended the inclusion of Fundamental Rights in the Constitution for the country. Although that demand

of the people was not met by the British Parliament under the Government of India Act, 1935, yet the enthusiasm of the people to have such rights in the Constitution was not impaired. As a result of that enthusiasm they were successful in getting a recommendation being included in the Statement of May 16, 1946 made by the Cabinet Mission-(which became the basis of the present Constitution) to the effect that the Constitution-making body may adopt the rights in the Constitution. Therefore, as soon as Constituent Assembly began to work in December, 1947, in its objectives resolution Pt. Jawahar Lal Nehru moved for the protection of certain rights to be provided in the Constitution. The rights as they emerged are contained in Part III of the Constitution the title of which is "Fundamental Rights". The Supreme Court in *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 held that Part III of the Constitution protects substantive as well as procedural rights and hence implications which arise there from must efficiently be protected by the Judiciary.

Inclusion of Fundamental Rights in Part III of the Constitution

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



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

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

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

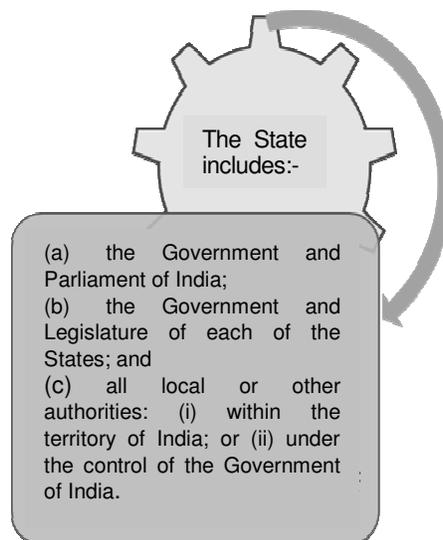
- (a) Articles 15, 16, 19 and 30 are guaranteed only to *citizens*.

- (b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India—citizen or foreigner.
- (c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.

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

Definition of State

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



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

The Supreme Court in *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 and in *R.D. Shetty v. International Airports Authority*, AIR 1979 SC 1628, has pointed out that corporations acting as instrumentality or agency of government would become ‘State’ because obviously they are subjected to the same limitations in the field of constitutional or administrative law as the government itself, though in the eye of law they would be distinct

and independent legal entities. In *Satish Nayak v. Cochin Stock Exchange Ltd.* (1995 Comp LJ 35), the Kerala High Court held that since a Stock Exchange was independent of Government control and was not discharging any public duty, it cannot be treated as 'other authority' under Article 12.

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

- (1) If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
- (2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.
- (3) Whether the corporation enjoys a monopoly status which is conferred or protected by the State.
- (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or an instrumentality.
- (5) If the functions of the corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.
- (6) If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

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

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

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

Justifiability of Fundamental Rights

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

Existing Laws: Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before

the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws: Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution. After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.

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

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

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

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

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

Doctrine of Severability

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

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

Doctrine of Eclipse

The another noteworthy thing in Article 13 is that, though an existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead

altogether. A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e. is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

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

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

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

Waiver

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

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

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances. The case is *Charanjit Lal Chowdhary v. Union of India*, AIR 1951 SC 41. In this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company through its directors had been managing and running a textile mill of the same name. Later, on account of mis-management, a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain section of the community. The Central Government issued an Ordinance which was later replaced by an Act, known as Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950. With the passing of this Act, the management and the administration of the assets of the company were placed under the control of the directors appointed by the Government. As regards the shareholders, the Act declared that they could neither appoint a new director nor could take proceedings against the

company for winding up. The petitioner filed a writ petition on the ground that the said Act infringed the rule of equal protection of laws as embodied in Article 14, because a single company and its shareholders were subjected to disability as compared with other companies and their shareholders. The Supreme Court dismissed the petition and held the legislation as valid. It laid down that the law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him only, that single individual may be treated as a class by himself. However, in subsequent cases the Court explained that the rule of presumption laid down in *Charanjit Lal's* case is not absolute, but would depend on facts of each case.

For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void (*P. Rajandran v. State of Mysore*, AIR 1968 SC 1012).

Right of equality

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

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

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

As is evident, Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression ‘equality before the law’ which is borrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts. The second expression “the equal protection of the laws” which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary v. Union of India*, AIR 1951 SC 41). The right to equality is also recognised as one of the basic features of the Constitution (*Indra Sawhney v. Union of India*, AIR 2000 SC 498).

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

Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are ‘similarly situated’ to the complainant. (*Glanrock Estate (P) Ltd. v. State of T N* (2010) 10 SCC 96)

Legislative classification

A right conferred on persons that they shall not be denied equal protection of the laws does not mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. To separate persons similarly situated from those who are not, legislative classification or distinction is made carefully between persons who are and

who are not similarly situated. The Supreme Court in a number of cases has upheld the view that Article 14 does not rule out classification for purposes of legislation. Article 14 does not forbid classification or differentiation which rests upon reasonable grounds of distinction.

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

Test of valid classification

Since a distinction is to be made for the purpose of enacting a legislation, it must pass the classical test enunciated by the Supreme Court in *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75. Permissible classification must satisfy two conditions, namely; (i) it must be founded on an *intelligible differentia* which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

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

- (i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and
- (ii) Such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".

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

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

Scope of Article 14

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

- (i) Article 14 forbids class legislation, but does not forbid classification.
- (ii) Permissible classification must satisfy two conditions, namely, (a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (b) the differentia must have a relation to the object sought to be achieved

by the statute in question.

- (iii) The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.
- (iv) In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non identity of treatment is enough.
- (v) Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.
- (vi) Article 14 condemns discrimination not only by substantive law but by a law of procedure.
- (vii) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

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

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

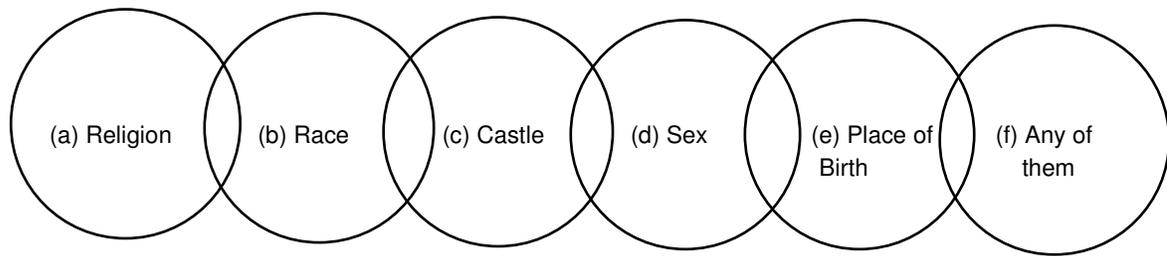
Finally it should be mentioned that Article 14 invalidates discrimination not only in substantive law but also in procedure. Further, it applies to executive acts also.

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

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

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

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



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

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

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

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

- (a) Socially and educationally backward classes of citizens;
- (b) Scheduled casts; and
- (c) Scheduled tribes.

Article 16: Equality of opportunity in matters of public employment.

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

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

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

- (1) Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]
- (2) A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]
- (3) A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16(5)]

The Supreme Court in *Secy. of State of Karnataka v. Umadevi* (2006) 4 SCC 1 held that adherence to the

rule of equality in public employment is a basic feature of the Constitution and since the rule of law is the core of the Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14. Equality of opportunity is the hallmark and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus any public employment has to be in terms of the Constitutional Scheme.

Article 17: Abolition of untouchability

Article 17 says that “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

Untouchability does not include an instigation to social boycott (*Davarajiah v. Padamanna*, AIR 1961 Mad. 35, 39). Punishment for violation of Article 17 is to be provided by Parliament under Article 35(a)(ii).

In 1955 Parliament enacted the Untouchability (Offences) Act 1955. In 1976, the Act was amended and renamed as the “Protection of Civil Rights Act, 1955” making changes in the existing law namely, all offences to be treated as non-compoundable and offences punishable upto three months to be tried summarily; punishment of offences enhanced; preaching of untouchability or its justification made an offence; a machinery envisaged for better administration and enforcement of its provisions.

Article 18: Abolition of titles

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special allegiance to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality. To do away with that practice, now Article 18 provides as under:

- (i) No title, not being a military or academic distinction, shall be conferred by the State.
- (ii) No citizen of India shall accept any title from any foreign State.
- (iii) No person, who is not a citizen of India shall, while he holds any office or trust under the State, accept without the consent of the President, any title from any foreign State.
- (iv) No person, holding any office of profit or trust under State shall without the consent of the President, accept any present, emolument or office of any kind from or under a foreign State.

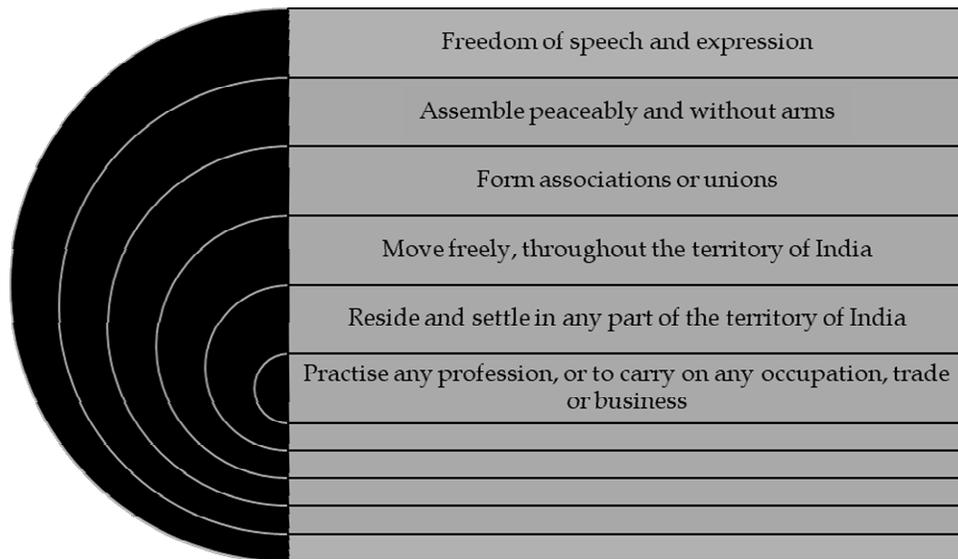
It has been pointed out by the Supreme Court that the framers of the Constitution prohibited titles of nobility and all other titles that carry suffixes or prefixes as they result in the distinct class of citizens. However, framers of the Constitution did not intend that the State should not officially recognise merit or work of an extra ordinary nature. The National awards are not violative of the principles of equality as guaranteed by the provisions of the Constitution. The theory of equality does not mandate that merit should not be recognised. The Court has held that the National awards do not amount to “titles” within the meaning of Article 18(1) and they should not be used as suffixes or prefixes. If this is done, the defaulter should forfeit the National award conferred on him/her, following the procedure laid down in regulation 10 of each of the four notifications creating these National awards.

6. Rights Relating to Freedom

Articles 19-22 guarantee certain fundamental freedoms.

The six freedoms of citizens

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 the 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.

Reasonableness

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

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

- (i) The objective of the restriction;
- (ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;
- (iii) How far the restriction is proportion to the evil in question
- (iv) Duration of the restriction
- (v) The conditions prevailing at the time when the law was framed.

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

Procedural and Substantiveness

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

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

Scope and Limitations on the Freedoms

(a) Right to freedom of speech and expression

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

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

The right to freedom of speech is infringed not only by a direct ban on the circulation of a publication but also by an action of the Government which would adversely affect the circulation of the paper. The only

restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other (*Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305).

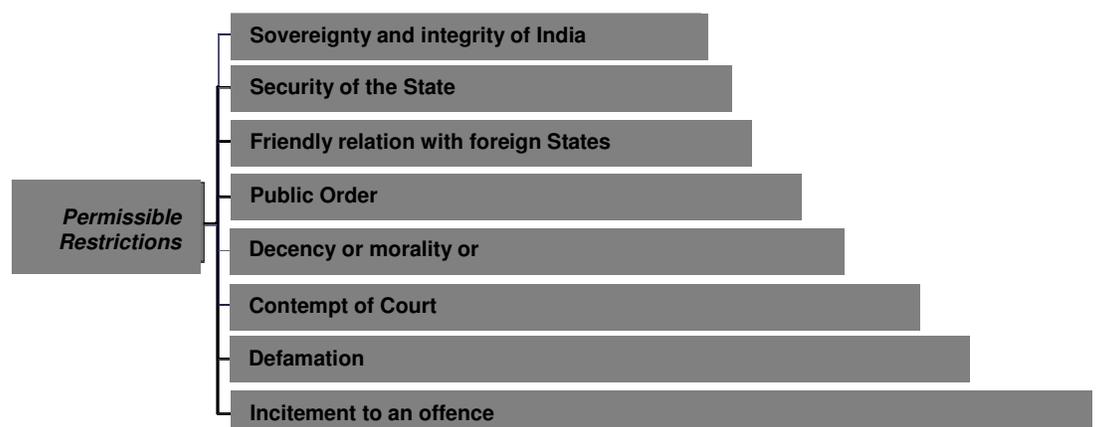
Regarding Commercial advertisements it was held in *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce. A commercial advertisement does not aim at the furtherance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

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

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

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

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



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

Corporations

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

(b) Freedom of assembly

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

- (i) the sovereignty and integrity of India, or
- (ii) public order.

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

(c) Freedom of association

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

- (i) the sovereignty and integrity of India, or
- (ii) public order, or
- (iii) morality.

A question not yet free from doubt is whether the fundamental right to form association also conveys the freedom to deny to form an association. In *Tikaramji v. Uttar Pradesh*, AIR 1956 SC 676, the Supreme Court observed that assuming the right to form an association "implies a right not to form an association, it does not follow that the negative right must also be regarded as a fundamental right". However, the High Court of Andhra Pradesh has held, that this right necessarily implies a right not to be a member of an association. Hence, the rules which made it compulsory for all teachers of elementary schools to become members of an association were held to be void as being violative of Article 19(1)(c) (*Sitharamachary v. Sr. Dy. Inspector of*

Schools, AIR 1958 A.P. 78). This view gets support from *O.K. Ghosh v. Joseph*, AIR 1963 SC 812. It has been held that a right to form associations or unions does not include within its ken as a fundamental right a right to form associations or unions for achieving a particular object or running a particular institution (2004) 1 SCC 712.

(d) Freedom of movement

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

- (i) in the interests of the general public, or
- (ii) for the protection of the interests of any scheduled tribe.

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

(e) Freedom of residence

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

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

(g) Freedom to trade and occupations

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

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

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

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

affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to—

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled, for, clause (6) of the Article authorises legislation which (i) imposes reasonable restrictions on this freedom in the interests of the general public; (ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and (iii) enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

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

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

Monopoly

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

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

Protection in respect of conviction for offences

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

1. Protection against ex-post facto laws

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at

the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

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

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

In *Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 S.C. 394, it was clarified that Article 20(1) prohibited the conviction under an *ex post facto law*, and that too the substantive law. This protection is not available with respect to procedural law. Thus, no one has a vested right in procedure. A law which nullifies the rigour of criminal law is not affected by the rule against *ex post facto law* (*Rattan Lal v. State of Punjab*, (1964) 7 S.C.R. 676).

(ii) Protection against double jeopardy

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

(iii) Protection against self-incrimination

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

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

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

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

Protection of life and personal liberty

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

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

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

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

The expression 'liberty' in the 5th and 14th Amendments of the U.S. Constitution has been given a very wide meaning. The restricted interpretation of the expression 'personal liberty' preferred by the majority judgement in *A.K. Gopalan's case* namely, that the expression 'personal liberty' means only liberty relating to or concerning the person or body of the individual, has not been accepted by the Supreme Court in subsequent cases.

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

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

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

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

It was stated in *Maneka Gandhi v. Union of India*, AIR 1978 S.C. 597, that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this

right except according to procedure prescribed by law. In this case, it was clearly laid down that the fundamental rights conferred by Part III of the Constitution are not distinct and mutually exclusive. Thus, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has still to stand the test of one or more of fundamental rights conferred by Article 19 which may be applicable to a given situation.

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

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

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

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

Presently, this term personal liberty extends to variety of matters like right to bail, right not to be handcuffed except under very few cases, right to speedy trial, right to free legal aid etc.

Article 21A: Right to Education

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Protection against arrest and detention

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

- (a) alien enemies,
- (b) person arrested or detained under preventive detention law, and
- (c) other persons.

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

- (i) A person who is arrested cannot be detained in custody unless he has been informed, as soon as

he may be, of the grounds for such arrest.

- (ii) Such person shall have the right to consult and to be defended by a legal practitioner of his choice.
- (iii) A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

Preventive Detention

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

Safeguards against Preventive Detention

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

- (a) such a person cannot be detained for a longer period than three months unless:
 - (i) An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.
 - (ii) Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board.
- (b) The authority ordering the detention of a person under the preventive detention law shall:
 - (i) communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and
 - (ii) afford him the earliest opportunity of making the representation against the order.

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

Right against Exploitation

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

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

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

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

fundamental right under Article 23.

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

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

(b) Prohibition of employment of children

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

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

Right to Freedom of Religion

With Article 25 begins a group of provisions ensuring equality of all religions thereby promoting secularism.

Freedom of conscience and free profession, practice and propagation of religion.

Article 25 gives to every person the:

- (i) freedom of conscience, and
- (ii) the right freely to profess, practice and propagate religion.

But this freedom is subject to restrictions imposed by the State on the following grounds:

- (i) public order, morality and health,
- (ii) other provisions in Part III of the Constitution,
- (iii) any law regulating or restricting any economic, financial; political or other secular activity which may be associated with religious practice, and
- (iv) any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The Supreme Court in *State of Karnataka v. Dr. Praveen Bhai Thogadia*, (2004) 9 SCC 684, held that secularism means that State should have no religion of its own and each person, whatever his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience.

The freedom of religion conferred by the present Article is not confined to the citizens of Indian but extends to all persons including aliens and individuals exercising their rights individually or through institutions (*Ratilal v. State of Bombay*, (1954) SCR 105, *Stanslaus v. State*, AIR 1975 M. 163).

The term 'Hindu' here includes person professing the Sikh, Jain, or Buddhist religion also and accordingly the term 'Hindu religious institutions' also includes the institutions belonging to these religions. Special right has been accorded to the Sikhs to wear *kirpan* as part of professing their religion.

(a) The Concept of Religion

Our Constitution does not define the word religion. Religion is certainly a matter of faith with individuals or

communities and it is not necessarily theistic — There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in any system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its follower to accept, it might prescribe rituals and observances, ceremonies and modes or worship which are regarded as integral parts of religion and those forms and observances might extend even to matters of food and dress (*Justice Mukherjee in Commr. of H.R.E., Madras v. Sirur Mutt*, A.I.R. 1954 S.C. 282).

(b) Freedom to manage religious affairs

Although no clear cut distinction is possible, yet it may be said that while Article 25 discussed above protects the religious freedom of individuals. Article 26 deals with the collective rights of religious denominations. Here the question may be raised as to what is a religious denomination? In the words of our Supreme Court:

“The word ‘*denomination*’ has been defined in the Oxford Dictionary to mean a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name. It is well known that the practice of setting up *Maths* as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankaracharya, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, in many cases it is the name of the founder and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnavas, undoubtedly constitute a religious denomination, and so do the followers of Madhavacharya and other religious teachers” (*Mukherjee J. in Commr. of H.R.E., Madras v. Sirur Mutt.*, A.I.R. 1954 S.C. 282).

However, a religious denomination is not a ‘citizen’. Now coming to the provisions of Article 26, it grants to every religious denomination or any sect thereof the right—

- (i) to establish and maintain institutions of religious and charitable purposes;
- (ii) to manage its own affairs in matters of religion;
- (iii) to own and acquire movable and immovable property; and
- (iv) to administer such property in accordance with law.

All these rights are subject to public order, morality and health, and therefore, if they conflict then the right will give way to these exceptions. One more exception may be noted. A denomination’s right to manage its own affairs in matters of religion is subject to the State’s power to throw open Hindu religious institutions of a public nature to all classes or sections of Hindus covered in Article 25.

(c) Freedom as to payment of tax for the promotion of any particular religion

According to Article 27, no person can be compelled to pay any taxes, the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. It is notable that freedom not to pay taxes is only with respect to those taxes the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or denomination.

(d) Freedom as to attendance at religious instruction or religious worship in educational institutions

Article 28 prohibits religious instruction in certain educational institutions and gives freedom to a person to

participate in such religious instructions. The Article states that—

- (i) No religious instruction can be provided in any educational institution wholly maintained out of State funds. However, this prohibition does not extend to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
- (ii) No person attending an educational institution recognised by the State or receiving aid out of State funds cannot be required:
 - (a) to take part in any religious instruction that may be imparted in such institution; or
 - (b) to attend any religious worship that may be conducted in such institution or any premises attached thereto,

unless such person or if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights [Rights of Minorities]

Minority

The word 'minority' has not been defined in the Constitution. The Supreme Court in *D.A.V. College, Jullundur v. State of Punjab*, A.I.R. 1971, S.C. 1737, seems to have stated the law on the point. It said that minority should be determined in relation to a particular impugned legislation. The determination of minority should be based on the area of operation of a particular piece of legislation. If it is a State law, the population of the State should be kept in mind and if it is a Central Law the population of the whole of India should be taken into account.

The two Articles guarantee the following rights:

(a) Protection of interests of Minorities

Article 29 guarantees two rights:

- (i) Any section of the citizens residing in the territory of Indian or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. Thus, citizens from Tamil Nadu or Bengal has the right to conserve their language or culture if they are living in Delhi, a Hindi speaking area and *vice versa*.
- (ii) No citizen can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. This provision is general and applies to each citizen individually and is not confined to a group of citizens. An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

(b) Right of Minorities to establish and administer educational institutions

The rights guaranteed to the minorities in Article 30 are even more important than those covered by Article 29. Following rights are declared in Article 30:

- (i) All minorities, whether based on religion or on language, shall have the right to establish and administer educational institutions of their choice. It may be noted here that this right is not limited only to linguistic minorities but it extends to religious minorities also. Both of them have been given the freedom to establish and administer educational institutions of their own choice. So they can establish educational institution of any type and cannot be restrained from its administration. The

maladministration may be checked by the State but administration cannot be entrusted to outside hands. Mal-administration defeats the very object of Article 30, which is to promote excellence of minority institutions in the field of education (*All Saints High School v. Government of A.P.*, AIR 1980 SC 1042). And in that educational institution they may teach religion, or may give secular education, but no bar can be imposed on their choice. In the matter of medium of instruction also, the minorities are completely free to adopt any medium of their choice.

- (ii) The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It has been held that the State cannot impose conditions in granting aid to such institutions. Further, the minority institutions are also entitled to recognition and the State cannot deny them that right, merely because they do not follow the directions of the State which impair rights under Article 30 (In *re. Kerala Education Bill* 1957, A.I.R. 1958 S.C. 956; *Sidhrajhai v. State of Gujarat*, A.I.R. 1963 S.C. 540).

In *DAV College v. State of Punjab*, AIR 1971 SC 1737, it was held that any community—religious or linguistic, which is numerically less than 50 percent of the population of that State, is a minority within the meaning of Article 30. The expression minority in Article 30(1) is used as distinct from 'Any sections of citizens' in Article 29(1) which lends support to the view that Article 30(1) deals with national minorities or minorities recognised in the context of the entire nation (*St. Xaviers College v. State of Gujarat*, AIR 1974 SC 1389).

The right conferred on religious and linguistic minorities to administer educational institutions of their choice, though couched in absolute terms, is not free from regulation. Delhi High Court in *Delhi Abibhavak Mahasangh v. U.O.I. and others*; AIR 1999 Delhi 124 held that Article 30(1) of the Constitution does not permit, minorities to indulge in commercialisation of education in the garb of constitutional protection. For the application of this right minority institutions are divided into three classes: (i) institution which neither seek aid nor recognition from the State; (ii) institution that seek aid from the State; and (iii) institutions which seek recognition but not aid. While the institutions of class (i) cannot be subjected to any regulations except those emanating from the general law of the land such as labour, contract or tax laws, the institutions in classes (ii) and (iii) can be subjected to regulations pertaining to the academic standards and to the better administration of the institution, in the interest of that institution itself.

In *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481, is an eleven Bench decision dealing with right of minorities to establish and administer educational institutions and correctness of the decision in *St. Stephen's College* case. While interpreting Article 30, the Supreme Court held that minority includes both linguistic and religious minorities and for determination of minority status, the unit would be the State and not whole of India. Further, the right of minorities to establish and administer educational institutions (including professional education) was not absolute and regulatory measures could be imposed for ensuring educational standards and maintaining excellence thereof. Right of minorities included right to determine the procedure and method of admission and selection of students, which should be fair and transparent and based on merit.

The Constitution (44th Amendment Act) has introduced new sub-clause (1A) which provides that wherever compulsory acquisition of any property of an educational institution established and administered by a minority is provided under any law, the State shall ensure that the amount fixed by or determined under any such law is such as would not restrict or abrogate the right guaranteed under this Article.

Articles 31A, 31B and 31C relating to Property

Right to property is no more a fundamental right which was previously guaranteed under Part III of the

Constitution by Article 31.

But the right to property has been inserted by Article 300A under Part XII of the Constitution. Article 300A reads — “No person shall be deprived of his property save by authority of law”.

Saving of Laws Providing for Acquisition of Estates etc.

Then follows Article 31A which is an exception to the right of equality as guaranteed in Article 14 and to the six freedoms as guaranteed in Article 19, if they come into conflict with any law mentioned in Article 31A.

Such laws are those which provide for—

- (i) the acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights. ‘Estate’ here means the property included within that expression according to the land tenures applicable in the area where it is situated. And ‘rights’ in relation to an estate means proprietary and other intermediary rights. In short, such laws are those which related to agrarian reforms, or
- (ii) the taking over of the management of any property by the State for a limited period in the public interest or in order to secure the proper management of the property, or
- (iii) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (iv) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (v) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence.

However, limitations have been imposed with respect to the laws relating to the acquisition of the estates. They are:

- (a) If such a law is made by a State Legislature then it cannot be protected by the provisions of Article 31A unless such law having been reserved for the consideration of the President has received his assent, and
- (b) If the law provides for the acquisition of (i) any land within the ceiling limit applicable in that area, (ii) any building or structure standing thereon or apartment thereto, it (law) shall not be valid unless it provides for payment of compensation at a rate which shall not be less than the market value thereof. This provision, however, has been amended by the Constitution (29th Amendment) Act.

Validation of certain Acts and Regulations

Article 31B protects certain laws against attack on the ground of violation of any fundamental rights. The laws so protected are specified in the Ninth Schedule to the Constitution. These laws also relate mainly to land reforms.

Saving of Laws giving effect to certain Directive Principles

Article 31C added by 25th Amendment of the Constitution lifted to the constitutional limitations on the powers of State, imposed by Article 14 (equality before law) and Article 19 (freedoms) as regards law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39. These principles are—

- (i) that the ownership and control of the maternal resources of the community are so distributed as best

to subserve the common good, and

- (ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The issue whether the 24th, 25th and 29th Amendments made by Parliament were valid or not was raised in the Supreme Court. In [*Kesavananda Bharti v. State of Kerala*, (1973) S.C.C. 225], the majority judgement (of a full bench of 13 judges) upheld the power of Parliament to amend the Constitution provided it did not alter its basic framework.

By the 42nd Amendment in Article 31-C for the words the principles specified in clause (a) or clause (c) of Article 39 the words in all or any of the principles laid down in Part IV were substituted. But this substitution was held to be void by the Supreme Court in *Minerva Mills v. Union of India*, (1980) 2 SCC 591.

Right to Constitutional Remedies

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

Remedies for enforcement of Fundamental Rights

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

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

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

Where a fundamental right is also available against private persons such as the right under Articles 17, 23 and 24, the Supreme Court can always be approached for appropriate remedy against the violation of such rights by private individuals. (*Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473). A petitioners challenge under Article 32 extends not only to the validity of a law but also to an executive order issued under the authority of the law.

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

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

Supplementary provisions

Articles 33-35 — contain certain supplementary provisions.

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

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

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

Amendability of the Fundamental Rights

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

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

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

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

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

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

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

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

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

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

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

violation shall be open to challenge on the ground that it destroys or damages the basic structure doctrine.

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

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

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

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

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

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

The doctrine of basic structure provides a touchstone on which validity of the constitutional amendment Act could be judged. Core constitutional values/ overarching principles like secularism; egalitarian equality etc. fall outside the amendatory power under Article 368 of the Constitution and Parliament cannot amend the constitution to abrogate these principles so as to rewrite the constitution. [In *Glanrock Estate (P) Ltd. v. State of T N* (2010) 10 SCC 96.]

DIRECTIVE PRINCIPLES OF STATE POLICY

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

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the 'provisions contained in this part (i) shall not be enforceable by any Court, but the principles therein laid down are nevertheless (ii) fundamental in the governance of the country and it shall be the duty of the state to apply these principles in

making laws. The Directives, however, differ from the Fundamental Rights contained in Part-III of the Constitution or the ordinary laws of the land in the following respects:

- (i) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.
- (ii) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.
- (iii) The Directives per-se do not confer upon or take away any legislative power from the appropriate legislature.
- (iv) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.
- (v) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.
- (vi) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

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

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

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

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

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

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

- (2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).
- (b) *Certain principles of policy to be followed by the State.* The State, particularly, must direct its policy towards securing:
- (i) that the citizens, men and women equally, have the right to an adequate means of livelihood;
 - (ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods;
 - (iii) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;
 - (iv) equal pay for equal work for both men and women;
 - (v) 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;
 - (vi) 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 upto the age of fourteen years (Article 45).
- (i) The State must promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46).
 - (j) The State must regard it one of its primary duties to raise the level of nutritional 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).

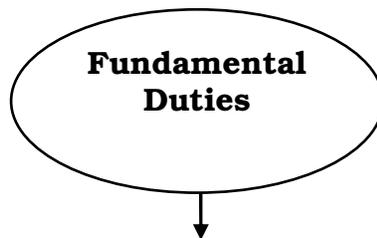
- (kk) The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48A).
- (l) Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).
- (m) The State must separate executive 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 Forty-second Amendment) Act, 1976.

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

These Fundamental Duties are:



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

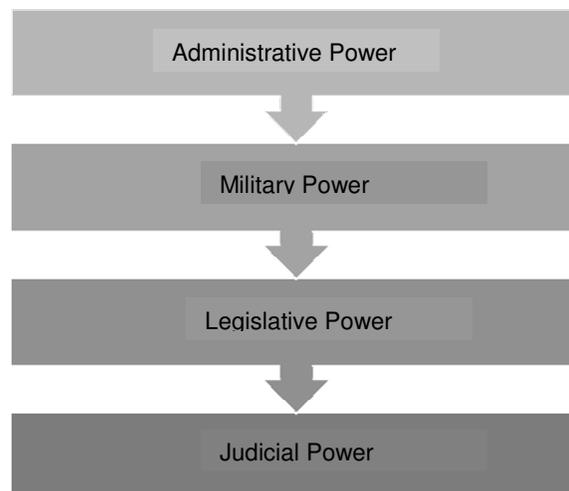
Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (*Surya Narain v. Union of India*, AIR 1982 Raj 1). The Supreme Court in *AIIMS Students' Union v. AIIMS* (2002) SCC 428 has reiterated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

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

ORDINANCE MAKING POWERS

1. Of the President

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



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

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

Ordinance-making power

The most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when

it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

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

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

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

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

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 Presidents except that he has no diplomate or military powers like the President.

Ordinance making power

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

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

- (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.
- (c) an Act of the State legislature containing the same provisions would under this Constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

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

LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

The Indian Constitution is essentially federal.

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

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

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

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

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

- (a) territory with respect to which the laws are to be made, and
- (b) subject matter on which laws are to be made.

2. Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the

territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that States. For example, a law passed by the legislature of the Punjab State cannot be made applicable to the State of Uttar Pradesh or any other state. However, this simple generalisation of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

From the territorial point of view, Parliament, being supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India. A law made by Parliament is not invalid merely because it has an extra-territorial operation. As explained by Kania C.J. in *A.H. Wadia v. Income-tax Commissioner*, A.I.R. 1949 F.C. 18, 25 "In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned".

A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law. Article 246(4) provides that Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List. With regard to Union Territories, there is no distribution of legislative powers. Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject. These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

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

- (i) the connection must be real and not illusory; and
- (ii) the liability sought to be imposed by that law must be pertinent to that connection.

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

this way, the state laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax-matters.

3. Distribution of Subject Matter of Legislation

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

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

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

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

- (i) The entries relating to tax have been separated from other subjects and thus if a subject is included

in any particular List it does not mean the power to impose tax with respect to that also follows. Apart from that, while other subjects are in the first part of the List in one group, the subjects relating to tax are given towards the end of the List.

- (ii) Subject-matter of tax is enumerated only in the Union List and the State List. There is no tax subject included in the Concurrent List.
- (iii) In each List there is an entry of “fees” with respect to any matter included in that List excluding court fee. This entry is the last in all the Lists except List I where it is last but one.
- (iv) There is an entry each in Lists I and II relating to “offences against laws with respect to any of the matters” included in the respective List while criminal law is a general subject in the Concurrent List.

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

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

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

- (a) With respect to the subject enumerated in the Union i.e., List I, the Union Parliament has the *exclusive* power to make laws. The State Legislature has no power to make laws on any of these subjects and it is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake — which is not expected — the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognised.
- (b) With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has *exclusive* power to make laws. Therefore Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.
- (c) With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognises an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the

consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.

- (d) With respect to all those matters which are not included in any of the three lists, Parliament has the exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction (*Union of India v. H.S. Dhillon*, A.I.R. 1972 S.C. 1061).

5. Power of Parliament to make Laws on State List

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

(a) In the National Interest (Article 249)

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

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

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

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

issued at a time when the House of People (Lok Sabha) has been dissolved, or the dissolution of the House of People takes place during the period of one month referred to above but before passing the resolution, and if a resolution approving the proclamation has been passed by the Council of State (Rajya Sabha), the proclamation shall cease to operate at the expiry of thirty days from the date on which the House of the People (Lok Sabha) first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the proclamation has also passed by the House of the People.

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

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

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

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

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

Clause 2 of Article 356 provides that any such proclamation may be revoked or varied by a subsequent proclamation. It may, however, be noted that the presidential proclamation is valid only for six months at a

time and that also if approved by both the Houses of Parliament within a period of two months from the date of proclamation. A fresh proclamation can be issued to extend the life of the existing one for a further period of six months but in no case such proclamation can remain in force beyond a consecutive period of three years. The Constitution (Forty-Second) Amendment Act, 1976 inserted a new clause (2) in Article 357. It provides that any law made in exercise of the Power of the Legislature of the State by Parliament or the President or other Authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other Authority would not, but for the issue of a proclamation under Article 356 have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered, or repealed or amended by a competent Legislature or other authority. This means that the laws made during the subsistence of the proclamation shall continue to be in force unless and until they are altered or repealed by the State Legislature. So an express negative act is required in order to put an end to the operation of the laws made in respect of that State by the Union.

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

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

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

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

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

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

- (i) any treaty, agreement or convention with any other country or countries, or
- (ii) any decision made at any international conference, association or other body.

These five exceptions to the general scheme of distribution of legislative powers on the basis of exclusive Union and State Lists go to show that in our Constitution there is nothing which makes the States totally

immune from legislative interference by the Centre in any matter. There remains no subject in the exclusive State jurisdiction which cannot be approached by the Centre in certain situations. But by this, one must not conclude that the distribution of legislative power in our Constitution is just illusory and all the powers vest in the Centre. On the other hand, the distribution of legislative powers is real and that is the general rule but to face the practical difficulties the Constitution has made a few exceptions which are to operate within the circumscribed sphere and conditions.

6. Interpretation of the Legislative Lists

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

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

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

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

- (b) *Harmonious Construction*: Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.
- (c) *Pith and Substance Rule*: The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. In a federal Constitution, as was observed by Gwyer C.J. “it must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere” (*Prafulla Kumar v. Bank of Khulna*, AIR 1947 PC 60). Therefore, where such overlapping occurs, the question must be asked, what is, “pith and substance” of the enactment in question and in which list its true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered. By way of illustration, acting on entry 6 of List II which reads “Public Health and Sanitation”. Rajasthan Legislature passed a law restricting the use of sound amplifiers. The law was challenged on the

ground that it dealt with a matter which fell in entry 81 of List I which reads: “Post and telegraphs, telephones, wireless broadcasting and other like forms of communication”, and, therefore, the State Legislature was not competent to pass it. The Supreme Court rejected this argument on the ground that the object of the law was to prohibit unnecessary noise affecting the health of public and not to make a law on broadcasting, etc. Therefore, the pith and substance of the law was “public health” and not “broadcasting” (*G. Chawla v. State of Rajasthan*, AIR 1959 SC 544).

- (d) *Colourable Legislation*: It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colourable piece of legislation and is invalid. To take an example in *Kameshwar Singh v. State of Bihar*, A.I.R. 1952 S.C. 252, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensation. The Supreme Court found that this was a colourable exercise of power of acquisition by the State legislature, because “the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised”.

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

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

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

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

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

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

The concept of *trade, commerce and intercourse* today is so wide that from ordinary sale and purchase it includes broadcasting on radios, communication on telephone and even to non-commercial movement from one place to another place. If such is the scope of trade and commerce then any law relating to any matter may affect the freedom of trade, commerce and intercourse, e.g., it may be said that the law which imposes

the condition of licence for having a radio violates the freedom of trade and commerce, or a law which regulates the hours during which the electricity in a particular locality shall be available may be called as affecting the freedom of trade and commerce because during those hours one cannot use the radio or television or one cannot run this factory. If that view is taken then every law shall become contrary to Articles 301 and unless saved by Articles 302 to 307 shall be unconstitutional. To avoid such situations the Supreme Court in the very first case on the matter (*Atiabari Tea Co. v. State of Assam*, A.I.R. 1951 S.C. 232) declared that only those laws which "directly and immediately" restrict or impede the freedom of trade and commerce are covered by Article 301 and such laws which directly and incidentally affect the freedom guaranteed in that article are not within the reach of Article 301. The word 'intercourse' in this article is of wide import. It will cover all such intercourse as might not be included in the words 'trade and commerce'. Thus, it would cover movement and dealings even of a non-commercial nature (*Chobe v. Palnitkar*, A.I.R. 1954 Hyd. 207). The word, free in Article 301 cannot mean an absolute freedom. Such measures as traffic regulations licensing of vehicles etc. are not open to challenge.

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

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

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

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

(a) Parliament to Impose Restriction in the Public Interest

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

(b) Parliament to make Preference or Discrimination

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

(c) Power of the State Legislature

The Legislature of a State may by law:

- (a) impose on goods imported from other States or the Union territories any tax to which similar goods

manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

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

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

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

(d) Saving of Existing Laws

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

(e) Saving of Laws providing for State Monopoly

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

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

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

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

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

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

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

THE JUDICIARY

The Supreme Court

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

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

High Courts

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

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

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

Subordinate Courts

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

Civil Courts

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

Criminal Courts

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves

have been divided by the Code of Criminal Procedure into 'Judicial' and 'Executive' Magistrates. The latter do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquillity and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

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

In some big cities (including the three Presidency towns and Ahmedabad and Delhi), the Magistrates are called Metropolitan Magistrates. There is no gradation *inter se*. Further, in some big cities (including the three Presidency towns and Ahmedabad and Hyderabad), the Sessions Court is called the "City Sessions Court", its powers being the same as those of the Courts of Session in the districts.

Special Tribunals

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

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

WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

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

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

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

the Constitution;

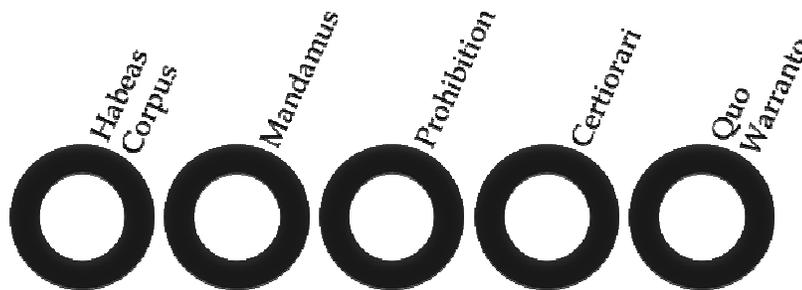
- (b) while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person, Government or other authority only if such person or authority is physically resident or located within the territorial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

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

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

Types of Writs

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



1. Habeas Corpus

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

2. Mandamus

The word ‘*Mandamus*’ literally means we command. The writ of *mandamus* is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified

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

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

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

3. Prohibition

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

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

4. Certiorari

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

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

5. Quo Warranto

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

- (i) the office is of public and of a substantive nature,
- (ii) created by statute or by the Constitution itself, and

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

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

DELEGATED LEGISLATION

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

The three relevant justifications for delegated legislation are:

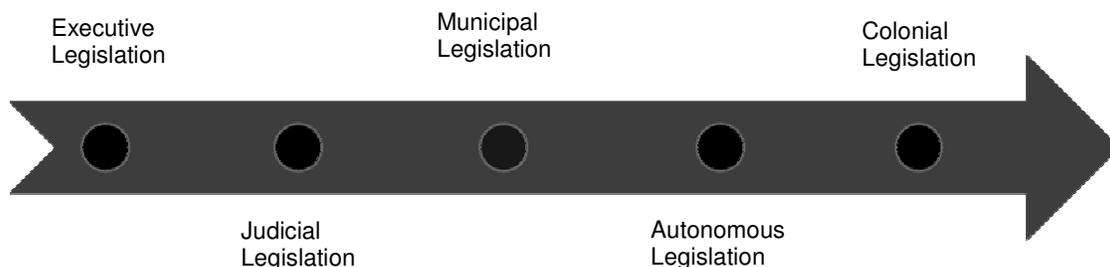
- (i) the limits of the time of the legislature;
- (ii) the limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations, where direction is wanted; and
- (iii) the need of some weapon for coping with situations created by emergency.

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

Classification of delegated legislation

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

Classification of Subordinate Legislation



1. Executive Legislation

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

2. Judicial Legislation

Under various 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 sub-ordinate powers of establishing special laws applicable to the whole or any part of the area under their administration known as bye-laws.

4. Autonomous Legislation

Under this head fall the regulations which 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 delegates must directly act within the powers which are conferred on it and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers. The doctrine of implied powers means where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.

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

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

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

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

- (a) The primary duty of law-making has to be discharged by the Legislature itself. The Legislature

cannot delegate its primary or essential legislative function to an outside authority in any case.

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

SEPERATION OF POWERS

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

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

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

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

The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the government have been sufficiently differentiated. (*Ram Jawaya v. State of Punjab*, AIR 1955 SC 549). None of the three organs of the Government can take over the functions assigned to the other organs. (*Keshanand Bharti v. State of Kerala*, AIR 1973 SC 1461, *Asif Hameed v. State of J&K* 1989 AIR, SC 1899) In *State of Bihar v. Bihar Distillery Ltd.*, (AIR 1997 SC 1511) the Supreme Court has held that the judiciary must recognize the fundamental nature and importance of the legislature process and must accord due regard and deference to it. The Legislative and Executive are also expected to show due regard and deference to the judiciary. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government. The concept of checks and balance is inherent in the scheme.

LEGISLATIVE FUNCTIONS

Bill

A Bill is a draft statute which becomes law after it is passed by both the Houses of Parliament and assented to by the President. All legislative proposals are brought before Parliament in the forms of Bills.

Types of Bills and their Specific Features

- (i) Bills may be broadly classified into Government Bills and Private Members' Bills depending upon their initiation in the House by a Minister or a Private Member.
- (ii) Content wise, Bills are further classified into:
 - (a) Original Bills which embody new proposals, ideas or policies,
 - (b) Amending Bills which seek to modify, amend or revise existing Acts,
 - (c) Consolidating Bills which seek to consolidate existing law/enactments on a particular subject,
 - (d) Expiring Laws (Continuance) Bills which seek to continue Acts which, otherwise, would expire on a specified date,
 - (e) Repealing and amending Bill to cleanse the Statute Book,
 - (f) Validating Acts to give validity to certain actions,
 - (g) Bills to replace Ordinances,
 - (h) Money and Financial Bills, and
 - (i) Constitution Amendment Bills.
- (iii) However, procedurally, the Bills are classified as
 - (a) Ordinary Bills
 - (b) Money Bills and Financial Bills
 - (c) Ordinance Replacing Bills and
 - (d) Constitution Amendment Bills.
- (iv) Money Bills are those Bills which contain only provisions dealing with all or any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 of the Constitution. Financial Bills can be further classified as Financial Bills Categories A and B. Category A Bills contain provisions dealing with any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 and other matters and Category B Bills involve expenditure from the Consolidated Fund of India.

Except Money Bills and Financial Bills, Category A, which can be introduced only in the Lok Sabha,

a Bill may originate in either House of Parliament. As per the provisions of article 109 of the Constitution, the Rajya Sabha has limited powers with respect to Money Bills. A Money Bill after having been passed by the Lok Sabha, and sent to Rajya Sabha for its recommendations, has to be returned to Lok Sabha by the Rajya Sabha, within a period of fourteen days from the date of its receipt, with or without recommendations. It is open for the Lok Sabha, to either accept or reject all or any of the recommendations of the Rajya Sabha. If the Lok Sabha accepts any of the recommendations of the Rajya Sabha, the Money Bill is deemed to have been passed by both Houses with the amendments recommended by the Rajya Sabha and accepted by the Lok Sabha. If the Lok Sabha does not accept any of the recommendations of the Rajya Sabha, the Money Bill is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha without any of the amendments recommended by the Rajya Sabha. In case a Money Bill is not returned by the Rajya Sabha to the Lok Sabha within a period of fourteen days from the date of its receipt, it is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha after the expiry of said period.

- (v) Financial Bill Category A can only be introduced in the Lok Sabha on the recommendation of the President. However once it has been passed by the Lok Sabha, it is like an ordinary Bill and there is no restriction on the powers of the Rajya Sabha on such Bills.
- (vi) Financial Bill Category B and Ordinary Bills can be introduced in either House of Parliament.
- (vii) Ordinance replacing Bills are brought before Parliament to replace an Ordinance, with or without modifications, promulgated by the President under article 123 of the Constitution of a subject. To provide continuity to the provisions of the Ordinance, such a Bill has to be passed by the Houses of Parliament and assented to by the President within six weeks of the reassembly of Parliament.
- (viii) As per the procedure laid down in the Constitution, Constitution Amendment Bills can be of three types *viz.*,
 - (a) requiring simple majority for their passage in each House;
 - (b) requiring special majority for their passage in each House *i.e.*, a majority of the total membership of a House and by a majority of not less than two-thirds of the members of that House present and voting (article 368); and
 - (c) requiring special majority for their passage and ratification by Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures (proviso to clause (2) of article 368). A Constitution Amendment Bill under article 368 can be introduced in either House of Parliament and has to be passed by each House by special majority.
- (ix) Under provisions of article 108 of the Constitution, if after a Bill passed by one House and transmitted to the other House:-
 - (a) is rejected by the other House; or
 - (b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
 - (c) more than six months elapse from the date of its receipt by the other House without the Bill being passed by it,

the President may, unless the Bill has elapsed by reason of a dissolution of the Lok Sabha, summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill. If at the joint sitting of the two Houses, the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed to have been passed by both Houses. However there is no provision of joint

sittings on a Money Bill or a Constitution Amending Bill.

- (x) After the dissolution of Lok Sabha all Bills except the Bills introduced in the Rajya Sabha and pending therein, lapse.

Law making process (How a Bill becomes an Act)

(i) A Bill undergoes three readings in each House of Parliament. The First Reading consists of the Introduction of a Bill. The Bill is introduced after adoption of a motion for leave to introduce a Bill in either of the House. With the setting up of the Department-related Parliamentary Standing Committees, invariably all Bills, barring Ordinance replacing Bills; Bills of innocuous nature and Money Bills, are referred to the these Committees for examination and report within three months. The next stage on a Bill *i.e.*, second reading start only after the Committee submits its report on the Bill to the Houses. The Second Reading consists of two stages: the 'first stage' consists of discussion on the principles of the Bill and its provisions generally on any of the following motions: that the Bill be taken into consideration; that the Bill be referred to a Select Committee of the Rajya Sabha ; that the Bill be referred to a Joint Committee of the Houses with the concurrence of the Lok Sabha; that it be circulated for the purpose of eliciting opinion thereon; and the 'second stage' signifies the clause-by clause consideration of the Bill as introduced or as reported by the Select/Joint Committee. Amendments given by members to various clauses are moved at this stage. The Third Reading refers to the discussion on the motion that the Bill (or the Bill as amended) be passed or returned (to the Lok Sabha, in the case of a Money Bill) wherein the arguments are based against or in favour of the Bill. After a Bill has been passed by one House, it is sent to the other House where it goes through the same procedure. However the Bill is not again introduced in the other House, it is laid on the Table of the other House which constitutes its first reading there.

(ii) After a Bill has been passed by both Houses, it is presented to the President for his assent. The President can assent or withhold his assent to a Bill or he can return a Bill, other than a Money Bill, for reconsideration. If the Bill is again passed by the Houses, with or without amendment made by the President, he shall not withhold assent there from. But, when a Bill amending the Constitution passed by each House with the requisite majority is presented to the President, he shall give his assent thereto.

A Bill becomes an Act of Parliament after being passed by both the Houses of Parliament and assented to by the President.

PARLIAMENTARY COMMITTEES

The work done by the Parliament in modern times is not only varied in nature, but considerable in volume. The time at its disposal is limited. It cannot, therefore, give close consideration to all the legislative and other matters that come up before it. A good deal of its business is, therefore, transacted by what are called the Parliamentary Committees.

Parliamentary Committees play a vital role in the Parliamentary System. They are a vibrant link between the Parliament, the Executive and the general public. The need for Committees arises out of two factors, the first one being the need for vigilance on the part of the Legislature over the actions of the Executive, while the second one is that the modern Legislature these days is over-burdened with heavy volume of work with limited time at its disposal. It thus becomes impossible that every matter should be thoroughly and systematically scrutinised and considered on the floor of the House. If the work is to be done with reasonable care, naturally some Parliamentary responsibility has to be entrusted to an agency in which the whole House has confidence. Entrusting certain functions of the House to the Committees has, therefore, become a normal practice. This has become all the more necessary as a Committee provides the expertise on a matter which is referred to it. In a Committee, the matter is deliberated at length, views are expressed freely, the matter is considered in depth, in a business-like manner and in a calmer atmosphere. In most of the Committees, public is directly or indirectly associated when memoranda containing suggestions are received, on-the-spot studies are conducted and oral evidence is taken which helps the Committees in arriving at the

conclusions.

The Committees aid and assist the Legislature in discharging its duties and regulating its functions effectively, expeditiously and efficiently. Through Committees, Parliament exercises its control and influence over administration. Parliamentary Committees have a salutary effect on the Executive. The Committees are not meant to weaken the administration, instead they prevent misuse of power exercisable by the Executive. It may, however, be remembered that Parliamentary control in the context of the functioning of the Committees may mean influence, not direct control; advice, not command; criticism, not obstruction; scrutiny, not initiative; and accountability, not prior approval. This, in brief, is the rationale of the Committee System. The Committees have functioned in a non-partisan manner and their deliberations and conclusions have been objective. This, in a large measure, accounts for the respect in which the recommendations of the Parliamentary Committees are held.

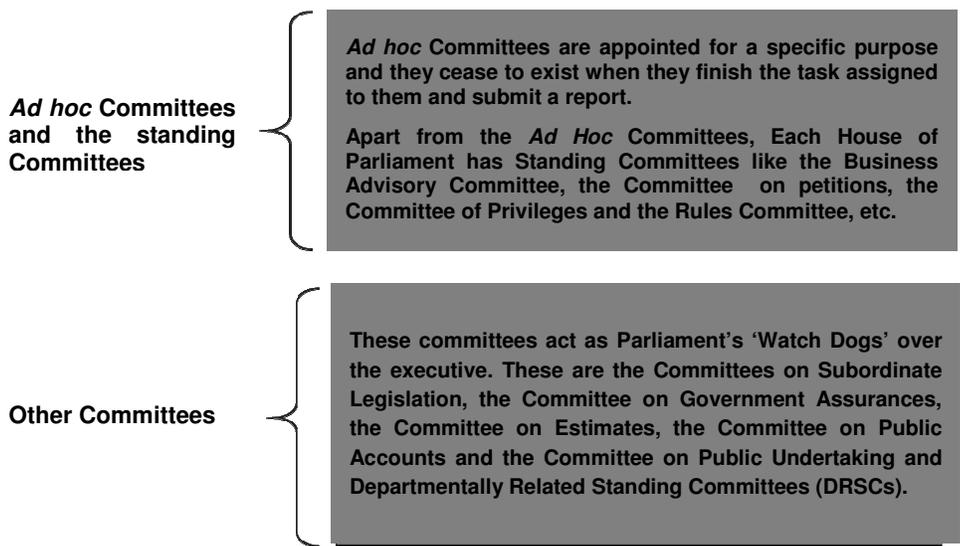
Ad hoc and Standing Committees

Parliamentary Committees are of two kinds: *Ad hoc* Committees and the Standing Committees. *Ad hoc* Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report. The principal *Ad hoc* Committees are the Select and Joint Committees on Bills. Others like the Railway Convention Committee, the Committees on the Draft Five Year Plans and the Hindi Equivalent Committee were appointed for specific purposes. Apart from the *Ad hoc* Committees, each House of Parliament has Standing Committees like the Business Advisory Committee, the Committee on Petitions, the Committee of Privileges and the Rules Committee, etc.

Other Committees

Of special importance is yet another class of Committees which act as Parliament’s ‘Watch Dogs’ over the executive. These are the Committees on Subordinate Legislation, the Committee on Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertakings and Departmentally Related Standing Committees (DRSCs). The Committee on Estimates, the Committee on Public Accounts, the Committee on Public Undertakings and DRSCs play an important role in exercising a check over governmental expenditure and Policy formulation.

Parliamentary Committees:-



LESSON ROUND-UP

- The Constitution of India came into force on January 26, 1950. The preamble to the Constitution sets out the aims and aspirations of the people of India. Constitution of India is basically federal but with certain unitary features. The essential features of a Federal or System are – dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution.
- The fundamental rights are envisaged in Part III of the Constitution. These are:
 - (i) Right to Equality; (ii) Right to Freedom; (iii) Right against Exploitation; (iv) Right to Freedom of Religion; (v) Cultural and Educational Rights; (vi) Right to Constitutional Remedies.
- The Directive Principles as envisaged by the Constitution makers lay down the ideals to be observed by every Government to bring about an economic democracy in this country.
- Article 51 A imposing the fundamental duties on every citizen of India was inserted by the Constitution (Forty-second Amendment) Act, 1976.
- The most important legislative power conferred on the President is to promulgate Ordinances. The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of the Parliament. The Governor's power to make Ordinances is similar to the Ordinance making power of the President and has the force of an Act of the State Legislature.
- The Union of India is composed of 29 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. Both the Union and States are equally subject to the limitations imposed by the Constitution. However, there are some parts of Indian Territory which are not covered by these States and such territories are called Union Territories.
- The courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country is an institution created by the Constitution. The jurisdiction of the Supreme Court is vast including the writ jurisdiction for enforcing Fundamental Rights.
- The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances, have made it necessary for the legislatures to delegate its powers.
- Article 50 of the Constitution of India dealing with Separation of judiciary from executive. It provides that the State shall take steps to separate the judiciary from the executive in the public services of the State
- A Bill is a draft statute which becomes law after it is passed by both the Houses of Parliament and assented to by the President. All legislative proposals are brought before Parliament in the forms of Bills.
- Parliamentary Committees play a vital role in the Parliamentary System. They are a vibrant link between the Parliament, the Executive and the general public.

SELF-TEST QUESTIONS

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

1. The Constitution of India is “federal in character but with unitary features”. Comment.
2. What is bill? Discuss type of bills and their specific features.
3. Write short notes on:
 - (i) Separation of Powers

Lesson 3

Interpretation of Statute

LESSON OUTLINE

- Learning Objectives
- Introduction
- Need for and Object of Interpretation
- General Principles of Interpretation
- Primary Rules
- Mischief Rules
- Rule of Reasonable Construction
- Rule of Harmonious Construction
- Rule of Ejusdem Generis
- No scitur a Sociis
- Strict and Liberal Construction
- Other Rules
- Internal Aids in Interpretation
- Preamble heading and Title of a Chapter
- Marginal notes
- Interpretation clause
- External Aids in Interpretation
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

A statute is a will of legislature conveyed in the form of text. Interpretation or construction of a statute is an age-old process and as old as language. It is well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to seek the intention of legislature. The intention of legislature assimilates two aspects; one aspect carries the concept of 'meaning', and another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute. The process of construction, therefore, combines both the literal and purposive approaches.

Necessity of interpretation would arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. If the language is clear and unambiguous, no need of interpretation would arise. For the purpose of construction or interpretation, the Court obviously has to take recourse to various internal and external aids. These internal aids include long title, preamble, headings, marginal notes, illustrations, punctuation, proviso, schedule, transitory provisions, etc. When internal aids are not adequate, Court has to take recourse to external aids. It may be parliamentary material, historical background, reports of a committee or a commission, official statement, dictionary meanings, foreign decisions, etc.

The complexity of modern legislation demands a clear understanding of the principles of construction applicable to it. The students will understand the general principles of interpretation as well as internal and external aids in interpretation of the statutes.

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

– **Salmond**

INTRODUCTION

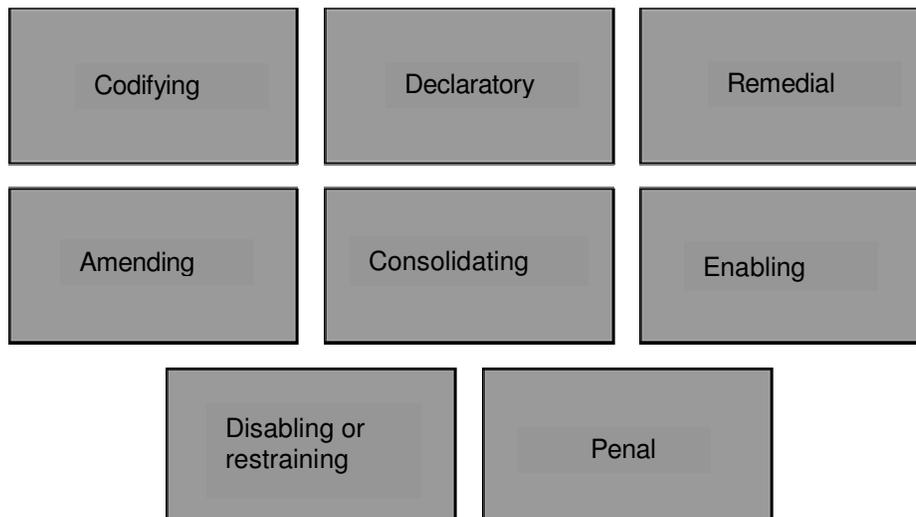
A statute has been defined as “the will of the legislature” (*Maxwell, Interpretation of Statutes*, 11th ed. p. 1). Normally, it denotes the Act enacted by the legislature.

A statute is thus a written “will” of the legislature expressed according to the form necessary to constitute it as a law of the State, and rendered authentic by certain prescribed forms and solemnities. (*Crawford*, p. 1)

According to *Bouvier’s Law Dictionary*, a statute is “a law established by the act of the legislative power i.e. an Act of the legislature. The written will of the legislature. The term ‘statute’ is generally applied to laws and regulations of every sort law which ordains, permits or prohibits anything which is designated as a statute, without considering from what source it arises”.

The Constitution of India does not use the term ‘statute’ but it employs the term “law” to describe an exercise of legislative power.

Statutes are commonly divided into following classes:



(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 AND OBJECT OF INTERPRETATION

The following observation of Denning L.J. in *Seaford Court Estates Ltd. v. Asher*, (1949) 2 K.B. 481 (498), on the need for statutory interpretation is instructive: “It is not within human powers to foresee the manifold sets of facts which may arise; and that; even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judge’s trouble if Acts of Parliament were drafted with divine prescience and perfect

clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. To put into other words : A judge should ask himself the question : If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

The object of interpretation has been explained in *Halsbury's Laws of England* 3rd Ed., vol. 2, p. 381 in the following words: "The object of all interpretation of a 'Written Document' is to discover the intention of the author, the written declaration of whose mind the document is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as possible, and as the law will permit. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent of the intention. It is not possible to guess at the intention of the parties and substitute the presumed for the expressed intention. The ordinary rules of construction must be applied, although by doing so the real intention of the parties may, in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law". The object of interpretation, thus, in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

According to *Salmond*, interpretation or construction is the process by which the Court's seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

GENERAL PRINCIPLES 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 Eiusdem Generis

Other Rules of Interpretation

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

(i) Primary Rules

(a) The Primary Rule: Literal Construction

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

Interpretation should not be given which would make other provisions redundant (*Nand Prakash Vohra v. State of H.P.*, AIR 2000 HP 65).

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases."

"Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used". (Brett M.R.)

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions of another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated.

Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.

Some of the other basic principles of literal construction are:

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

While discussing rules of literal construction the Supreme Court in *State of H.P. v. Pawan Kumar* (2005) 4 SCALE, P.1, held: One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.

- If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended, abridged, so far as to avoid such an inconvenience, but no further.
- The onus of showing that the words do not mean what they say lies heavily on the party who alleges it.
- He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

(b) The Mischief Rule or Heydon's Rule

In *Heydon's Case*, in 1584, 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 Pareat

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 pareat*, 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.

It is only when the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship of injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence (*Tirath Singh v. Bachittar Singh*, A.I.R. 1955 S.C. 830).

Courts can depart from dictionary meaning of a word and give it a meaning which will advance the remedy and suppress the mischief provided the Court does not have to conjecture or surmise. A construction will be adopted in accordance with the policy and object of the statute (*Kanwar Singh v. Delhi Administration*, AIR 1965 S.C. 871). To make the discovered intention fit the words used in the statute, actual expression used in it may be modified (*Newman Manufacturing Co. Ltd. v. Marrables*, (1931) 2 KB 297, *Williams v. Ellis*, 1880 49

L.J.M.C.). If the Court considers that the *littera legis* is not clear, it, must interpret according to the purpose, policy or spirit of the statute (*ratio-legis*). It is, thus, evident that no invariable rule can be established for literal interpretation.

In *RBI v. Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424. The Supreme Court stated that if a statute is looked at in the context of its enactment, with the glasses of the statute makers provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. (See also *Chairman Indira Vikas Pradhikaran v. Pure Industrial Coke and Chemicals Ltd.*, AIR 2007 SC 2458).

(d) Rule of Harmonious Construction

A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid “a head on clash” between two sections of the same Act and, “whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise” (*Raj Krishna v. Pinod Kanungo*, A.I.R. 1954 S.C. 202 at 203).

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

The Supreme Court applied this rule in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution and it was held that the right of every religious denomination or any section thereof to manage its own affairs in matters of religion [Article 26(b)] is subject to a law made by a State providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)(b)]. (*Venkataramana Devaru v. State of Mysore*, A.I.R. 1958 S.C. 255).

(e) Rule of Eiusdem Generis

Eiusdem Generis, literally means “of the same kind or species”. The rule can be stated thus:

(a) In an enumeration of different subjects in an Act, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed down by treating them as applying to things of the same kind as those previously mentioned, unless of course, there is something to show that a wide sense was intended; (b) If the particular words exhaust the whole genus, then the general words are construed as embracing a larger genus.

In other words, the *eiusdem generis* rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose. It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature (*Jage Ram v. State of Haryana*, A.I.R. 1971 S.C. 1033). To apply the rule the following conditions must exist:

- (1) The statute contains an enumeration by specific words,
- (2) The members of the enumeration constitute a class,
- (3) The class is not exhausted by the enumeration,
- (4) A general term follows the enumeration,
- (5) There is a distinct genus which comprises more than one species, and

- (6) There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires. (See *Thakura Singh v. Revenue Minister*, AIR 1965 J & K 102)

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.

At the same time, general words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction; because many things are put into a statute *ex abundantia cautela*, and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute. The method of construction according to this maxim must be carefully watched. The failure to make the 'expressio' complete may arise from accident. Similarly, the 'exclusio' is often the result of inadvertence or accident because it never struck the draftsman that the thing supposed to be excluded requires specific mention. The maxim ought not to be applied when its application leads to inconsistency or injustice.

Similarly, it cannot be applied when the language of the Statute is plain with clear meaning (*Parbhani Transport Co-operative Society Ltd v Regional Transport Authority*, AIR 1960 SC 801)

(b) Contemporanea Expositio Est Optima Et Fortissima in Lege

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

But if the statute appears to be capable of only interpretation, the fact that a wrong meaning had been attached to it for many years, will be immaterial and the correct meaning will be given by the Courts except when title to property may be affected or when every day transactions have been entered into on such wrong interpretation.

(c) Noscitur a Sociis

The '*Noscitur a Sociis*' i.e. "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words. It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim 'noscitur a sociis' has much relevance in understanding the import of words in a statutory provision (*K. Bhagirathi G. Shenoy v. K.P. Ballakuraya*, AIR 1999 SC 2143).

The rule states that where two or more words which are susceptible of analogous meaning are coupled together, they are understood in their cognate sense. It is only where the intention of the legislature in

associating wider words with words of narrower significance, is doubtful that the present rule of construction can be usefully applied.

The *same words bear the same meaning in the same statute*. But this rule will not apply:

- (i) when the context excluded that principle.
- (ii) if sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.
- (iii) where it would cause injustice or absurdity.
- (iv) where different circumstances are being dealt with.
- (v) where the words are used in a different context. Many do not distinguish between this rule and the *ejusdem generis* doctrine. But there is a subtle distinction as pointed out in the case of *State of Bombay v. Hospital Mazdoor Sabha*, (1960) 2 SCR 866.

(d) Strict and Liberal Construction

In *Wiberforce on Statute Law*, it is said that what is meant by 'strict construction' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute". Beneficial construction to suppress the mischief and advance the remedy is generally preferred.

A Court invokes the rule which produces a result that satisfies its sense of justice in the case before it. "Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (viz., the literal rule, the golden rule and the mischief rule) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another. Sometimes a Court discusses all the three approaches. Sometimes it expressly rejects the 'mischief rule' in favour of the 'literal rule'. Sometimes it prefers, although never expressly, the 'mischief rule' to the 'literal rule'.

PRESUMPTIONS

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

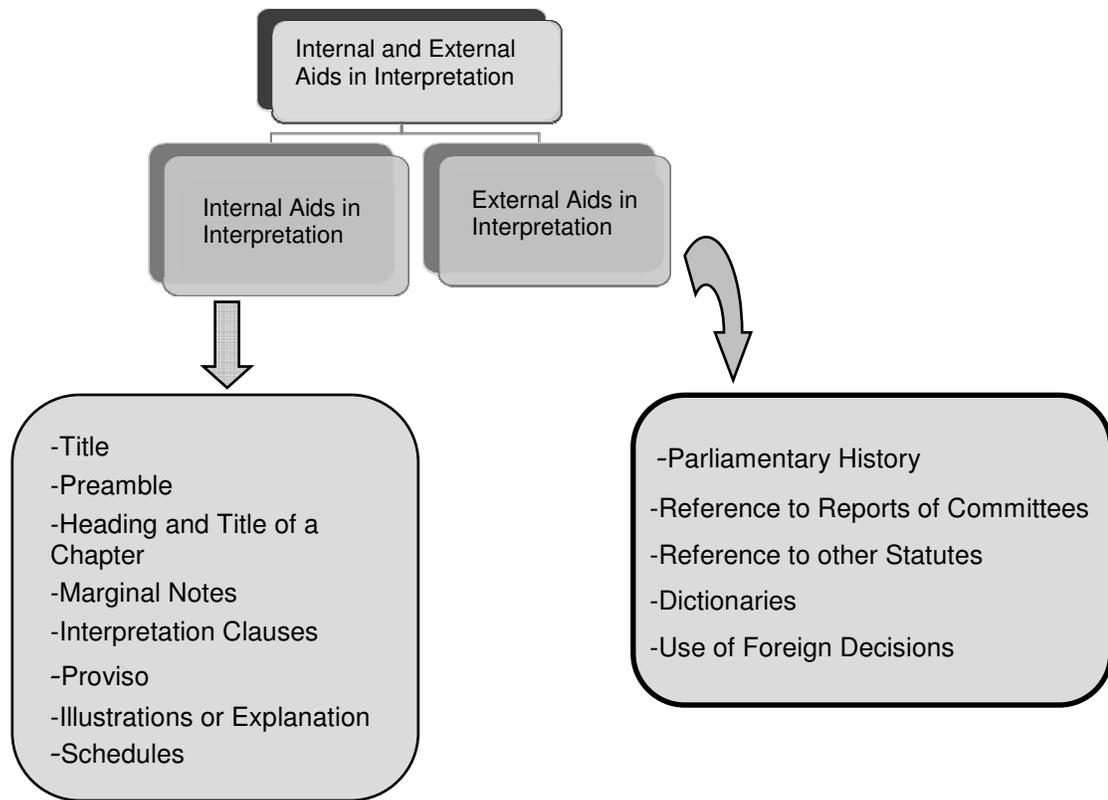
- (a) that the words in a statute are used precisely and not loosely.
- (b) that *vested rights*, i.e., rights which a person possessed at the time the statute was passed, *are not taken away without express words, or necessary implication or without compensation*.
- (c) that "*mens rea*", i.e., *guilty mind is required for a criminal act*. There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent.

The general rule applicable to criminal cases is "*actus non facit reum nisi mens sit rea*" (*The act itself does not constitute guilt unless done with a guilty intent*).

- (d) that the *state is not affected* by a statute unless it is expressly mentioned as being so affected.
- (e) that a statute *is not intended to be inconsistent with the principles of International Law*. Although the judges cannot declare a statute void as being repugnant to International Law, yet if two possible alternatives present themselves, the judges will choose that which is not at variance with it.
- (f) that the *legislature knows* the state of the law.

- (g) that the *legislature does not make any alteration* in the existing law unless by express enactment.
- (h) that the legislature *knows the practice of the executive and the judiciary*.
- (i) *legislature confers powers necessary to carry out duties imposed by it*.
- (j) that the *legislature does not make mistake*. The Court will not even alter an obvious one, unless it be to correct faulty language where the intention is clear.
- (jj) *the law compels no man to do that which is futile or fruitless*.
- (k) *legal fictions* may be said to be statements or suppositions which are known, to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome, and substantial justice secured. It is a well settled rule of interpretation that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.
- (l) where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and *vice versa*, the *delegation of powers takes with it the duties*.
- (m) *the doctrine of natural justice* is really a doctrine for the interpretation of statutes, under which the Court will presume that the legislature while granting a drastic power must intend that it should be fairly exercised.

INTERNAL AND EXTERNAL AIDS IN INTERPRETATION



In coming to a determination as to the meaning of a particular Act, it is permissible to consider two points, namely, (1) the external evidence derived from extraneous circumstances, such as, previous legislation and decided cases etc., and (2) the internal evidence derived from the Act itself.

Internal Aids in Interpretation

The following may be taken into account while interpreting a statute:

Title

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

While dealing with the Supreme Court Advocates (Practice in High Court) Act, 1951 bearing a full title as “An Act to authorise Advocates of the Supreme Court to practice as of right in any High Court”, S.R. Das, J. observed: “One cannot but be impressed at once with the wording of the full title of the Act. Although there are observations in earlier English Cases that the title is not a part of the statute and is, therefore, to be excluded from consideration in construing the statutes. It is now a settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of an enactment.

Preamble

The true place of a preamble in a statute was at one time, the subject of conflicting decisions. In *Mills v. Wilkins*, (1794) 6 Mad. 62, Lord Hold said: “the preamble of a statute is not part thereof, but contains generally the motives or inducement thereof”. On the other hand, it was said that “the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischief it was intended to remedy”. The modern rule lies between these two extremes and is that where the enacting part is explicit and unambiguous the preamble cannot be resorted to, control, qualify or restrict it, but where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it (*Raj Mal v. Harnam Singh*, (1928) 9 Lah. 260). In *Powell v. Kempton Park Race Course Co.*, (1899) AC 143, 157, Lord Halsbury said: “Two propositions are quite clear — One that a preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment”. This rule has been applied to Indian statutes also by the Privy Council in *Secretary of State v. Maharaja Bobbili*, (1920) 43 Mad. 529, and by the Courts in India in a number of cases (See for example, *Burrakur Coal Co. v. Union of India*, AIR 1961 SC 154. Referring to the cases in *Re. Kerala Education Bill*, AIR 1958 SC 956 and *Bishambar Singh v. State of Orissa*, AIR 1954 SC 139, the Allahabad High Court has held in *Kashi Prasad v. State*, AIR 1967 All. 173, that even though the preamble cannot be used to defeat the enacting clauses of a statute, it has been treated to be a key for the interpretation of the statute.

Supreme Court in *Kamalpara Kochunni v. State of Madras*, AIR 1960 SC 1080, pointed out that the preamble may be legitimately consulted in case any ambiguity arises in the construction of an Act and it may be useful to fix the meaning of words used so as to keep the effect of the statute within its real scope.

Heading and Title of a Chapter

In different parts of an Act, there is generally found a series or class of enactments applicable to some special object, and such sections are in many instances, preceded by a heading. It is now settled that the

headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the headings. A “heading”, according to one view “is to be regarded as giving the key to the interpretation of clauses ranged under it, unless the wording is inconsistent with such interpretation; and so that headings, might be treated “as preambles to the provisions following them”. But according to the other view, resort to the heading can only be taken when the enacting words are ambiguous. So Lord *Goddard, C.J.* expressed himself as: However, the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the sections where there cannot be any doubt as to the ordinary meaning of the words”. Similarly, it was said by Patanjali Shastri, J.: “Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment”. In this regard, the Madhya Pradesh High Court in *Suresh Kumar v. Town Improvement Trust*, AIR 1975 MP 189, has held: “Headings or titles prefixed to sections or group of sections may be referred to as to construction of doubtful expressions; but the title of a chapter cannot be used to restrict the plain terms of an enactment”.

The Supreme Court observed that “the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or the sub-heading may be referred to as an aid for construing the provision but even in such a case aid could not be used for cutting down the wide application of the clear words used in the provision” (*Frick India Ltd. v. Union of India*, AIR 1990 SC 689).

Marginal Notes

In England, the disposition of the Court is to disregard the marginal notes. In our country the Courts have entertained different views. Although opinion is not uniform, the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section.

“There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament” (*Balraj Kumar v. Jagatpal Singh*, 26 All. 393). Patanjali Shastri, J., after referring to the above case with approval observed: “Marginal notes in an Indian statute, as in an Act of Parliament cannot be referred to for the purpose of construing the Statute” (*C.I.T. v. Anand Bhai Umar Bhai*, A.I.R. 1950 S.C. 134). At any rate, there can be no justification for restricting the section by the marginal note, and the marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear and unambiguous (*Chandraji Rao v. Income-tax Commissioner*, A.I.R. 1970 S.C. 158).

The Privy Council in *Balraj Kumar v. Jagatpal Singh*, (1904) 26 All. 393, has held that the marginal notes to the sections are not to be referred to for the purpose of construction. The Supreme Court in *Western India Theatres Ltd. v. Municipal Corporation of Poona*, (1959) S.C.J. 390, has also held, that a marginal note cannot be invoked for construction where the meaning is clear.

Marginal notes appended to the Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore, they have been made use of in consulting the Articles, e.g. Article 286, as furnishing prima facie, “some clue as to the meaning and purpose of the Article”.

When reference to marginal note is relevant? The Supreme Court has held that the marginal note although

may not be relevant for rendition of decisions in all types of cases but where the main provision is sought to be interpreted differently, reference to marginal note would be permissible in law. [*Sarbajit Rick Singh v. Union of India* (2008) 2 SCC 417; See also *Dewan Singh v. Rajendra Prasad* (2007) 1 Scale 32].

Interpretation Clauses

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

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to ‘mean’ such and such, the definition is *prima facie* restrictive and exhaustive, whereas where the word defined is declared to ‘include’ such and such, the definition is *prima facie* extensive. Further, a definition may be in the form of ‘means and includes’, where again the definition is exhaustive. On the other hand, if a word is defined ‘to apply to and include’, the definition is understood as extensive. (See *Balkrishan v. M. Bhai* AIR 1999 MP 86)

A definition section may also be worded in the form ‘so deemed to include’ which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within the word defined which according to ordinary meaning is not included within it.

A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. In such a case limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within the inclusive definition.

The definition section may itself be ambiguous and may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or a phrase which would otherwise be vague and uncertain but not to contradict or supplement it altogether.

When a word has been defined in the interpretation clause, *prima facie* that definition governs whenever that word is used in the body of the statute.

When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language, the provision and the object intended to be served thereby.

Proviso

“When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of proviso”. In the words of Lord Macmillan: “The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to the case”.

As stated by Hidayatullah, J. : “As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule”.

A distinction is said to exist between the provisions worded as ‘proviso’, ‘exception’ or ‘saving clause’. ‘Exception’ is intended to restrain the enacting clause to particular cases; ‘proviso’ is used to remove special

cases from the general enactment and provide for them specially; and 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

Illustrations or Explanation

"Illustrations attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature. An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. But illustrations cannot have the effect of modifying the language of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment. The meaning to be given to an 'explanation' must depend upon its terms, and 'no theory of its purpose can be entertained unless it is to be inferred from the language used" (*Lalla Ballanmal v. Ahmad Shah*, 1918 P.C. 249).

An explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an explanation may have been added *ex abundanti cautela* to allay groundless apprehension.

Schedules

The schedules form a part of the statute and must be read together with it for all purposes of construction. But expression in the schedule cannot control or prevail against the express enactment (*Allen v. Flicker*, 1989, 10 A and F 6.40).

In *Ramchand Textile v. Sales Tax Officer*, A.I.R. 1961, All. 24, the Allahabad High Court has held that, if there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

There are two principles or rules of interpretation which ought to be applied to the combination of an Act and its schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then the Act and the schedule must be read as if the schedule were operating for that purpose only. If the language of a clause in the schedule can be satisfied without extending it beyond for a certain purpose, in spite of that, if the language of the schedule has in its words and terms that go clearly outside the purpose, the effect must be given by them and they must not be treated as limited by the heading of the part of the schedule or by the purpose mentioned in the Act for which the schedule is *prima facie* to be used. One cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act.

Whether a particular requirement prescribed by a form is mandatory or directory may have to be decided in each case having regard to the purpose or object of the requirement and its interrelation with other enacting provisions of the statute; and it is difficult to lay down any uniform rule. Where forms prescribed under the rules become part of rules and, the Act confers an authority prescribed by rules to frame particulars of an application form, such authority may exercise the power to prescribe a particular form of application.

The statement of objects and reasons as well as the 'notes on clauses of the Bill relating to any particular legislation may be relied upon for construing any of its provisions where the clauses have been adopted by the Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original Bill and it will be unsafe to attach undue importance to the statement of objects and reasons or notes on clauses.

The Courts have only to enquire, what has the legislature thought fit to enact?

Regarding the reference to the statement of objects and reasons, it is a settled law that it can legitimately be referred to for a correct appreciation of:

- (1) what was the law before the disputed Act was passed;
- (2) what was the mischief or defect for which the law had not provided;
- (3) what remedy the legislature has intended; and
- (4) the reasons for the statute.

(b) External Aids in Interpretation

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

Parliamentary History

The Supreme Court, enunciated the rule of 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.

It has already been noticed that the Court is entitled to take into account “such external or historical facts as may be necessary to understand the subject-matter of the statute”, or to have regard to “the surrounding circumstances” which existed at the time of passing of the statute. Like any other external aid, the inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself.

Reference to Reports of Committees

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

When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision (*Davis v. Johnson* (1978) 1 All. E.R. 1132. But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

Present trends in the European Economic Community Countries and the European Court, however, is to interpret treaties, conventions, statutes, etc. by reference to *travaux preparatoires*, that is, all preparatory records such as reports and other historical material.

Reference to other Statutes

It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in *pari materia*, i.e. statutes dealing with the same subject matter or forming part of the same system. *Viscount Simonds* conceived it to be a right and duty to construe every word of a statute in its context and he used the word in its widest sense including other statutes in *pari materia*.

The meaning of the phrase '*pari materia*' has been explained in an American case in the following words: "Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the words *similis*. It is used in opposition to it intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. When the two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia*."

It is a well accepted legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and subjects of the Act.

Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. But the later law is entitled to weight when it comes to the problem of construction.

Generally speaking, a subsequent Act of a legislature affords no useful guide to the meaning of another Act which comes into existence before the later one was ever framed. Under special circumstances the law does, however, admit of a subsequent Act to be resorted to for this purpose but the conditions, under which the later Act may be resorted to for the interpretation of the earlier Act are strict. Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings.

Although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at the repealed Act in *pari materia* on a question of construction.

The regulations themselves cannot alter or vary the meaning of the words of a statute, but they may be looked at as being an interpretation placed by the appropriate Government department on the words of the statute. Though the regulations cannot control construction of the Act, yet they may be looked at, to assist in the interpretation of the Act and may be referred to as working out in detail the provisions of the Act consistently with their terms.

Dictionaries

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word, regard must always be had to the context as it is a fundamental rule that "*the meaning of words and expressions used in an Act must take their colour from the context in which they appear*". Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers". As stated by *Krishna Aiyar, J.* "Dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically the definition clause furnish a different denotation". Further, words and expressions at times have a 'technical' or a 'legal meaning' and in that case, they are

understood in that sense. Again, judicial decisions expounding the meaning of words in construing statutes in *pari materia* will have more weight than the meaning furnished by dictionaries.

Use of Foreign Decisions

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

LESSON ROUND-UP

- A statute normally denotes the Act enacted by the legislature. The object of interpretation in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.
- The General Principles of Interpretation are Primary Rules and other Rules of Interpretation.
- The primary rules are:
 - Literal Construction
 - The Mischief Rule or Heydon's Rule
 - Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat
 - Rule of Harmonious Construction
 - Rule of Ejusdem Generis
- Other Rules of Interpretation are:
 - Expressio Unis Est Exclusio Alterius
 - Contemporanea Expositio Est Optima Et Fortissima in Lege
 - The 'Noscitura Sociis'
 - Strict and Liberal Construction
 - Presumptions
- Internal Aids in Interpretation are: Title; Preamble; Heading and Title of a Chapter; Marginal Notes; Interpretation Clauses; Proviso; Illustrations or Explanations; and Schedules.
- External Aids in Interpretation: Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. There are: Parliamentary History; Reference to Reports of Committees; Reference to other Statutes; Dictionaries and Use of Foreign Decisions.

SELF-TEST QUESTIONS

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

1. Discuss the need and object for interpretation of statutes.
2. Write notes on the following indicating their importance as an aid to interpretation of statutes:

Lesson 4

General Clauses Act 1897

LESSON OUTLINE

- Learning Objective
- Introduction
- General rule of Construction
- Statutory Provision of Rule of Construction
- Judicial Stand on Rule of Construction
- Kinds of Rule of Construction and Interpretation
- Retrospective Amendments
- Power and Functionalities under the Act
- Understanding Citation of Cases
- Lesson Round up
- Self-Test Questions

LEARNING OBJECTIVES

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

The General Clauses Act, 1897 contains 'definitions' of some words and also some general principles of interpretation.

The General Clauses Act is very operational in the absence of clear definition in the specific enactments and in the construction or interpretation of statute. The Act gives a clear suggestion for the conflicting provisions and differentiates the legislation according to the commencement and enforcement to avoid uncertainty.

The complexity of modern legislation demands a clear understanding of the principles of construction applicable to it. Therefore, it is imperative that one understands the facts and facets of General Clauses Act, 1897. Hence this Lesson discusses the principle of interpretation and noteworthy Provisions of General Clauses Act.

INTRODUCTION

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

A supplementary General Clauses Act was enacted as the General Clauses Act, 1887 which contained 10 sections. The additions made in this Act were based on the personal experience of Sir Courtenay Ilbert who drafted this Act. In 1897, the General Clauses Act of 1868 and 1887 were consolidated and a new Bill was introduced in the Council of the Governor-General on 4th February, 1897. While introducing the Bill in the Council the then Law Member pointed out that the new Bill was not intended to change the existing law. Its object was simply to shorten the language of future statutory enactments and as far as possible, to provide for uniformity of expression where there was identity of subject matter. It was convenient that the General Clauses Acts of 1868 and 1887, which were already on the statute book, should be consolidated to have Legislative Dictionary and rules for Construction of Acts in one and the same enactment.

The General Clauses Bill was referred to the Select Committee and the Select Committee submitted its report on March 4, 1897. Based on the report of the Select Committee the Bill was passed by the Council of the Governor-General and it came on the statute book as the General Clauses Act, 1897 (10 of 1897).

List of Amending Acts and Adaptation Orders

1. The Amending Act, 1903 (1 of 1903)
2. Act 10 of 1914
3. Act 17 of 1914
4. Act 24 of 1917
5. Act 18 of 1919
6. Act 31 of 1920
7. Act 11 of 192
8. Act 18 of 1928
9. Act 19 of 1936
10. The Adaptation of Indian Laws Order, 1937
11. The Indian (Adaptation of Existing Indian Laws) Order, 1947
12. The Adaptation of Laws Order, 1950
13. The Adaptation of Laws (Amendment) Order, 1950
14. The Adaptation of Laws (No.1) Order, 1956

The General Clauses Act 1897 belongs to the class of Acts which may be called as interpretation Acts. An interpretation Act lays down the basic rules as to how courts should interpret the provisions of an Act of Parliament. It also defines certain words or expressions so that there is no unnecessary repetition of definition of those words in other Acts. In other words, an Interpretation Act provides a standard set of

definitions or extended definitions of words and expressions commonly used in legislation (and is thus an Act of wide application). It also provides a set of rules which regulate certain aspects of operation of other enactments. In addition there are other provisions which are not merely definitions or rules of construction but substantive rules of law.

Key Definitions

Section 3 of the General Clause Act provides that in this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

(1) "Abet", with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code (45 of 1860);

(2) "Act", used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions;

(3) "Affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing;

(4) "Barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland;

(5) "British India" shall mean, as respects the period before the commencement of Part III of Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor General of India or through any Governor or Officer subordinate to the Governor General of India, and as respects any period after that date and before the date of establishment of the Dominion of India means all territories for the time being comprised within the Governor's Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Bearer;

(6) "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of those dominions are under both a Central and a Local Legislature, all part under the Central Legislature shall, for the purposes of this definition, be deemed to be one British possession;

(7) "Central Act" shall mean an Act of Parliament and shall include

- (a) An Act of the Dominion legislature or of the Indian Legislature passed before the commencement of the Constitution, and
- (b) An Act made before such commencement by the Governor General in Council or the Governor General, acting in a legislative capacity;

(8) "Central Government" shall,-

- (a) In relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor General in Council, as the case may be; and shall include,-
 - (i) In relation to functions entrusted under sub-section (1) of Section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and
 - (ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the

said Act; and

- (b) In relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include,-
 - (i) in relation to Functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;
 - (ii) In relation to the administration of a Part C State before the Commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-governor or the Government of a neighboring State or other authority acting within the scope of the authority acting within the authority given to him or it under Article 239 or Article 243 of the Constitution, as the case may be; (and)
 - (iii) In relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution;
- (9) "Chapter" shall mean a Chapter of the Act or Regulation in which the word occurs;
- (10) "Chief Controlling Revenue Authority" or "Chief Revenue Authority" shall mean
 - (a) In a State where there is a Board of Revenue, that Board;
 - (b) In a State where there is a Revenue Commissioner, that Commissioner;
 - (c) In Punjab, the Financial Commissioner; and
 - (d) elsewhere, such authority as, in relation to matters enumerated in List I in the Seventh Schedule to the Constitution, the Central Government, and in relation to other matters, the state Government, may by notification in the Official Gazette, appoint;
- (11) "Collector" shall mean, in a Presidency-town, the Collector of Calcutta, Madras or Bombay, as the case may be, and elsewhere the chief officer-in-charge of the revenue-administration of a district;
- (12) Colony
 - (a) In any Central Act passed after the commencement of Part III of the Government of India Act, 1935, shall mean any part of His Majesty's dominions exclusive of the British Islands, the Dominions of India and Pakistan (and before the establishment of those Dominions, British India), any Dominions as defined in the Statute of Westminster, 1931, any Province or State forming part of any of the said Dominions, and British Burma; and
 - (b) In any Central Act passed before the commencement of Part III of the said Act, mean any part of His Majesty's dominions exclusive of the British Islands and of British India and in either case where parts of those dominions are under both a Central and Local Legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemed to be one colony.
- (13) "Commencement" used with reference to an Act or regulation, shall mean the day on which the Act or regulation comes into force;
- (14) "Commissioner" shall mean the chief officer-in-charge of the revenue administration of a division;
- (15) "Constitution" shall mean the Constitution of India;
- (16) "Consular officer" shall include consul-general, consul, vice-consul, consular agent, pro-consul and any

person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent;

(17) "District Judge" shall mean the Judge of a principal civil court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction;

(18) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter;

(19) "Enactment" shall include a regulation (as hereinafter defined) and any regulation of the Bengal, Madras or Bombay Code, and shall also include any provision contained in any Act or in any such regulation as aforesaid;

(20) "Father", in the case of any one whose personal law permits adoption, shall include an adoptive father;

(21) "Financial year" shall mean the year commencing on the first day of April;

(22) A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not;

(23) "Government" or "the Government" shall include both the Central Government and any State Government;

(24) "Government securities" shall mean securities of the Central Government or of any State Government, but in any Act or regulation made before the commencement of the Constitution shall not include securities of the government of any Part B State;

(25) "High Court", used with reference to civil proceedings, shall mean the highest civil court of appeal (not including the Supreme Court) in the part of India in which the Act or regulation containing the expression operates;

(26) "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

(27) "Imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code;

(28) "India" shall mean-

- (a) as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;
- (b) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and
- (c) as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India;

(29) "Indian law" shall mean any Act, ordinance, regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;

(30) "Indian State" shall mean any territory which the Central Government recognized as such a State before the commencement of the Constitution, whether described as a State, an Estate, a Jagir or otherwise;

(31) "local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government with the control or management of a municipal or local fund;

(32) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force;

(33) "Master", used with reference to a ship, shall mean, any person (except a pilot or harbor-master) having for the time being control or charge of the ship;

(34) "merged territories" shall mean the territories which by virtue of an order made under section 290A of the Government of India Act, 1935, were immediately before the commencement of the Constitution being administered as if they formed part of a Governor's Province or as if they were a Chief Commissioner's Province;

(35) "Month" shall mean a month reckoned according to the British calendar;

(36) "Movable property" shall mean property of every description, except immovable property;

(37) "Oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing;

(38) "Offence" shall mean any act or omission made punishable by any law for the time being in force;

(39) "Official Gazette" or "Gazette" shall mean the Gazette of India or the Official Gazette of a State;

(40) "Part" shall mean a part of the Act or regulation in which the word occurs;

(41) "Part A State" shall mean a State for the time being specified in Part A of Schedule I to the Constitution, as in force before the Constitution (Seventh Amendment) Act, 1956, "Part B State" shall mean a State for the time being specified in Part B of that Schedule and "Part C State" shall mean a State for the time being specified in Part C of that Schedule or a territory for the time being administered by the President under the provisions of article 243 of the Constitution;

(42) "Person" shall include any company or association or body of individuals, whether incorporated or not;

(43) "Political Agent" shall mean,-

- (a) in relation to any territory outside India, the Principal Officer, by whatever name called, representing the Central Government in such territory; and
- (b) in relation to any territory within India to which the Act or regulation containing the expression does not extend, any officer appointed by the Central Government to exercise all or any of the powers of a Political Agent under that Act or regulation;

(44) "Presidency-town" shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Calcutta, Madras or Bombay, as the case may be;

(45) "Province" shall mean a Presidency, a Governor's Province, a Lieutenant Governor's Province or a Chief Commissioner's Province;

(46) "Provincial Act" shall mean an Act made by the Governor in Council, Lieutenant Governor in Council or

Chief Commissioner in Council of a Province under any of the Indian Councils Acts or the Government of India Act, 1915, or an Act made by the Local Legislature or the Governor of a Province under the Government of India Act, or an Act made by the Provincial Legislature or Governor of a Province or the Coorg Legislative Council under the Government of India Act, 1935;

(47) "Provincial Government" shall mean, as respects anything done before the commencement of the Constitution, the authority or person authorized at the relevant date to administer executive government in the Province in question;

(48) "Public nuisance" shall mean a public nuisance as defined in the Indian Penal Code;

(49) "Registered", used with reference to a document, shall mean registered in 6[India] under the law for the time being in force for the registration of documents;

(50) "Regulation" shall mean a Regulation made by the President under article 240 of the Constitution and shall include a Regulation made by the President under article 243 thereof and a regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, or the Government of India Act, 1935;

(51) "Rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;

(52) "Schedule" shall mean a schedule to the Act or Regulation in which the word occurs;

(53) "Scheduled District" shall mean a "Scheduled District" as defined in the Scheduled District Act, 1874;

(54) "Section" shall mean a section of the Act or Regulation in which the word occurs;

(55) "Ship" shall include every description of vessel used in navigation not exclusively propelled by oars;

(56) "Sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions;

(57) "Son", in the case of any one whose personal law permits adoption, shall include an adopted son;

(58) "State"-

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and

(b) as respects any period after such commencement, shall mean a State specified in Schedule I to the Constitution and shall include a Union Territory;

(59) "State Act" shall mean an Act passed by the Legislature of a State established or continued by the Constitution;

(60) "State Government"-

(a) As respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorized at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government;

(b) As respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;

- (c) As respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under Article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article;

(61) "Sub-section" shall mean a sub-section of the section in which the word occurs;

(62) "Swear", with its grammatical variations and cognate expressions, shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing;

(62A) "Union Territory" shall mean any Union Territory specified in Schedule I to the Constitution and shall include any other territory comprised within the territory of India but not specified in that Schedule;

(63) "Vessel" shall include any ship or boat or any other description of vessel used in navigation;

(64) "Will" shall include a codicil and every writing making a voluntary posthumous disposition of property;

(65) Expression referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form; and

(66) "Year" shall mean a year reckoned according to the British calendar.

Application of foregoing definitions to previous enactment

(1) The definitions in section 3 of the following words and expressions, that is to say, "affidavit", "barrister", "District Judge", "father", "immovable property", "imprisonment", "Magistrate", "month", "movable property", "oath", "person", "section", "son", "swear", "will", and "year" apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after the third day of January, 1868, and to all regulations made on or after the fourteenth day of January, 1887.

(2) The definitions in the said section of the following words and expressions, that is to say, "abet", "chapter", "commencement", "financial year", "local authority", "master", "offence", "part", "public nuisance", "registered", "schedule", "ship", "sign", "sub-section" and "writing" apply also, unless there is anything repugnant in the subject or context, to all Central Acts and Regulations made on or after the fourteenth day of January, 1887. [Section 4]

Application of certain definitions to Indian laws

(1) The definitions in section 3 of the expressions "British India", "Central Act", "Central Government", "Chief Controlling Revenue Authority", "Chief Revenue Authority", "Constitution", "Gazette", "Government", "Government securities", "High Court", "India", "Indian law", "Indian State", "merged territories", "Official Gazette", "Part A State", "Part B State", "Part C State", "Provincial Government", "State", and "State Government" shall apply, unless there is anything repugnant in the subject or context, to all Indian laws.

(2) In any Indian law, references, by whatever form of words, to revenues of the Central Government or to any State Government shall, on and from the first day of April, 1950, be construed as references to the Consolidated Fund of India or the Consolidated Fund of the State, as the case may be.[Section 4A]

General Rule of Construction

Rule of Construction is a rule used for interpreting legal instruments, especially contracts and statutes. Very

few states have codified the rules of construction. Most states treat the rules as mere customs not having the force of law.

Judges usually makes a construction of an unclear term in a document at issue in a case that involves a dispute as to its legal significance. The judge examines the circumstances surrounding the provision, laws, other writings, and verbal agreements dealing with the same subject matter, and the probable purpose of the unclear phrase in order to conclude the proper meaning of such words. Once the judge has done so, the court will enforce the words as construed. However, for language that is plain and clear, there cannot be a construction.

When ambiguous language is given its exact and technical meaning, and no other equitable considerations or reasonable implications are made, there has been a strict or literal construction of the unclear term.

A liberal or equitable construction permits a term to be reasonably and fairly evaluated so as to implement the object and purpose for which the document is designed. This does not mean that the words will be strained beyond their natural or customary meanings.

A rule of construction is a principle that either governs the effect of the ascertained intention of a document or agreement containing an ambiguous term or establishes what a court should do if the intention is neither express nor implied. A regular pattern of decisions concerning the application of a particular provision of a statute is a rule of construction that governs how the text is to be applied in similar cases.

Example

Contra proferentem and ***Ejusdem Generic*** are two examples of rules of construction. According to *Contra Proferentem Rule*, if a clause in a contract appears to be ambiguous, it should be interpreted against the interests of the person who insisted that the clause be included. Likewise *Ejusdem Generis Rule* states that where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

The constitutionality of an ambiguous statute is a Question of Law and a matter of construction within the province of the court. The meaning of the language of the statute must be determined in light of its objectives, purposes, and practical effect as a whole. If a statute is so ambiguous that a judge cannot make a reasonable construction of its disputed provisions, and a reasonable person could not determine from reading it what the law orders or prohibits, it is void for vagueness because it violates the guarantee of Due Process of Law.

Some states have codified terms that had in the past been subject to repeated judicial construction. The need for court proceedings to determine the real meaning of some terms has been eliminated by enactment of statutes that give specific meanings—such as specifying that "calendar day" means a twenty-four hour period starting on midnight of one date and ending midnight of the next day.

Judicial Stand on Rule of Construction

It was held in *The Secretary of State in Council of India v. The Bombay Landing and Shipping Company Limited* (1868) 5 BHL that in a winding up proceedings the Crown was entitled to the same precedence in regard to the debts due to it in England. In *Ganpat Putava v. Collector of Kanara* that the Crown was entitled to the same precedence in regard to fees payable to it by a pauper plaintiff. In *The Secretary of State for India v. Mathura Bhai* it was held that section 26 of the Limitation Act, 1877 being a branch of substantive law did not affect the Crown's right. In *Motilal Virchand v. The Collector of Ahmedabad* (1907) ilr 31 Bom 86 it

was decided that the Mamlatdars' Courts could not entertain and decide a suit to which the collector was a party. In *The Government of Bombay v. Esufali Salebhai* the decision was that the Crown had a prerogative right to intervene and claim compensation in Land Acquisition proceedings. In *Hiranand Khushiram v. Secretary of State*, that the Crown was not bound by the provision of the Bombay Municipality Act. In the *Secretary of State for India v. The Municipal Corporation of Bombay* that the Crown was subject to a charge under Section 212 of the Bombay City Municipal Act.

A careful study of these decisions discloses that all of them related to particular prerogatives of the Crown and that the Court held either that the prerogative of the Crown was taken away by the statute or not, having regard to the construction placed by it on the relevant statute. It is true that in some of the decisions the said rule of construction was noticed, but as the decisions turned upon the construction of the relevant provisions, it could not be said that the said rule had been accepted as an inflexible rule of construction by the Bombay High Court.

In one of the judgments even the applicability of the rule of construction was doubted. A learned thesis on the subject is found in the judgment of *Bhashyam Ayyangar, J.*, in *Bell v. The Municipal Commissioners for the City of Madras (1902) ILR 25 Mad 457*. The Superintendent of the Government Gun-carriage Factory, Madras, having brought timber belonging to the Government into the City of Madras without taking out a license and paying the license fees prescribed by Section 341 of the City of Madras Municipal Act, was prosecuted. There was no mention of Government in the said section as constructed by the Division Bench of the Madras High Court.

To sum up, some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the Indian Law. That apart, in the mofussil, some principles of Common Law were invoked by courts on the ground of justice, equity and good conscience. It is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof.

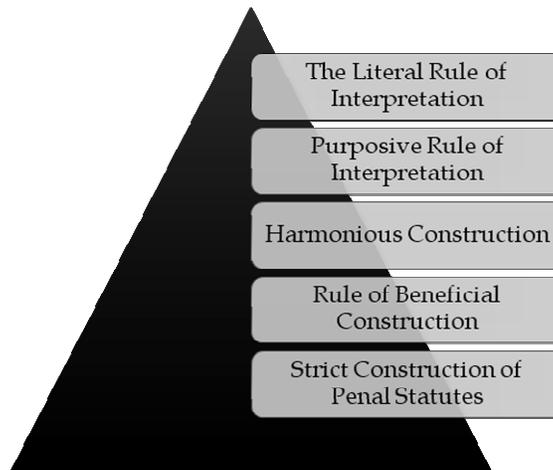
The aforesaid rule of construction is only a canon of interpretation; it is not a rule of substantive law. Though it was noticed in some of the judgments of the Bombay High Court, the decisions therein mainly turned upon the relevant statutory provisions. One decision even questioned its correctness. There is nothing to show that it was applied in other parts of the country on the ground of justice, good conscience and equity.

The Privy Council gave its approval to the rule mainly on the concession of Advocates and that decision related to Bombay City. It is, therefore, clear that the said rule of construction was not accepted as a rule of construction throughout India and even in the Presidency towns it was not regarded as inflexible rule of construction. In short it has not become a law of the land.

Let us now proceed on the assumption that it has been accepted as a rule of construction throughout India. This leads us to the question whether the said rule of construction is the law of the land after the Constitution came into force. Under Article 372, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force, therein until altered or repealed or amended by a competent Legislature or other competent authority.

With all the above discussion, one could conclude that In the rule of construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

Kinds of Rule of Construction and Interpretation



The interpretation of laws is confined to courts of law. In course of time, courts have evolved a large and elaborate body of rules to guide them in construing or interpreting laws. Most of them have been collected in books on interpretation of statutes and the draftsman would be well advised to keep these in mind in drafting Acts. Some Interpretation Acts, like the Canadian one, lay down that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. The object of all such rules or principles as aforesaid broadly speaking, is to ascertain the true intent, meaning and spirit of every statute. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that unattainable.

1. The Literal Rule of Interpretation:

The primary and important rule of interpretation is called the Literal Rule, laid down in the *Sussex Peerage Case*. This rule stated that: "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case; best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer is "a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress".

2. Purposive Rule of Interpretation

In Halsbury's *Laws of England*, it is stated: "Parliament intends that an 'enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief. The doctrine originates in *Haydon's case* where the Barons of the Exchequer resolved 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:

- what was the common law before the making of the Act;
- what was the mischief and defect for which the common law did not provide; what remedy Parliament has resolved and appointed to cure the disease of the commonwealth; and
- the true reason of the remedy, and then the office of all the judges is always to make such construction as shall –
 - suppress the mischief and advance the remedy; and
 - suppress subtle inventions and evasions for the continuance of the mischief pro private-commode (for private benefit); and
 - Add force and life to the cure and remedy according to the true intent of the makers of the Act *pro publico* (for the public good).”

3. Harmonious Construction

The principle of harmonious interpretation is similar to the idea of broad or purposive approach. The key to this method of constitutional interpretation is that provisions of the Constitution should be harmoniously interpreted. As per Kelly: Constitutional provisions should not be construed in isolation from all other parts of the Constitution, but should be construed as to harmonize with those other parts. A provision of the constitution must be construed and considered as part of the Constitution and it should be given a meaning and an application which does not lead to conflict with other Articles and which confirms with the Constitution's general scheme. When there are two provisions in a statute, which are in apparent conflict with each other, they should be interpreted such that effect can be given to both and that construction which renders either of them inoperative and useless should not be adopted except in the last resort.

This principle is illustrated in the case of *Raj Krishna v. Binod AIR 1954 SC 202*. In this case, two provisions of Representation of People Act, 1951, which were in apparent conflict, were brought forth. Section 33(2) says that a Government Servant can nominate or second a person in election but section 123(8) says that a Government Servant cannot assist any candidate in election except by casting his vote. The Supreme Court observed that both these provisions should be harmoniously interpreted and held that a Government Servant was entitled to nominate or second a candidate seeking election in State Legislative assembly. This harmony can only be achieved if Section 123(8) is interpreted as giving the Government servant the right to vote as well as to nominate or second a candidate and forbidding him to assist the candidate in any other manner.

4. Rule of Beneficial Construction:

Beneficial construction involves giving the widest meaning possible to the statutes. When there are two or more possible ways of interpreting a section or a word, the meaning which gives relief and protects the benefits which are purported to be given by the legislation, should be chosen. A beneficial statute has to be construed in its correct perspective so as to fructify the legislative intent. Although beneficial legislation does receive liberal interpretation, the courts try to remain within the scheme and not extend the benefit to those not covered by the scheme. It is also true that once the provision envisages the conferment of benefit limited in point of time and subject to the fulfillment of certain conditions, their non-compliance will have the effect of nullifying the benefit. There should be due stress and emphasis to Directive Principles of State Policy and any international convention on the subject.

There is no set principle of construction that a beneficial legislation should always be retrospectively operated although such legislation is either expressly or by necessary intendment not made retrospective. Further, the rule of interpretation can only be resorted to without doing any violence to the language of the statute. In case of any exception when the implementation of the beneficent act is restricted the Court would construe it narrowly so as not to unduly expand the area or scope of exception. The liberal construction can

only flow from the language of the act and there cannot be placing of unnatural interpretation on the words contained in the enactment. Also, beneficial construction does not permit rising of any presumption that protection of widest amplitude must be deemed to have been conferred on those for whose benefit the legislation may have been enacted.

Beneficial Construction of statutes have enormously played an important role in the development and beneficial interpretation of socio – economic legislations and have always encouraged the Indian legislators to make more laws in favor of the backward class of people in India.

5. Strict Construction of Penal Statutes

The general rule for the construction of a penal statute is that it would be strictly interpreted, that is, if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes a penalty. A penal statute has to be construed narrowly in favor of the person proceeded against. This rule implies a preference for the liberty of the subject, in case of ambiguity in the language of the provision. The courts invariably follow the principle of strict construction in penal statutes. In constructing a penal Act, if a reasonable interpretation in a particular case can avoid the penalty the Court adopts that construction.

Retrospective Amendments

The General Clauses Act, 1897 was enacted on March 11, 1897 to combine and expand the General Clauses Act, 1868 and 1887. The general definitions provided under the Act are applicable to all Central Acts and Regulation where there is no definition in the Act that conflicts with the provisions of the Central Acts or regulations.

The Act explains the meaning of 'regulation' formulated by the President according to Article 240 and Article 243 of the Constitution and comprises of regulations made under the Government of India Act, 1870 or Government of India Act, 1915 or Government of India Act, 1935 by the Central Government. The 'rule' means rule made in exercise of the authority of any legislation and the regulation issued as a rule framed under the legislation.

Where legislation is not specifically mentioned to come into force on a prescribed date, it shall be implemented on the day that it receives the assent of the Governor General before the commencement of the Indian Constitution and thereafter of the President. The regulation shall come into force instantly on the ending of the day prior to its commencement unless expressly provided. Where any Central legislation or any regulation enacted after the commencement of this Act repeals any Act made or yet to be made, unless another purpose exists, the repeal shall not:

- Renew anything not enforced or prevailed during the period at which repeal is effected or;
- Affect the prior management of any legislation that is repealed or anything performed or undergone or;
- Affect any claim, privilege, responsibility or debt obtained, ensued or sustained under any legislation so repealed or;
- Affect any punishment, forfeiture or penalty sustained with regard to any offence committed as opposed to any legislation or
- Affect any inquiry, litigation or remedy with regard to such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

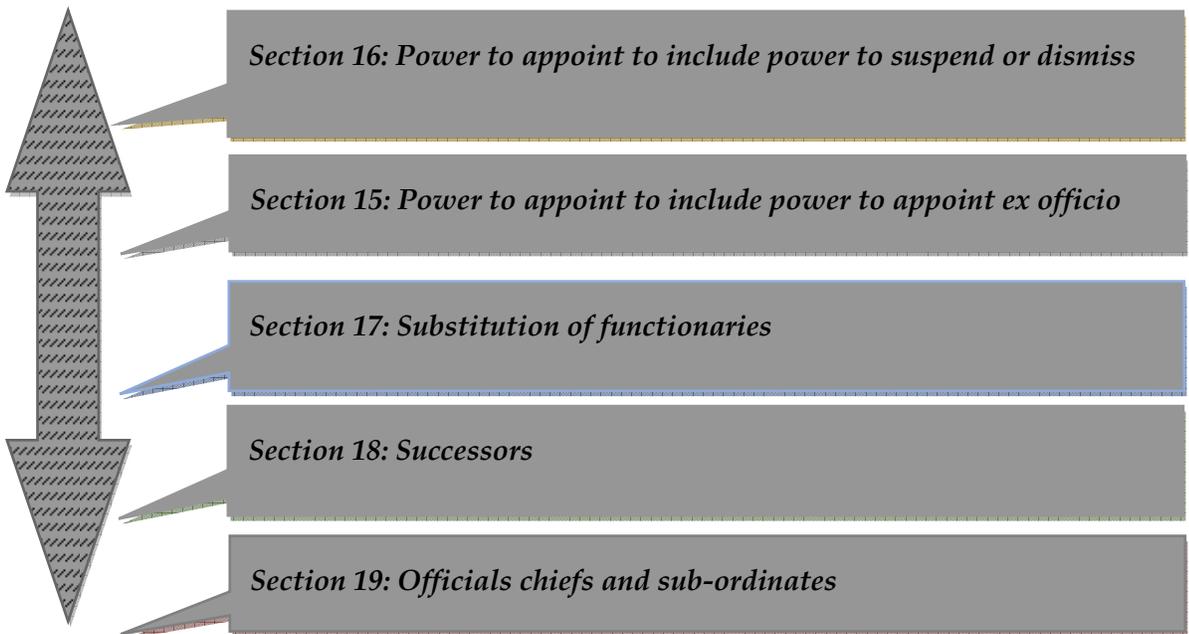
In any Central legislation or regulation framed subsequent to the enforcement of the legislation, it shall be essential to revive any legislation either entirely or partly repealed expressly to provide the purpose.

Furthermore, if the present legislation or any Central enactment or regulation made subsequent to the enactment, repeals or restructure with or without amendments of the prior legislation, then the indication in any other legislation or any other mechanism to the provision that has been repealed shall be interpreted as indication to the provision that has been re-enacted.

If any Central legislation or regulation made after the implementation of any legislation or procedure is ordered or permitted to be performed or taken in any Court or office on a particular day or within specified time, then if the Court or office is not opened on that day or last day of the specified period, the legislation or proceedings shall be deemed to be performed or taken in due time if it is performed or taken on the subsequent day afterward the Court reopens.

Powers and Functionaries

The Power and Functionaries are provided under section 14 to section 19 of the General Clause Act, 1897.



Powers conferred to be exercisable from time to time

(1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires.

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.[Section 14]

Power to appoint to include power to appoint ex officio

Where, by any Central Act or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office. [Section 15]

Power to appoint to include power to suspend or dismiss

Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. [Section 16]

Substitution of functionaries

(1) In any Central Act or Regulation, made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the function of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 17]

Successors

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 18]

Officials chiefs and sub-ordinates

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 19]

Power as to Orders, Rules etc., made under Enactments

Section 21 of the General Clause Act deals with power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.

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

LESSON ROUND-UP

- The General Clauses Act, 1897 has been enacted with the aim and objective to provide a one single statute as a composite structure in defining different provisions as regards to the interpretation of words and legal principles which would better placed to be defined for the general application for various rules and regulations
- Rule of Construction is a rule used for interpreting legal instruments, especially contracts and statutes. Very few states have codified the rules of construction. Most states treat the rules as mere customs not having the force of law.
- Section 8 of General Clauses Act, 1897 talks about the validating provision for the applicability of the Rule of Construction in the larger interest of justice at the court of law.
- Kinds of Rule of Construction and Interpretation are Literal Rule of Interpretation, Purposive Rule of

Lesson 5

Administrative Law

LESSON OUTLINE

- Learning Objectives
- Introduction
- Need for Administrative Law
- Sources of Administrative Law
- Administrative Discretion
- Judicial Control over Administrative Actions
- Principles of Natural Justice
- Liability of the Government
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

The study of Administrative law involves analysis of the institutions and legal rules through which governmental decision-making is authorized, affected, limited and reviewed.

In order to meet the growing needs of changing social, political and economic paradigm, this branch of law, i.e., Administrative Law is necessary. Administrative Law spreads into approximately every phase of modern life.

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

Study of this lesson helps the student to know how those parts of our system of governance that are neither legislatures nor courts, make decisions and what controls are applicable on such decisions.

Administrative law as the law relating to administration. It determines the organisation, power and duties of the administrative authorities.

INTRODUCTION

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

Kenneth Culp Davis, a leading American legal scholar on administrative law, defines it as the law concerning the powers and procedures of administrative agencies, including especially the law governing the judicial review of administrative action. An administrative agency, according to him, is a government authority, other than a court and other than a legislative body, which affects the rights of private parties either through adjudication or rule-making. He further adds that apart from judicial review, the manner in which public officials handle business unrelated to adjudication or rule-making is not a part of administrative law. The formulation of administrative agency in this definition is restrictive as it seeks to exclude agencies having administrative authority pure and simple and not having adjudicative or legislative functions. This definition also does not cover purely discretionary functions which may be called (administrative) of administrative agencies not falling within the category of legislative or quasi-judicial.

According to *Albert Venn Dicey*, the great British constitutional scholar, administrative law relates to that portion of a nation's legal system which determines the legal status and liabilities of all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced. Dicey's formulation focuses on one aspect of administrative law, i.e., judicial control over public officials. This definition is narrow as it leaves out of consideration many aspects of administrative law, e.g., Public Corporations would not be covered under this definition because, strictly speaking, they are not state officials.

Ivor Jennings defined administrative law as the law relating to administration. It determines the organization, powers and duties of administrative authorities. This formulation is too broad and general as it does not differentiate between administrative and constitutional law. It excludes the manner of exercise of powers and duties.

Administrative law is the by-product of ever increasing functions of the Governments. States are no longer police states, limited to maintaining internal order and protecting from external threats. These, no doubt continue to be the basic functions but a state that is limited to this traditional role will de-legitimize itself. With the rise of political consciousness, the citizens of a state are no longer satisfied with the state's provisioning of traditional services. The modern state is, therefore, striving to be a welfare state. It has taken the task to improve social and economic condition of its people. It involves undertaking a large number of complex tasks. Development produces great economic and social changes and creates challenges in the field of health, education, pollution, inequality etc. These complex problems cannot be solved except with the growth of administration. States have also taken over a number of functions, which were previously left to private enterprise. All this has led to the origin and the growth of administrative law.

Need for Administrative Law

The modern state typically has three organs- legislative, executive and judiciary. Traditionally, the legislature was tasked with the making of laws, the executive with the implementation of the laws and judiciary with the administration of justice and settlement of disputes. However, this traditional demarcation of role has been found wanting in meeting the challenges of present era. The legislature is unable to come up with the required quality and quantity of legislations because of limitations of time, the technical nature of legislation and the rigidity of their enactments. The traditional administration of justice through judiciary is technical, expensive and dilatory. The states have empowered their executive (administrative) branch to fill in the gaps

of legislature and judiciary. This has led to an all pervasive presence of administration in the life of a modern citizen. In such a context, a study of administrative law assumes great significance.

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

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

The ever-increasing administrative functions have created a vast new complex of relations between the administration and the citizen. The modern administration is present everywhere in the daily life of an individual and it has assumed a tremendous capacity to affect their rights and liberties.

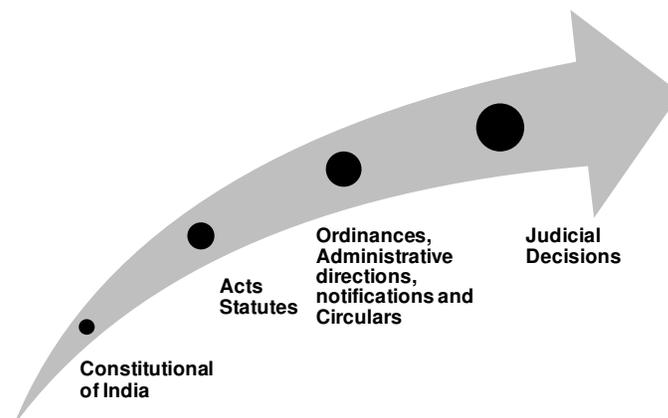
Since the whole purpose of bestowing the administration with larger powers is to ensure a better life for the people, it is necessary to keep a check on the administration, consistent with the efficiency, in such a way that it does not violate the rights of the individual. There is an age-old conflict between individual liberty and government control there must be a constant vigil to ensure that a proper balance be evolved between private interest and government which represents public interest. It is the demand of prudence that when large powers are conferred on administrative organs, effective control-mechanism be also evolved so as to ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose. It is the task of administrative law to ensure that the governmental functions are exercised according to law and legal principles and rules of reason and justice.

The goal of administrative law is to ensure that the individual is not at receiving end of state's administrative power and in cases where the individual is aggrieved by any action of the administration, he or she can get it redressed. There is no antithesis between an effective government and controlling the exercise of administrative powers. Administrative powers are exercised by thousands of officials and affect millions of people. Administrative efficiency cannot be the end-all of administrative powers and the interests of people must be at the centre of any conferment of administrative power. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state.

A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control on the exercise of administrative powers.

Sources of Administrative Law

There are four principal sources of administrative law in India:-



1. **Constitution of India:** It is the primary source of administrative law. Article 73 of the Constitution provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws. Similar powers are provided to States under Article 62. Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity. The Constitution also envisages tribunals, public sector and government liability which are important aspects of administrative law.
2. **Acts/ Statutes:** Acts passed by the central and state governments for the maintenance of peace and order, tax collection, economic and social growth empower the administrative organs to carry on various tasks necessary for it. These Acts list the responsibilities of the administration, limit their power in certain respects and provide for grievance redressal mechanism for the people affected by the administrative action.
3. **Ordinances, Administrative directions, notifications and Circulars:** Ordinances are issued when there are unforeseen developments and the legislature is not in session and therefore cannot make laws. The ordinances allow the administration to take necessary steps to deal with such developments. Administrative directions, notifications and circulars are issued by the executive in the exercise of power granted under various Acts.
4. **Judicial decisions:** Judiciary is the final arbiter in case of any dispute between various wings of government or between the citizen and the administration. In India, we have the supremacy of Constitution and the Supreme Court is vested with the authority to interpret it. The courts through their various decisions on the exercise of power by the administration, the liability of the government in case of breach of contract or tortuous acts of Governments servants lay down administrative law which guide their future conduct.

Administrative Discretion

It means the freedom of an administrative authority to choose from amongst various alternatives but with reference to rules of reason and justice and not according to personal whims. The exercise of discretion should not be arbitrary, vague and fanciful, but legal and regular.

The government cannot function without the exercise of some discretion by its officials. It is necessary because it is humanly impossible to lay down a rule for every conceivable eventuality that may arise in day-to-day affairs of the government. It is, however, equally true that discretion is prone to abuse. Therefore there needs to be a system in place to ensure that administrative discretion is exercised in the right manner.

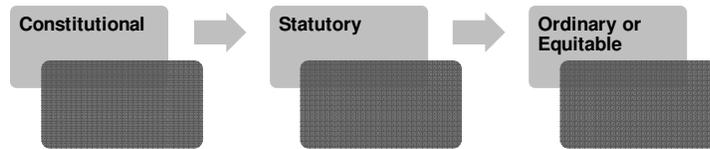
Administration has become a highly complicated job needing a good deal of flexibility apart from technical knowledge, expertise and know-how. Freedom to choose from various alternatives allows the administration to fashion its best response to various situations. If a certain rule is found to be unsuitable in practice, the administration can change, amend or abrogate it without much delay. Even if the administration is dealing with a problem on a case to case basis it can change its approach according to the exigency of situation and the demands of justice.

Judicial Control over Administrative Actions

Any country which claims to have a rule of law cannot have a government authority which has no checks on its power. Administrative organs have wide powers and their exercise of discretion can be vitiated by a number of factors. Therefore, the government must also provide for proper redressed mechanism. For India, it is of special significance because of the proclaimed objectives of Indian polity to build a socialistic pattern

of society that has led to huge proliferation of administrative agencies and processes.

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



(A) Constitutional

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

Judicial Review

The biggest check over administrative action is the power of judicial review. Judicial review is the authority of Courts to declare void the acts of the legislature and executive, if they are found in violation of provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction.

The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of authority or power conferred on the authority exercising the power. Where the act of executive or administration is found ultra virus the Constitution or the relevant Act, it is declared as such and, therefore, void. The Courts attitude appears to be stiffer in respect of discretionary powers of the executive or administrative authorities. The Court is not against the vesting of discretionary power in the executive, but it expects that there would be proper guidelines for the exercise of power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretion.

In *Mansukhlal Vithaldas Chauhan v State of Gujarat, AIR 1997 SC 3400*, the Supreme Court held that while exercising the power of judicial review it does sit as a court of appeal but merely reviews the manner in which the decision was made, particularly as the court lacks the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision which itself may

be fallible. The court is to confine itself to the question of legality. Its concern should be: 1) whether a decision making authority exceeding its power? 2) committed an error of law? 3) committed a breach of rules of natural justice? 4) reached a decision which no reasonable tribunal would have reached, or 5) abused its power?

Judicial review is exercised at two stages: (i) at the stage of delegation of discretion, and (ii) at the stage of exercise of administrative discretion.

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

Any law can be challenged on the ground that it is violative of the Constitution and therefore laws conferring administrative discretion can thus also be challenged under the Constitution. In the case of delegated legislation the Constitutional courts have often been satisfied with vague or broad statements of policy, but usually it has not been so in the cases where administrative discretion has been conferred in matters relating to fundamental rights.

The court exercise control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared *ultra vires* Article 14, Article 19 and other provisions of the Constitution.

In certain situations, the statute though does not give discretionary power to the administrative authority to take action, may still give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowing of such discretion on the ground of excessive delegation.

The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has been held violative of a fundamental right.

Administrative Discretion and Article 14

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

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

The Court in determining the question of validity of such statute examines whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of Executive to such an extent as to enable it to discriminate.

In *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75 it was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of "speedier trial" was held to be too vague, uncertain and indefinite criterion to

form the basis of a valid and reasonable classification.

Administrative Discretion and Article 19

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion.

A number of cases have come up involving the question of validity of law conferring discretion on the executive to restrict the right under Article 19(1)(b) and 19(1)(e) (the right to assemble peacefully and without arms and the right to reside and settle in any part of the territory of India). The government has conferred powers on the executive through a number of laws to extern a person from a particular area in the interest of peace and safety.

In *Dr. Ram Manohar v. State of Delhi*, AIR 1950 SC 211, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of externment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the executive on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his externment from the executive.

In *Hari v. Deputy Commissioner of Police*, AIR 1956 SC 559, the Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provision of law, which apparently appears to be a violation of the residence, was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order.

In a large number of cases, the question as to how much discretion can be conferred on the executive to control and regulate trade and business has been raised. The general principle laid down is that the power conferred on the executive should not be arbitrary, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority.

The Supreme Court in *H.R. Banthis v. Union of India*, 1979 1 SCC 166, declared a licensing provision invalid as it conferred an uncontrolled and unguided power on the executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, *inter alia*, the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand' was vague one. The expression 'suitability of the applicant and 'public interest' did not contain any objective standards or norms.

Where the Act provides some general principles to guide the exercise of discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the executive has been granted unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision of law.

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

No law can clothe administrative action with a complete finality even if the law says so, for the courts always examine the ambit and even the mode of its exercise to check its conformity with fundamental rights. The

courts in India have developed various formulations to control the exercise of administrative discretion, which can be grouped under two broad heads, as under:

1. Authority has not exercised its discretion properly- 'abuse of discretion'.
2. Authority is deemed not to have exercised its discretion at all- 'non-application of mind'.

(a) Abuse of discretion

- (i) *Mala fides*: If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. *Malafide* exercise of discretionary power is always bad and taken as abuse of discretion. *Malafide* (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

In *Tata Cellular v. Union of India*, AIR 1996 SC 11 the Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

- (ii) *Irrelevant considerations*: If a statute confers power for one purpose, its use for a different purpose is not regarded as a valid exercise of power and is likely to be quashed by the courts. If the administrative authority takes into account factors, circumstances or events wholly irrelevant or extraneous to the purpose mentioned in the statute, then the administrative action is vitiated.
- (iii) *Leaving out relevant considerations*: The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.
- (iv) *Arbitrary orders*: The order made should be based on facts and cogent reasoning and not on the whims and fancies of the adjudicatory authority.
- (v) *Improper purpose*: The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose it will amount to abuse of power.
- (vi) *Colourable exercise of power*: Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colourable exercise of the discretionary power and it is declared invalid.
- (vii) *Non-compliance with procedural requirements and principles of natural justice*: If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.
- (viii) *Exceeding jurisdiction*: The authority is required to exercise the power within the limits of the statute. Consequently, if the authority exceeds this limit, its action will be held to be *ultra vires* and, therefore, void.

(b) Non-application of mind

- (i) *Acting under dictation*: Where the authority exercises its discretionary power under the instructions or dictation from superior authority it is taken as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind. For example in *Commissioner of Police v. Gordhandas Bhanji*, AIR 1952 SC 60, the Police Commissioner empowered to grant license for construction of cinema theatres, granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.
- (ii) *Self restriction*: If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and the authority should not impose fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it.
- (iii) *Acting mechanically and without due care*: Non-application of mind to an issue that requires an exercise of discretion on the part of the authority will render the decision bad in law.

(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 on point of law. e.g. Section 30 Workmen's Compensation Act, 1923.
- (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. Under Section 256 of the Income-tax Act, 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.

(C) Ordinary or Equitable

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

1. Injunction

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

- (a) *Prohibitory Injunction*: Prohibitory injunction forbids the defendant to do a wrongful act, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.
- (1) *Interlocutory or temporary injunction*: Temporary injunctions are such as to continue until a specified time or until the further order of the court. (Section 37 for the Specific Relief Act). It is granted as an interim measure to preserve *status quo* until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code and are provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.
 - (2) *Perpetual injunction*: A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect, it may be awarded for a fixed period or for a fixed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended for a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.
- (b) *Mandatory injunction*: When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act.

2. Declaratory Action

In some cases where wrong has been done to a person by an administrative act, declaratory judgments may be the appropriate remedy. Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief. Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes against the defendant. By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the rights. It is an equitable remedy. It is a discretionary remedy and cannot be claimed as a matter of right.

3. Action for damages

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

Principles of Natural Justice

One of the most important principles in the administration of justice is that justice must not only be done but also seen to be done. This is necessary to inspire confidence in the people in the judicial system. Natural justice is a concept of Common Law and represents procedural principles developed by judges. Though it enjoys no express constitutional status, it is one of the most important concepts that ensure that people retain their faith in the system of adjudication. Principles of natural justice are not precise rules of unchanging content; their scope varies according to the context. Nevertheless it provides the foundation on which the whole super-structure of judicial control of administrative action is based.

In India, the principles of natural justice are derived from Article 14 and 21 of the Constitution. The courts

have always insisted that the administrative agencies must follow a minimum of fair procedure, i.e. principles of natural justice. The concept of natural justice has undergone a tremendous change over a period of time. In the past, it was thought that it included just two rules: rule against bias and rule of fair hearing. In the course of time many sub-rules were added.

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

Bias can be of the following three types:

- (a) Pecuniary bias: The judicial approach is unanimous on the point that any financial interest of the adjudicatory authority in the matter, howsoever small, would vitiate the adjudication. Thus a pecuniary interest, howsoever insufficient, will disqualify a person from acting as a Judge.
- (b) Personal bias: There are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or related to him through family, professional or business ties. The judge might also be hostile to one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

The leading case on the matter of personal bias is *Mineral Development Ltd. V. State of Bihar*, AIR 1960 SC 468. In this case, the petitioner company was owned by Raja Kamakhya Narain Singh, who was a lessee for 99 years of 3026 villages, situated in Bihar, for purposes of exploiting mica from them. The Minister of Revenue acting under Bihar Mica Act cancelled his license. The owner of the company Raja Kamakhya Narain Singh, had opposed the minister in general election of 1952 and the minister had filed a criminal case under section 500, Indian Penal Code, against him. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

The other case on the point is *Manek Lal v. Prem Chand*, AIR 1957 SC 425. Here the respondent had filed a complaint of professional misconduct against Manek Lal who was an advocate of Rajasthan High Court. The Chief Justice of the High Court appointed bar council tribunal to enquire into the alleged misconduct of the petitioner. The tribunal consisted of the Chairman who had earlier represented the respondent in a case. He was a senior advocate and was once the advocate-General of the State. The Supreme Court held the view that even though Chairman had no personal contact with his client and did not remember that he had appeared on his behalf in certain proceedings, and there was no real likelihood of bias, yet he was disqualified to conduct the inquiry on the ground that justice not only be done but must appear to be done to the litigating public. Actual proof of prejudice was not necessary; reasonable ground for assuming the possibility of bias is sufficient.

- (c) *Subject matter bias*: A judge may have a bias in the subject matter, which means that he himself is a party, or has some direct connection with the litigation. To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute. To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias. Such bias can be classified into four categories.

- (1) Partiality or connection to the issue
 - (2) Departmental bias
 - (3) Prior utterances and pre-judgment of issues
 - (4) Acting under dictation
2. Rule of fair hearing (*audi alteram partem*): The second principle of natural justice is *audi alteram partem* (hear the other side) i.e. no one should be condemned unheard. It requires that both sides should be heard before passing the order. This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto. Following are the ingredients of the rule of fair hearing:
- (a) *Right to notice*: Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly. However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own fault.

The notice must give sufficient time to the person concerned to prepare his case. Whether the person concerned has been allowed sufficient time or not depends upon the facts of each case. The notice must be adequate and reasonable. The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.
 - (b) *Right to present case and evidence*: The party against whom proceedings have been initiated must be given full opportunity to present his or her case and the evidence in support of it. The reply is usually in the written form and the party is also given an opportunity to present the case orally though it is not mandatory.
 - (c) *Right to rebut adverse evidence*: For the hearing to be fair the adjudicating authority is not only required to disclose to the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material.
 1. *Cross-examination*: Examination of a witness by the adverse party is called cross-examination. The main aim of cross-examination is the detection of falsehood in the testimony of the witness. The rules of natural justice say that evidence may not be read against a party unless the same has been subjected to cross-examination or at least an opportunity has been given for cross-examination.
 2. *Legal Representation*: Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However, in certain situations denial of the right to legal representation amounts to violation of natural justice. Thus where the case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice because in such conditions the party may not be able to meet the case effectively and therefore he must be given the opportunity to engage professional assistance to make his right

to be heard meaningful.

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

In *Sunil Batra v. Delhi administration* AIR 1980 SC 1579, the Supreme Court while interpreting section 56 of the Prisons Act, 1894, observed that there is an implied duty on the jail superintendent to give reasons for putting bar fetters on a prisoner to avoid invalidity of that provision under Article 21 of the constitution. Thus the Supreme Court laid the foundation of a sound administrative process requiring the adjudicatory authorities to substantiate their order with reasons.

Exceptions to Natural Justice

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

1. *Statutory Exclusion*: The principle of natural justice may be excluded by the statutory provision. Where the statute expressly provides for the observance of the principles of natural justice, the provision is treated as mandatory and the authority is bound by it. Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto. However, the principles of natural justice are not incapable of exclusion. The statute may exclude them. When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate. But one thing may be noted that in India, Parliament is not supreme and therefore statutory exclusion is not final. The statute must stand the test of constitutional provision. Even if there is no provision under the statute for observance of the principle of natural justice, courts may read the requirement of natural justice for sustaining the law as constitutional.
2. *Emergency*: In exceptional cases of urgency or emergency where prompt and preventive action is required the principles of natural justice need not be observed. Thus, the pre-decisional hearing may be excluded where the prompt action is required to be taken in the interest of the public safety or public morality and any delay in administrative order because of pre-decisional hearing before the action may cause injury to the public interest and public safety. However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.

In *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post

decisional hearing, remedial in aim, should be given to the person concerned. In the case, it has also been held that “public interest” is a justiciable issue and the determination of administrative authority on it is not final.

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

In *Abhay Kumar v. K. Srinivasan* AIR 1981 Delhi 381 an order was passed by the college authority debaring the student from entering the premises of the college and attending the class till the pendency of a criminal case against him for stabbing a student. The Court held that the order was interim and not final. It was preventive in nature. It was passed with the object to maintain peace in the campus. The rules of natural justice were not applicable in such case.

4. *Academic evaluation*: Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assess the work of a student over the period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded but this exclusion does not apply in the case of disciplinary matters.
5. *Impracticability*: Where the authority deals with a large number of person it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice. In *P. Radhakrishna v. Osmania University*, AIR 1974 AP 283, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

Effect of Failure of Natural Justice

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

Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed. On the other hand, a void order is no order at all from its inception; it is a nullity and void *ab initio*. In most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter. Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a Court for an authoritative determination as to the nature of the order is void. For example, an order challenged as a nullity for failure of natural justice gives rise to the following crucial question: Was the authority required to follow natural justice?

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

The most significant case in the series is *Nawabkhan v. Gujarat*. Section 56 of the Bombay Police Act, 1951 empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the Commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the

appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void *ab initio*; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Court's own decision invalidating the order in question was not retroactive and did not render it a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment.

However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right (Article 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void *ab initio* and ineffectual to bind the parties from the very beginning and a person cannot be convicted for non observance of such an order. The Supreme Court held that where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement and failure to comply with such a duty is fatal.

Liability

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

Liability of State or Government in Contract

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

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

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

The Supreme Court has made it clear that the provisions of Article 299 (1) are mandatory and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of estoppel.

According to section 65 of the Indian Contract Act, 1872, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. Therefore if the agreement with the Government is void as the requirement of Article 299(1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he has received it.

Effect of a valid contract with Government

As soon as a contract is executed with the Government in accordance with Article 299, the whole law of

contract as contained in the Indian Contract Act, 1872 comes into operation. In India the remedy for the breach of a contract with Government is simply a suit for damages.

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

In the case of *Shrilekha Vidyarathi v. State of U.P, 1991 SCC 212*, the Supreme Court has made it clear that the State has to act justly, fairly and reasonably even in contractual field. In the case of contractual actions of the State the public element is always present so as to attract Article 14. State acts for public good and in public interest and its public character does not change merely because the statutory or contractual rights are also available to the other party. The court has held that the state action is public in nature and therefore it is open to the judicial review even if it pertains to the contractual field. Thus the contractual action of the state may be questioned as arbitrary in proceedings under Article 32 or 226 of the Constitution. It is to be noted that the provisions of Sections 73, 74 and 75 of the Indian Contract Act, 1872 dealing with the determination of the quantum of damages in the case of breach of contract also applies in the case of Government contract.

Quasi-Contractual Liability

According to section 70 of the Indian Contracts Act, 1872, where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of section 70 of the Indian Contract Act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State. Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved.

Suit against State in Torts

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

When the responsibility of the act of one person falls on another person, it is called vicarious liability. For example, when the servant of a person harms another person through his act, we held the servant as well as his master liable for the act done by the servant. Similarly, sometimes the state is held vicariously liable for the torts committed by its servants in the exercise of their duty. The State would of course not be liable if the acts done were necessary for protection life or property. Acts such as judicial or *quasi-judicial* decisions done in good faith would not invite any liability. There are specific statutory provisions which protect the administrative authorities from liability. Such protection, however, would not extend to malicious acts. The burden of proving that an act was malicious would lie on the person who assails the administrative action.

The principles of law of torts would apply in the determination of what is a tort and all the defenses available to the respondent in a suit for tort would be available to the public servant also.

In India Article 300 of the Constitution declares that the Government of India or of a State may be sued for the tortious acts of its servants in the same manner as the Dominion of India and the corresponding provinces could have sued or have been sued before the commencement of the Constitution. This rule is, however, subject to any such law made by the Parliament or the State Legislature. No law has so far been passed as contemplated by Article 300(1).

The liability of the Centre or a State is thus co-terminus with that of the Dominion of India or a Province before the Constitution came into force. Section 176 of the Government of India Act, 1935, stated that the Dominion of India and the Provincial Government may sue or be sued in relation to their respective affairs in the like cases as the Secretary of State for India in Council might have sued or been sued if the Government of India Act of 1935 had not been enacted. Thus the liability of the Government was made co-extensive with that of the Secretary of the State for India under section 32 of the Government of India Act, 1915, which in turn made it co-extensive with that of the East India Company prior to the Government of India Act, 1958. Section 65 of this Act stipulated that all person "shall and may have and take the same suits, remedies and proceeding," against the Secretary of State in Council for India as they could have done against the East India Company.

The first important case involving the tortious liability of the Secretary of State for India-in-Council was raised in *P. and O. Steam Navigation v. Secretary of State for India (5 Bom HCR App 1)*. The question referred to the Supreme Court was whether the Secretary of State for India is liable for the damages caused by the negligence of the servants in the service of the Government. The Supreme Court answered the question in the affirmative. The Court pointed out the principle of law that the Secretary of State for India in Council is liable for the damages occasioned by the negligence of Government servants, if the negligence is such as would render an ordinary employer liable. According to the principle laid down in this case the Secretary of State can be liable only for acts of non sovereign nature, liability will not accrue for sovereign acts. The Court admitted the distinction between the sovereign and non sovereign functions of the government and said that here was a great and clear distinction between acts done in exercise of what are termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

The later judgments of the Supreme Court did not apply P&O judgment to the cases and carved out certain exceptions. The conflicting position before the commencement of the Constitution was set at rest in the well known judgment of the Supreme Court in *State of Rajasthan v. Vidyawati, AIR 1962 SC 933* where the driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of the district, drove it rashly and negligently while taking it back from the workshop to the residence of the Collector after repairs, and knocked down a pedestrian and fatally injured him. The State was sued for damages. The Supreme Court held that the State was vicariously liable for damages caused by the negligence of the driver. The decision of the Supreme Court in *State of Rajasthan v. Vidyawati*, introduces an important qualification on the State immunity in tort based on the doctrines of sovereign and non sovereign functions. It decided that the immunity for State action can only be claimed if the act in question was done in the course of the exercise of sovereign functions.

Then came the important case of *Kasturi Lal v. State of U. P., AIR 1965 SC 1039*, where the Government was not held liable for the tort committed by its servant because the tort was said to have been committed by him in the course of the discharge of statutory duties. The statutory functions imposed on the employee were referable to and ultimately based on the delegation of sovereign powers of the State. The Court held that the

Government was not liable as the activity involved was a sovereign activity. The Court affirmed the distinction between sovereign and non-sovereign function drawn in the *P. and O. Steam Navigation's* case.

There are, on the other hand, a good number of cases where the courts, although have maintained the distinction between sovereign and non-sovereign functions yet in practice have transformed their attitude holding most of the functions of the government as non-sovereign. These cases show that the traditional sovereign functions are the making of law, the administration of justice, the maintenance of order, the repression of crime, carrying on for war, the making of treaties of peace and other consequential functions. Though this list is not exhaustive, it is at least clear that the socio-economic and welfare activities undertaken by a modern state are not included in the traditional sovereign functions. Consequently there has been an expansion in the area of governmental liability in torts.

Damages

It may happen that a public servant may be negligent in exercise of his duty. It may, however, be difficult to recover compensation from him. From the point of view of the aggrieved person, compensation is more important than punishment. Therefore, like all other employers the State must be made vicariously liable for the wrongful acts of its servants.

The Courts in India are now becoming conscious about increasing cases of excesses and negligence on the part of the administration resulting in the negation of personal liberty. Hence, they are coming forward with the pronouncements holding the Government liable for damages even in those cases where the plea of sovereign function could have negative the governmental liability. One such pronouncement came in the case of *Rudal Shah v. State of Bihar, AIR 1983 SC 1036*. Here the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trial. The court awarded Rs. 30,000 as damages to the petitioner.

In *Bhim Singh v. State of J&K, AIR 1986 SC 494*, where the petitioner, a member of legislative Assembly was arrested while he was on his way to Srinagar to attend Legislative Assembly in gross violation of his constitutional rights under Articles 21 and 22(2) of the Constitution, the court awarded monetary compensation of ₹50,000 by way of exemplary costs to the petitioner.

Another landmark case namely, *C. Ramkonda Reddy v. State, AIR 1989 AP 235*, has been decided by the Andhra Pradesh, in which State plea of sovereign function was turned down and damages were awarded despite its being a case of exercise of sovereign function.

In *Saheli a Women's Resource Center v. Commissioner of Police, Delhi, AIR 1990 SC 513* where the death of nine years old boy took place on account of unwarranted atrocious beating and assault by a Police officer in New Delhi, the State Government was directed by the court to pay ₹75,000 as compensation to the mother of victim.

In *Lucknow Development Authority v. M.K. Gupta, 1994 1 SCC 245* the Supreme Court observed that where public servant by *malafide*, oppressive and capricious acts in discharging official duty causes injustice, harassment and agony to common man and renders the State or its instrumentality liable to pay damages to the person aggrieved from public fund, the State or its instrumentality is duly bound to recover the amount of compensation so paid from the public servant concerned.

Liability of the Public Servant

Liability of the State must be distinguished from the liability of individual officers of the State. So far as the

liability of individual officers is concerned, if they have acted outside the scope of their powers or have acted illegally, they are liable to same extent as any other private citizen would be. The ordinary law of contract or torts or criminal law governs that liability. An officer acting in discharge of his duty without bias or *malafides* could not be held personally liable for the loss caused to other person. However, such acts have to be done in pursuance of his official duty and they must not be *ultra vires* his powers. Where a public servant is required to be protected for acts done in the course of his duty, special statutory provisions are made for protecting them from liability.

Liability of Public Corporation

The term 'Statutory Corporation' (or Public Corporation) refers to such organisations which are incorporated under the special Acts of the Parliament/State Legislative Assemblies. Its management pattern, its powers and functions, the area of activity, rules and regulations for its employees and its relationship with government departments, etc. are specified in the concerned Act. It may be noted that more than one corporation can also be established under the same Act. State Electricity Boards and State Financial Corporation fall in this category.

Examples of Public Corporation

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

The main features of Statutory Corporations are as follows:

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 the 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 these enterprises are recruited as per their own requirement by following the terms and conditions of recruitment decided by the Board.

The principal benefits of the Public Corporation as an organizational device are its freedom from government regulations and controls and its high degree of operating and financial flexibility. In this form, there is a balance between the autonomy and flexibility enjoyed by private enterprise and the responsibility to the public as represented by elected members and legislators. However, this form, in its turn, has given rise to other problems, namely the difficulty of reconciling autonomy of the corporation with public accountability.

The public corporation (statutory corporation) is a body having an entity separate and independent from the Government. It is not a department or organ of the Government. Consequently, its employees are not regarded as Government servants and therefore they are not entitled to the protection of Article 311 of the Constitution. It is to be also noted that a public corporation is included within the meaning of 'State' under Article 12 and therefore the Fundamental Rights can be enforced against it. Public corporation are included with the meaning of 'other authorities' and therefore it is subject to the writ jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution.

For the validity of the corporation contract, the requirements of a valid contract laid down in Article 299 are not required to be complied with. On principles of vicarious liability, corporation is liable to pay damages for wrong done by their officers or servants. They are liable even for tort requiring a mental element as an ingredient, e.g. malicious prosecution. In India, local authorities like Municipalities and District Boards have been held responsible for the tort committed by their servants or officers.

LESSON ROUND-UP

- Administrative law is that branch of law that deals with powers, functions and responsibilities of various organs of the state. There is no single universal definition of 'administrative law' because it means different things to different theorists.
- The ambit of administration is wide and embraces following things within its ambit:-
 - It makes policies
 - It executes and administers the law
 - It adjudicates
 - It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.
- Four principal sources of administrative law in India are: (a) Constitution of India (b) Acts/ Statutes (c) Ordinances, Administrative directions, notifications and Circulars (d) Judicial decisions.
- In India the modes of judicial control of administrative are grouped into three heads (a) Constitutional (b) Statutory (c) Ordinary or Equitable.
- One of the most important principles in the administration of justice is that justice must not only be done but also seen to be done. This is necessary to inspire confidence in the people in the judicial system. Natural justice is a concept of Common Law and represents procedural principles developed by judges. In India, the principles of natural justice are derived from Article 14 and 21 of the Constitution.
- The liability of the government can either be contractual or tortious.

Lesson 6

Law Relating to Torts

LESSON OUTLINE

- Learning Objective
- Introduction
- General Condition of Liability for a Tort
- Kinds of Tortious Liability
- Torts or wrongs to personal safety and freedom
- Remedies in Torts
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

"Tort" means a civil wrong which is not exclusively the breach of a contract or the breach of trust. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong.

The object of this study lesson is to impart basic knowledge to the students regarding law relating to Torts.

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

–Ayn Rand

LAW RELATING TO TORTS

The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin language from the word *Tortum*. Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.

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

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

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

Fraser describes it as "an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party."

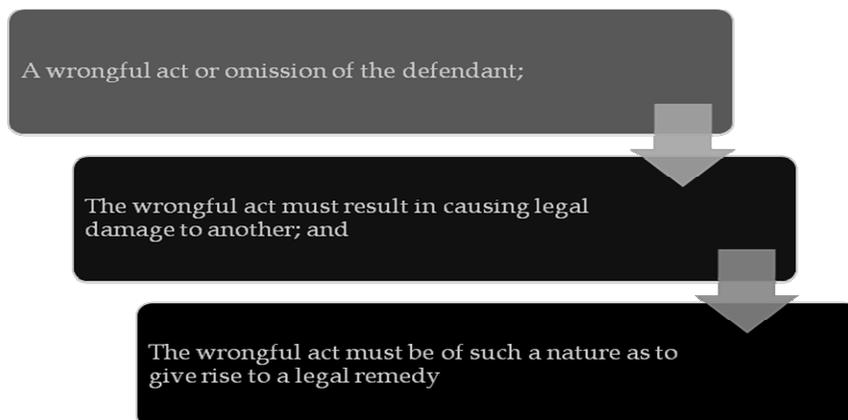
Winfield says: "Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages".

Two important elements can be derived from all these definitions, namely: (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and (ii) that every civil wrong is not a tort. Accordingly, it is now possible to distinguish tort from a crime and from a contract, a trust and a quasi-contract. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

General Conditions of Liability for a Tort

As stated earlier, there is no fixed catalogue of circumstances, which along and for all time mark the limit of what are torts. Certain situations have been held to be torts and will continue to be so in the absence of statutory repeal, and others have been held not to be torts. However, certain general conditions for tortious liability can be laid down.

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be:



(i) **Wrongful act:** The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above mentioned interests, and protected by law. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation or not.

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

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights. Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the loss in profits, because you are exercising your legal right. [*Gloucester Grammar School case*, (1410) Y.B. Hill. 11 Hen. IV to 27, pp. 21,36]

Injuria Sine Damnum

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.

Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an “absolute” private right of an individual, there is an *injuria* and the plaintiff’s action will succeed even if there is no *Damnum* or damages. An absolute right is one, the violation of which is actionable *per se*, i.e., without the proof of any damage. *Injuria sine damno* covers such cases and action lies when the right is violated even though no damage has occurred. Thus the act of trespassing upon another’s land is actionable even though it has not caused the plaintiff even the slightest harm.

(iii) **Legal remedy:** The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Self-help is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land. For example, if “A” finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

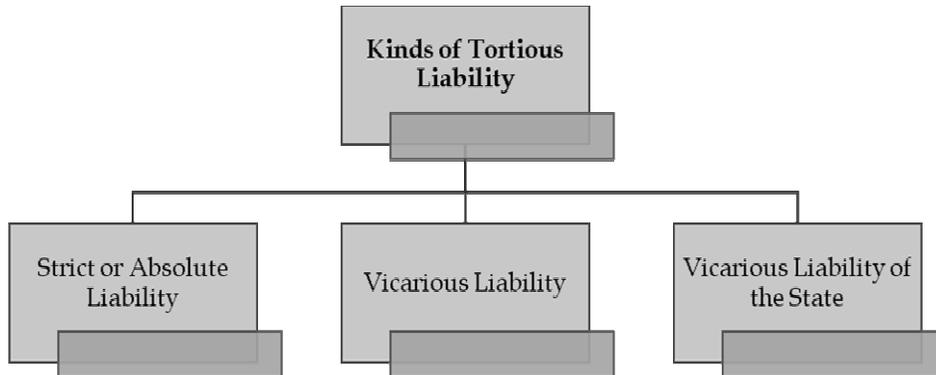
Mens Rea

How far a guilty mind of persons is required for liability for tort?

The General principle lies in the maxim “*actus non facit reum nisi mens sit rea*” i.e. the act itself creates no

guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. However, to this principle cases of absolute or strict liability are exceptions.

Kinds of Tortious Liability



(A) Strict or Absolute Liability

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

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

Rule in Rylands v. Fletcher

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

The facts of this case were as follows: B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursts through the shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; “We think that the true rule of law is that the person,

who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, *prima facie* answerable for all the damage which is the natural consequence of its escape.”

Later in the case of *Read v. Lyons* [(1946) 2 All. E.R. 471 (H.L.)], it has been explained that two conditions are necessary in order to apply the rule in *Ryland v. Fletcher*, these are:

- (i) *Escape* from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and
- (ii) *Non-natural use of Land*: The defendant is liable if he makes a non-natural use of land.

If either of these conditions is absent, the rule of strict liability will not apply.

Exceptions to the Rule of Strict Liability

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

(i) *Damage due to Natural Use of the Land*

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

(ii) *Consent of the plaintiff*

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

(iii) *Act of Third Party*

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

(iv) *Statutory Authority*

Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care.

Thus, in *Green v. Chelzea Water Works Co.* (1894) 70 L.T. 547 the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff’s premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

(v) *Act of God*

If an escape is caused, through natural causes and without human intervention circumstances

which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

(vi) *Escape due to plaintiff's own Default*

Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands v. Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

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

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

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

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

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part."

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands v. Fletcher*, need not be proved in India.

(B) 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. The common examples of such a liability are:

(a) *Principal and Agent [Specific authority]*

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

(b) Partners

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

(c) Master and Servant [Authority by relation]

A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several.

In such cases (1) liability of a person is independent of his own wrongful intention or negligence (2) liability is joint as well several (3) In case of vicarious liability the liability arises because of the relationship between the principal and the wrongdoer but in case of absolute or strict liability the liability arises out of the wrong itself.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondeat Superior* (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself).

The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

(d) Employer and Independent Contractor

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.

A servant is a person who is employed by another (the employer) to perform services in connection with the affairs of the employer, and over whom the employer has control in the performance of these services. An *independent contractor* is one who works for another but who is not controlled by that other in his conduct in the performance of that work. These definitions show that a person is a servant where the employer "retains the control of the actual performance" of the work.

(e) Where Employer is Liable for the acts of Independent Contractor

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

- (i) When employer authorizes him to commit a tort.
- (ii) In torts of strict liability
- (iii) Negligence of independent contractor

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

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

Employers of independent contractors are liable for the “collateral negligence” of their contractors in the course of his employment. Where A employed B to fit casement windows into certain premises. B’s servant negligently put a tool on the sill of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the sill on to a passer by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

(g) Liability for the acts of Servants

An employer is liable whenever his servant commits a tort *in the course of his employment*. An act is deemed to be done in the course of employment if it is either:

- (i) a wrongful act authorized by the employer, or
- (ii) a wrongful and unauthorized mode of doing some act authorized by the employer.

So far as the first alternative is concerned there is no difficulty in holding the master liable for the tort of his servant. A few examples, however, are necessary to explain the working of the rule in the second. These are as follows:

In *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board* (1942) A.C. 509, the director of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

Similarly, in *Bayley v. Manchester, Sheffield and Lincolnshire Rly. Co.* (1873) L.R. 7 C.P. 415, erroneously thinking that the plaintiff was in the wrong train, a porter of the defendants forcibly removed him. The defendants were held liable.

(C) Vicarious Liability of the State

(a) The Position in England

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

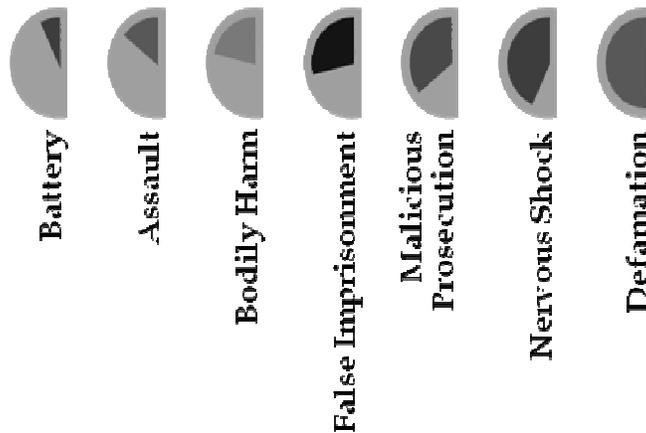
(b) The Position in India

Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.

When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. It is a sovereign function it could claim immunity from the tortious liability, otherwise not. Generally, the activities of commercial nature or those which can be carried out by the private individual are termed as non-sovereign functions.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

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



(a) Battery

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary: (i) use of force, however, trivial it may be without the plaintiff's consent, and (ii) without any lawful justification.

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

(b) Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind. To point a loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

(c) Bodily Harm

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

(d) False Imprisonment

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

restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

(e) Malicious Prosecution

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

The following are the essential elements of this tort:

- (i) There must have been a *prosecution* of the plaintiff by the defendant.
- (ii) There must have been *want of reasonable and probable cause* for that prosecution.
- (iii) The defendant must have *acted maliciously* (i.e. with an improper motive and not to further the end of justice).
- (iv) The plaintiff must have suffered *damages* as a result of the prosecution.
- (v) The prosecution must have terminated *in favour of the plaintiff*.

To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his own initiative.

(f) Nervous Shock

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

(g) Defamation

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

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

Defamation may be classified into two heads: Libel and Slander. *Libel* is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema films both the photographic part of it and the speech which is synchronized with it amount to tort.

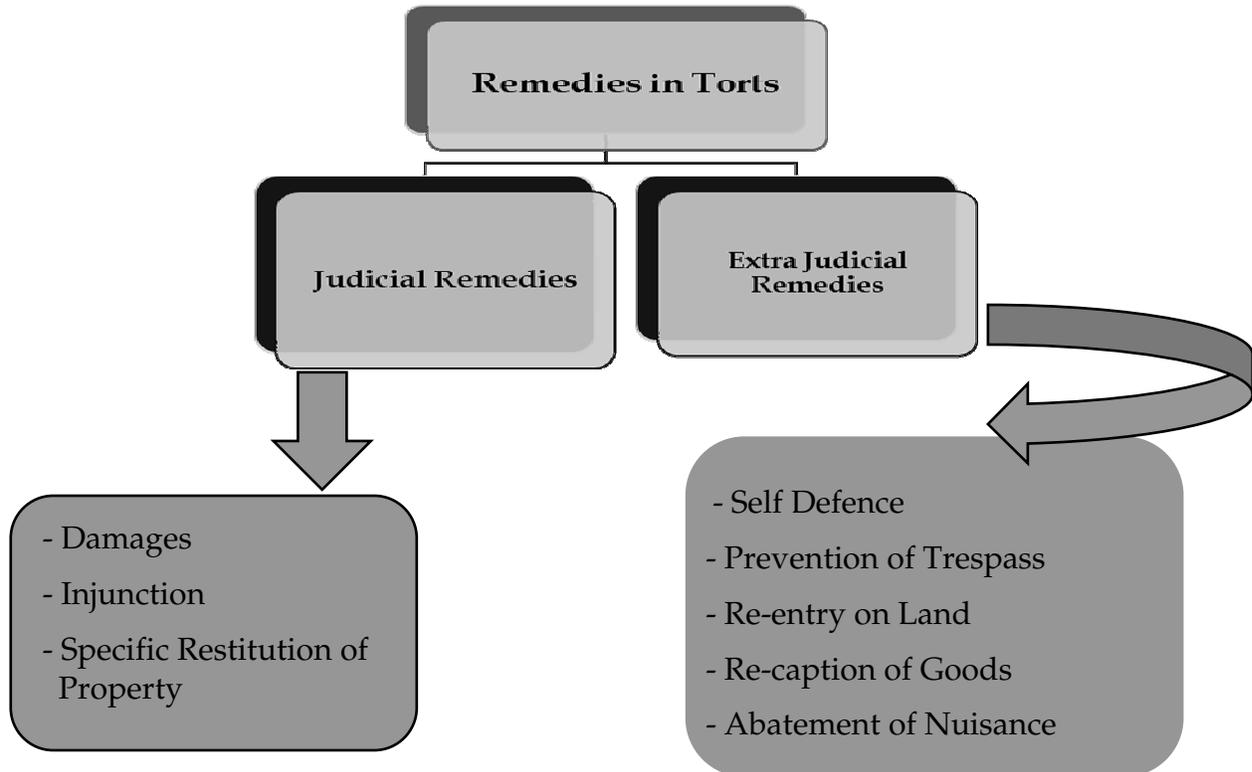
Slander is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.

Generally, the punishment for libel is more severe than for slander.

Defamation is tort as well as a crime in India.

In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code recognizes both libel and slander as an offence. However, torts in criminal law are stricter than in law of tort.

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.

Extra Judicial Remedies

In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

(a) *Self Defence*

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

(b) *Prevention of Trespass*

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

(c) *Re-entry on Land*

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) *Re-capture of Goods*

It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by

the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

(e) Abatement of Nuisance

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

(f) Distress Damage Feasant

An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage.

LESSON ROUND-UP

- Tort means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
- A tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be: (i) a wrongful act or omission of the defendant; (ii) the wrongful act must result in causing legal damage to another; and (iii) the wrongful act must be of such a nature as to give rise to a legal remedy.
- Tortious Liabilities are of three types (a) Strict or Absolute Liability, (b) Vicarious Liability and (c) Vicarious Liability of the State.
- An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:
 - Battery
 - Assault
 - Bodily harm
 - False imprisonment
 - Malicious prosecution
 - Nervous shock
 - Defamation
- Remedies in tort are of two type judicial remedies and extra judicial remedies. Three types of judicial remedies are available to the plaintiff in an action for torts are: (i) Damages, (ii) Injunction, and (iii) Specific Restitution of Property.
- Extra judicial remedies are: (i) Self Defense, (ii) Prevention of Trespass, (iii) Re-entry on Land, (iv) Recaption of Goods, (v) Abatement of Nuisance and (vi) Distress Damage Feasant.

SELF-TEST QUESTIONS

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

1. What are the general conditions of liability for a tort?
2. Distinguish between Damnum Sine Injuria and Injuria Sine Damnum

Lesson 7

Limitation Act 1963

LESSON OUTLINE

- Learning Objective
- Introduction
- Computation of the Period of Limitation
- Bar of Limitation
- Extension of time in certain cases
- Continuous running of time
- Computation of period of limitation
- Effect of acknowledgement on the period of limitation
- Effect of Payment on account of debt or interest on legacy
- Computation of time mentioned in the instrument
- Acquisition of ownership by possession
- Limitation and writs under the constitution
- The Schedule
- Classification of period of limitation
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

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.

Limitation and compensation of delay are two operative enactments in the quick disposal of cases and effective litigation.

The main objective of this study lesson is to give clear understanding to the students regarding the time period within which the suit can be filed and the time available within which the person can get the remedy conveniently.

Law as "the body of principles recognised and applied by the State in the administration of justice."

– Salmond

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 except the State of Jammu and Kashmir.

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process, in *Bombay Dying & Mfg. Co. Ltd. v. State of Bombay*, AIR 1958 SC 328. Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal.

COMPUTATION OF THE PERIOD OF LIMITATION FOR DIFFERENT TYPES OF SUITS

The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions. The Act prescribes the period of limitation in Articles in Schedule to the Act. In the Articles of the Schedule to the Limitation Act, Columns 1, 2, and 3 must be read together to give harmonious meaning and construction.

The Schedule containing the table showing the relevant Articles prescribing limitation period for a specified suit and also time from which such period commences is given at the end of this Lesson.

BAR OF LIMITATION

Section 3 of the Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the Court not to proceed with such suits irrespective of the fact whether the plea of limitation has been set up in defence or not. The provisions of Section 3 are mandatory. The Court can suo motu take note of question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint. It is a vital section upon which the whole limitation Act depends for its efficacy.

The effect of Section 3 is not to deprive the Court of its jurisdiction. Therefore, decision of a Court allowing a suit which had been instituted after the period prescribed is not vitiated for want of jurisdiction. A decree passed in a time barred suit is not a nullity.

EXTENSION OF TIME IN CERTAIN CASES

Doctrine of sufficient cause

Section 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as doctrine of “sufficient cause” for condonation of delay which is embodied in Section 5 of the Limitation Act, 1963. Section 5 provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

It is clarified by the explanation appended to the Section 5 that the fact that the appellant or applicant was misled by any order, practice or judgement of the High Court in ascertaining or computing the prescribed period may be a sufficient cause within the meaning of this section.

Thus, the Court may admit an application or appeal even after the expiry of the specified period of limitation if it is satisfied with the applicant or the appellant, as the case may be as to sufficient cause for not making it within time.

The Section is not applicable to applications made under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 and also to suits. The Court has no power to admit a time barred suit even if there is a sufficient cause for the delay. It applies only to appeals or applications as specified therein. The reason for non-aplicability of the Section to suits is that, the period of limitation allowed in most of the suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months. For the applicability of Section 5, the “prescribed period” should be over. The prescribed period means any period prescribed by any law for the time being in force.

The party applying for condonation of delay should satisfy the Court for not making an appeal or application within the prescribed period for sufficient cause. The term sufficient cause has not been defined in the Limitation Act. It depends on the circumstances of each case.

However, it must be a cause which is beyond the control of the party. In *Ramlal v. Rewa Coal Fields Ltd.*, AIR 1962 SC 361, the Supreme Court held that once the period of limitation expires then the appellant has to explain the delay made thereafter for day by day and if he is unable to explain the delay even for a single day, it would be deemed that the party did not have sufficient cause for delay.

It is the Court’s discretion to extend or not to extend the period of limitation even after the sufficient cause has been shown and other conditions are also specified. However, the Court should exercise its discretion judicially and not arbitrarily.

What is sufficient cause and what is not may be explained by the following Judicial observations:

1. Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause under Section 5;
2. In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be *bona fide*;
3. Wrong advice given by advocate can give rise to sufficient cause in certain cases;
4. Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;
5. Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
6. Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.
7. Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay (*Collector and Authorised Chief Settlement Commissioner v. Darshan Singh and others*, AIR 1999 Raj. 84).
8. Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause (*Mahendra Yadav v. Ratna Devi & others*, AIR 2006 (NOC) 339 Pat).

The test of “sufficient cause” is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of sufficient cause’ delightfully undefined thereby leaving to the court a well-intended discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such. [*R B Ramlingam v. R B Bhvansewari* (2009) 2 SCC 689].

The *quasi-judicial* tribunals, labour courts or executive authorities have no power to extend the period under this Section.

Persons under legal disability

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements Section 6, Section 8 controls these sections, which serves as an exception to Sections 6 and 7. The combined effect of Sections 6 and 8 is that where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled to a fresh period of limitation from the attainment of his majority subject to the condition that in no case the period extended by Section 6 shall by virtue of Section 8 exceeds three years from cessation of disability, i.e. attainment of majority.

Sections 6, 7 and 8 must be read together. Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of three years after the cessation of disability. The Section applies to all suits except suits to enforce rights of pre-emption.

The period of three years under Section 6 of this Act has to be counted, not from the date of attainment of majority by the person under disability, but from the date of cessation of minority or disability.

Both Sections 6 and 7 go together. Section 7 is an extension of Section 6, where the point of time at which the existence of disability is to be recognised “*the time from which the period of limitation is to be reckoned*”.

Section 7 is only an application of the principle in Section 6 to a joint-right inherited by a group of persons wherein some or all of whom are under the disability. The disability of all except one does not prevent the running of time, if the discharge can be given without the concurrence of the other. Otherwise the time will run only when the disability is removed.

To apply Section 7, disability must exist when the right to apply accrued, i.e., at the time from which period of limitation is to be reckoned.

In other words, Section 8 provides that in those cases where the application of Section 6 or 7 of the Act results in an extension of the period prescribed by Schedule, that extension is not to be more than three years after the cessation of the disability.

CONTINUOUS RUNNING OF TIME

According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.

The rule of this Section is based on the English dictum. “Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event”. Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running.

The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise as the starting point of limitation for that particular application will be deemed not to have been commenced.

Thus, time runs when the cause of action accrues. True test to determine when a cause of action has accrued is to ascertain the time, when plaintiff could have maintained his action to a successful result first if there is an infringement of a right at a particular time, the whole cause of action will be said to have arisen then and there.

Section 9 contemplates only cases where the cause of action continues to exist. Section 10 excludes suits against trustees and their representatives from the purview of the Act. In order to invoke the application of Section 10 the property must be vested in a trustee or trustees for a specific-purpose.

COMPUTATION OF PERIOD OF LIMITATION

(i) Exclusion of certain days or exclusion of time in legal proceedings

While computing Period of Limitation certain day/days are to be excluded.

Part III of the Act containing Sections 12 to 24 deals with computation of period of limitation and Section 12 prescribes the time which shall be excluded in computing the time of limitation in legal proceedings.

Computation of period of limitation for a suit, appeal or application: According to Section 12(1), the day which is to be excluded in computing period of limitation is the day from which the period of limitation is to be reckoned. In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.

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)].

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)].

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)].

Thus, the time required for getting copies of certain decisions, mentioned under Section 12 is also to be excluded in computing the period of limitation as per Sub-sections (2), (3) and (4).

The term “time requisite for obtaining a copy” means the time which is reasonably required for obtaining such a copy, On the explanation to Section 12, the Supreme Court in the case of *Udayan Chhina Bhai v. R.C. Bali*, AIR 1977 SC 2319, held that by reading Section 12(2) with explanation it is not possible to accept the submission that in computing the time requisite for obtaining copy of a decree by an application made after preparation of the decree, the time that elapsed between the pronouncement of the judgement and the signing of the decree should be excluded.

However, the time taken by the Court to prepare the decree or order before an application for a copy is made

shall not be excluded in computing the time for obtaining a copy of a decree or an order. (Explanation to Section 12)

(ii) Exclusion of time during which leave to sue or appeal as a pauper is applied for (Section 13).

(iii) Exclusion of time bona fide taken in a court without jurisdiction. (Section 14)

The relief to a person is given by Section 14 of the Act when the period of limitation is over, because another civil proceedings relating to the matter in issue had been initiated in a court which is unable to entertain it, by lack of jurisdiction or by any other like cause. The following conditions must co-exist for the applicability of this Section:

- (a) that the plaintiff or the applicant was prosecuting another civil proceedings against the defendant with due diligence;
- (b) that the previous suit or application related to the same matter in issue;
- (c) that the plaintiff or the applicant prosecuted in good-faith in that court; and
- (d) that the court was unable to entertain a suit or application on account of defect of jurisdiction or other like cause.

(iv) Exclusion of time in certain other cases

- (a) When a suit or application for the execution of a decree has been stayed by an injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded. [Section 15(1)].
- (b) The time required to obtain the sanction or consent of the Govt. required, or a notice period shall also be excluded in case of suits. [Section 15(2)].
- (c) In a suit or an application for execution of a decree by any receiver or interim receiver or any liquidator, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of their appointment shall be excluded. [Section 15(3)].
- (d) The time during which a proceeding to set aside the sale has been prosecuted shall be excluded in case of a suit for possession by a purchaser at a sale in execution of a decree. [Section 15(4)].
- (e) The time during which the defendant has been absent from India and from the territories outside India administered by the Central Government, shall also be excluded. [Section 15(5)].
- (f) In case of death of a person before the right to institute a suit accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application. The same rule applies in case if defendant dies. [Sections 16(1) and (2)].

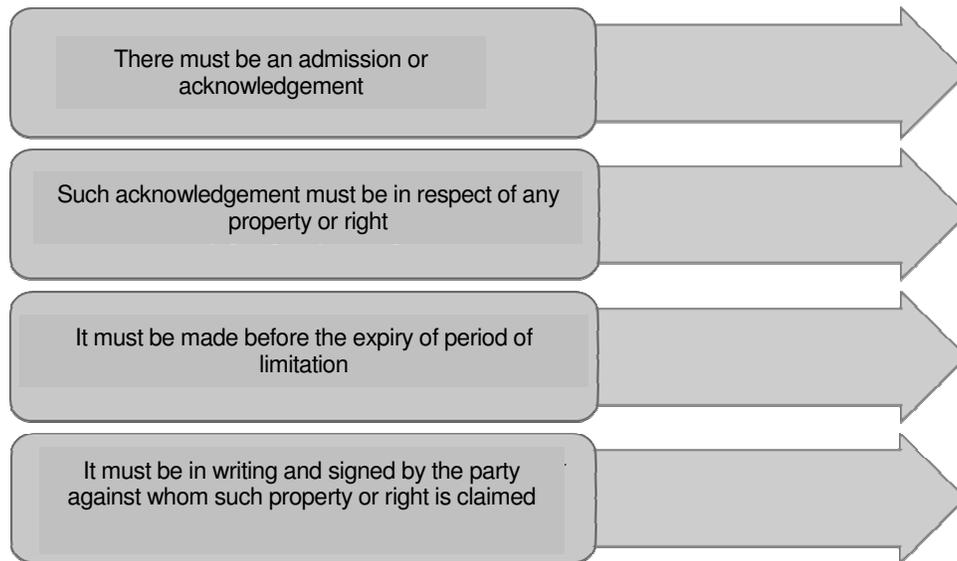
However, the above rule does not apply to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office. [Section 16(3)].

- (g) Where the suit or application is based upon the fraud or mistake of the defendant or respondent or his agent or in other cases as mentioned in Section 17, the period of limitation shall not begin to run until the plaintiff or applicant has discovered fraud or mistake subject to certain exceptions. (Section 17).

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION

Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on

the period of limitation. ***The following requirements should be present for a valid acknowledgement as per Section 18:***



If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY

As per Section 19 of the Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The proviso says that, save in the case of payment of interest made before the 1st day of January, 1928 an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.

According to the explanation appended to this Section:

- (a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;
- (b) 'debt' does not include money payable under a decree or order of a court for the purpose of this Section.

Thus, according to this section a fresh period of limitation becomes available to the creditor when part-payment of debt is made by the debtor before the expiration of the period of limitation.

COMPUTATION OF TIME MENTIONED IN INSTRUMENTS

All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian Calendar. (Section 24).

ACQUISITION OF OWNERSHIP BY POSSESSION

Section 25 applies to acquisition of easements. It provides that the right to access and use of light or air, way, watercourse, use of water, or any other easement which have been peaceably enjoyed without

interruption and for twenty years (thirty years if property belongs to Government) shall be absolute and indefeasible. Such period of twenty years shall be a period ending within two years next before the institution of the suit.

LIMITATION AND WRITS UNDER THE CONSTITUTION

The subject of limitation is dealt with in entry 13, List III of the Constitution of India. The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended Statute.

The Statute of Limitation is not unconstitutional since it applies to right of action in future. It is a shield and not a weapon of offence.

The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2) of the Constitution. It is against the State action that Fundamental Rights are claimed (*Tilokchand Motichand v. H.P. Munshi*, AIR 1970 SC 898).

The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory period of limitation (*State of M.P. v. Bhai Lal Bhai*, AIR 1964 SC 1006). Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation, the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction.

If the right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right to be enforced under Article 32 of the Constitution. In other case where the remedy only, not the right, is extinguished by limitation the Court will refuse to entertain stale claims on the ground of public policy (*Tilokchand Motichand v. H.P. Munshi*, AIR 1970 SC 898).

ANNEXURE

THE SCHEDULE (Periods of Limitation)

[Sections 2(j) and 3]

| | <i>Description of suit</i> | <i>Period of limitation</i> | <i>Time from which period begins to run</i> |
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| | (1) | (2) | (3) |
| First Division — SUITS | | | |
| PART I — SUITS RELATING TO ACCOUNTS | | | |
| 1. | For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties. | Three years | The close of the year in which the last time admitted or proved is entered in the account, such year to be computed as in the account. |

| | (1) | (2) | (3) |
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| 2. | Against a factor for an account. | Three years | When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. |
| 3. | By a principal against his agent for movable property received by the latter and not accounted for. | Three years | When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. |
| 4. | Other suits by principals against agents for neglect or misconduct. | Three years | When the neglect or misconduct becomes known to the plaintiff. |
| 5. | For an account and a share of the profits of a dissolved partnership. | Three years | The date of the dissolution. |
| PART II — SUITS RELATING TO CONTRACTS | | | |
| 6. | For a seaman's wages. | Three years | The end of the voyage during which the wages are earned. |
| 7. | For wages in the case of any other person. | Three years | When the wages accrue due. |
| 8. | For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house. | Three years | When the food or drink is delivered. |
| 9. | For the price of lodging. | Three years | When the price becomes payable. |
| 10. | Against a carrier for compensation for losing or injuring goods. | Three years | When the loss of injury occurs. |
| 11. | Against a carrier for compensation for non-delivery of, or delay in delivering goods. | Three years | When the goods sought to be delivered. |
| 12. | For the hire of animals, vehicles, boats or household furniture. | Three years | When the hire becomes payable. |
| 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. |

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| 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 |

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| | | | at a future time, and then when that time arrives. |
| 27. | For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency. | Three years | When the time specified arrives or the contingency happens. |
| 28. | On a single bond, where a day is specified for payment. | Three years | The day so specified. |
| 29. | On a single bond, where no such day is specified. | Three years | The date of executing the bond. |
| 30. | On a bond subject to a condition. | Three years | When the condition is broken. |
| 31. | On a bill of exchange or promissory note payable at a fixed time after date. | Three years | When the bill or note falls due. |
| 32. | On a bill of exchange payable at sight, or after sight, but not at a fixed time. | Three years | When the bill is presented. |
| 33. | On a bill of exchange accepted payable at a particular place. | Three years | When the bill is presented at that place. |
| 34. | On a bill of exchange or promissory note payable at a fixed time after sight or after demand. | Three years | When the fixed time expires. |
| 35. | On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue. | Three years | The date of the bill or note. |
| 36. | On a promissory note or bond payable by instalments. | Three years | The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment. |
| 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. |

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| 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. |
| | (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 | Three years | The date of the payment in excess of the plaintiff's own share. |

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| | a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-shares. | | |
| 49. | By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution. | Three years | When the right to contribution accrues. |
| 50. | By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate. | Three years | The date of the payment. |
| 51. | For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. | Three years | When the profits are received. |
| 52. | For arrears of rent. | Three years | When the arrears become due. |
| 53. | By a vendor of immovable property for personal payment of unpaid purchase-money. | Three years | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. |
| 54. | For specific performance of a contract | Three years | The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused. |
| 55. | For compensation for the breach of any contract, express or implied not herein specially provided for. | Three years | When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases. |
| PART III — SUITS RELATING TO DECLARATIONS | | | |
| 56. | To declare the forgery of an instrument issued or registered. | Three years | When the issue or registration becomes known to the plaintiff. |
| 57. | To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place. | Three years | When the alleged adoption becomes known to the plaintiff. |
| 58. | To obtain any other declaration. | Three years | When the right to sue first accrues. |
| PART IV — SUITS RELATING TO DECREES AND INSTRUMENTS | | | |

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| 59. | To cancel or set aside an instrument or decree or for the rescission of a contract. | Three years | When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him. |
| 60. | To set aside a transfer of property made by the guardian of a ward — | | |
| | (a) by the ward who has attained majority; | Three years | When the ward attains majority. |
| | (b) by the ward's legal representative — | | |
| | (i) When the ward dies within three years from the date of attaining majority; | Three years | When the ward attains majority. |
| | (ii) when the ward dies before attaining majority. | Three years | When the ward dies. |
| PART V — SUITS RELATING TO IMMOVABLE PROPERTY | | | |
| 61. | By a mortgagor — | | |
| | (a) to redeem or recover the possession of immovable property mortgaged; | Thirty years | When the right to redeem or to recover possession accrues. |
| | (b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration. | Twelve years | When the transfer becomes known to the plaintiff. |
| | (c) to recover surplus collection received by the mortgagee after the mortgage has been satisfied. | Three years | When the mortgagor re-enters on the mortgaged property. |
| 62. | To enforce payment of money secured by a mortgage or otherwise charged upon immovable property. | Twelve years | When the money sued for becomes due. |
| 63. | By a mortgagee: | | |
| | (a) for foreclosure; | Thirty years | When the money secured by the mortgagee becomes due. |

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| | (b) 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 of the property has been dispossessed. | Twelve years | The date of dispossession. |
| 65. | For possession of immovable property or any interest herein based on title. | Twelve years | When the possession of the defendant becomes adverse to the plaintiff. |
| | <i>Explanation</i> — For the purposes of this article— | | |
| | (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; | | |
| | (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; | | |
| | (c) where the suit is by a purchaser at a sale in execution of a decree when the judgement debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgement debtor who was out of possession. | | |
| 66. | For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach | Twelve years | When the forfeiture is incurred or the condition is broken. |

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| | of condition. | | |
| 67. | By a landlord to recover possession from a tenant. | Twelve years | When the tenancy is determined. |
| PART VI — SUITS RELATING TO MOVABLE PROPERTY | | | |
| 68. | For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion. | Three years | When the person having the right to the possession of the property first learns in whose possession it is. |
| 69. | For other specific movable property. | Three years | When the property is wrongfully taken. |
| 70. | To recover movable property deposited or pawned from a depository or pawnee. | Three years | The date of refusal after demand. |
| 71. | To recover movable property deposited or pawned, and afterwards bought from the depository or pawnee for a valuable consideration. | Three years | When the sale becomes known to the plaintiff. |
| PART VII — SUITS RELATING TO TORT | | | |
| 72. | For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends. | One year | When the act or omission takes place. |
| 73. | For compensation for false imprisonment. | One year | When the imprisonment ends. |
| 74. | For compensation for a malicious prosecution. | One year | When the plaintiff is acquitted or the prosecution is otherwise terminated. |
| 75. | For compensation for libel. | One year | When the libel is published. |
| 76. | For compensation for slander. | One year | When the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results. |
| 77. | For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter. | One year | When the loss occurs. |

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| 78. | For compensation for inducing a person to break a contract with the plaintiff. | One year | The date of the breach. |
| 79. | For compensation for an illegal, irregular or excessive distress. | One year | The date of the distress. |
| 80. | For compensation for wrongful seizure of movable property under legal process. | One year | The date of the seizure. |
| 81. | By executors, administrators or representatives' under the Legal Representatives' Suits Act, 1855. | One year | The date of the death of the person wronged. |
| 82. | By executors' administrators or representatives under the Indian Fatal Accidents Act, 1855. | Two years | The date of the death of the person killed. |
| 83. | Under the Legal Representatives' Suits Act, 1855, against an executor, an administrator or any other representative. | Two years | When the wrong complained of is done. |
| 84. | Against one who having a right to use property for specific purposes, perverts it to other purposes. | Two years | When the perversion first becomes known to the person injured thereby. |
| 85. | For compensation for obstructing a way or a water-course. | Three years | The date of the obstruction. |
| 86. | For compensation for diverting a water-course. | Three years | The date of the diversion. |
| 87. | For compensation for trespass upon immovable property. | Three years | The date of the trespass. |
| 88. | For compensation for infringing copyright or any other exclusive privilege. | Three years | The date of the infringement. |
| 89. | To restrain waste. | Three years | When the waste begins. |
| 90. | For compensation for injury caused by an injunction wrongfully obtained. | Three years | When the injunction ceases. |
| 91. | For compensation — | | |
| | (a) for wrongfully taking or detaining any specific movable property lost, or acquired by theft, | Three years | When the person having the right to the possession of the property first |

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| | or dishonest misappropriation or conversion; | | learns in whose possession it is. |
| | (b) for wrongfully taking or injuring or wrongfully detaining any other specific movable property. | Three years | When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful. |
| PART VIII — SUITS RELATING TO TRUSTS AND TRUST PROPERTY | | | |
| 92. | To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration. | Twelve years | When the transfer becomes known to the plaintiff. |
| 93. | To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration. | Three years | When the transfer becomes known to the plaintiff. |
| 94. | To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration. | Twelve years | When the transfer becomes known to the plaintiff. |
| 95. | A set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration. | Three years | When the transfer becomes known to the plaintiff. |
| 96. | By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration. | Twelve years | The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later. |
| PART IX — SUITS RELATING TO MISCELLANEOUS MATTERS | | | |
| 97. | To enforce a right of pre-emption whether the right is founded on law or general usage or on special | One year | When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the |

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| | contract. | | property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property when the instrument of sale is registered. |
| 98. | By a person against whom (an order referred to in Rule 63 or Rule 103) of Order XXI of the Code of Civil Procedure, 1908 or an order under Section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order. | One year | The date of the final order. |
| 99. | To set aside a sale by a Civil or Revenue Court or a sale for arrears of Government revenue or for any demand recoverable as such arrears. | One year | When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought. |
| 100. | To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order or an officer of Government in his official capacity. | One year | The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be. |
| 101. | Upon a judgement including a foreign judgement, or a recognisance. | Three years | The date of the judgement or recognisance. |
| 102. | For property which the plaintiff has conveyed while insane. | Three years | When the plaintiff is restored to sanity and has knowledge of the conveyance. |
| 103. | To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust. | Three years | The date of the trustee's death or if the loss has not then resulted, the date of the loss. |
| 104. | To establish a periodically recurring right. | Three years | When the plaintiff is first refused the enjoyment of the right. |
| 105. | By a Hindu for arrears of maintenance. | Three years | When the arrears are payable. |
| 106. | For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the | Twelve years | When the legacy or share becomes payable or deliverable. |

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| | property of an interstate against an executor or an administrator or some other person legally charged with the duty of distributing the estate. | | |
| 107. | For possession of a hereditary office. Explanation — A hereditary office is possessed when the properties thereof are usually received or if there are no properties when the duties thereof are usually performed. | Twelve years | When the defendant takes possession of the office adversely to the plaintiff. |
| 108. | Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage. | Twelve years | The date of the alienation. |
| 109. | By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property. | Twelve years | When the alienee takes possession of the property. |
| 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 | | | |
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| 113. | Any suit for which no period of limitation is provided elsewhere in this Schedule. | Three years | When the right to sue accrues. |
| Second Division — Appeals | | | |
| 114. | Appeal from an order of Acquittal — | | |
| | (a) under Sub-section (1) or Sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898; | Ninety days | The date of the order appealed from. |
| | (b) under Sub-section (3) of Section 417 of that Code. | Thirty days | The date of the grant of special leave. |
| 115. | Under the Code of Criminal Procedure, 1898. | | |
| | (a) from a sentence of death passed by a Court of Session or by a High Court in exercise of its Original Criminal Jurisdiction; | Thirty days | The date of the sentence. |
| | (b) from any other sentence or any order not being an order of acquittal — | | |
| | (i) to the High Court; | Sixty days | The date of the sentence or order. |
| | (ii) to any other Court. | Thirty days | The date of the sentence or order. |
| 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. |

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| 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 <i>ex parte</i> or to re-hear an appeal decreed or heard <i>ex parte</i> . <i>Explanation:</i> 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. |

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| 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 | Twelve years | When the decree or order becomes |

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| | (other than a decree granting a mandatory injunction) or order of any Civil Court. | | enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. |
| 137. | Any other application for which no period of limitation is provided elsewhere in this Division. | Three years | When the right to apply accrues. |

CLASSIFICATION OF PERIOD OF LIMITATION

Depending upon the duration, period of limitation for different purposes may be classified as follows:

Period of 30 years: The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits:

1. Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
2. Suits by mortgagee for foreclosure;
3. Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

Period of 12 years: A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.

Period of 3 years: A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

Period varying between 1 to 3 years: The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.

Period in days varying between 90 to 10 days: The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons. For appeals against a sentence of death passed by a court of session or a High Court in the exercise 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 ROUND-UP

- The essential purpose of a limitation period is to place a time limit on the period within which a party can commence legal proceedings.
- Limitation periods are imposed by statute, primarily the Limitation Act 1963. The Limitation Act provides different limitation periods for different types of suits.
- If a limitation period has expired for a particular claim, the claim will be “statute-barred”. This means that it will no longer be possible for the claimant to effect recovery for that claim against the alleged wrongdoer.
- Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.
- where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.
- Limitation is dealt with in entry 13, List III of the Constitution of India. The Statute of Limitation is not unconstitutional since it applies to right of action in future.

SELF-TEST QUESTIONS

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

1. Explain Doctrine of Sufficient Cause.
2. “Period of Limitation once starts cannot be stopped” Comment.
3. In which kind of suits maximum period of 30 years prescribed under the Limitation Act, 1963?
4. Write a short note on:-
 - (i) Effect of Payment on Account of Debt or of Interest on Legacy
 - (ii) Acquisition of Ownership by Possession
5. What are the sufficient causes for extension of time period under limitation act, 1963?

Lesson 8

Civil Procedure Code, 1908

LESSON OUTLINE

- Learning Objectives
- Introduction
- Aim and Scope of Civil Procedure Code, 1908
- Scheme of the Code
- Some Important Terms
- Structure of Civil Courts
- Jurisdiction of Courts and Venue of Suits
- Stay of Suit
- Place of Suing(Territorial)
- Res Judicata
- Set-off, Counter claim and Equitable set-off
- Temporary Injunctions and Interlocutory Orders
- Detention, Preservation, Inspection, etc. of subject-matter of Suit
- Institution of Suit
- Important stages in proceedings of a Suit
- Delivery of Summons by Court
- Appeals
- Reference, Review and Revision
- Suits by or against Corporation
- Suits by or against Minors
- Summary Procedure
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

Laws can be divided into two groups: (i) substantive law; and (ii) procedural law. Where as substantive law determines rights and liabilities of parties, procedural or adjective law prescribes practice, procedure and machinery for the enforcement of those rights and liabilities. Procedural law is thus an adjunct or an accessory to substantive law.

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code of Civil Procedure is an adjective law it neither creates nor takes away any right. It is intended to regulate the procedure to be followed by Civil Courts. The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.

The students need to be familiar with the essentials of the basic procedural laws of the Country. It is necessary for them to keep in view the requirement of the procedural law in handling of corporate business, even in initial stages which could have legal implications at some subsequent stage.

“Civil Procedure” means, body of law concerned with the methods, procedures and practices used in civil litigation.

– Black’s Law Dictionary, 6th Edn

INTRODUCTION

The Company Secretary and the Secretarial Staff of a Company need to be familiar with the essentials of the basic procedural laws of the country. While the specific corporate, industrial, taxation, property and urban land laws have direct relevance for the efficient performance of the duties and responsibilities of the Company Secretary, the procedural law also provides the parameters for the pursuance of legal action. It is also therefore necessary to keep in view the requirement of the procedural law, or as such law is often termed "adjective law", in the handling of corporate business, even in initial stages, which could have legal implications at some subsequent stage. Such monitoring and guidance is required to be rendered by the Company Secretary and other Secretarial Executives to the line management for safeguarding the interests of the company. It has been endeavoured in this Chapter to summarise one of such aspects of Indian procedural laws which have to be referred to by the Company Secretaries.

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

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law the latter prevails over the former. Where the special law is silent on a particular matter the Code applies, but consistent with the special enactment.

SCHEME OF THE CODE

The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised. Thus the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.

SOME IMPORTANT TERMS

Cause of Action

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

Judgement, Decree and Order

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

Decree

"*Decree*" is defined in Section 2(2) of the Code as (i) the formal expression of an adjudication which, so far as regards the Court expressing it; (ii) conclusively; (iii) determines the rights of the parties; (iv) with regard to all or any of the matters in controversy; (v) in the suit and may be either preliminary (i.e. when further

proceedings have to be taken before disposal of the suit) or final.

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 a formal expression of adjudication

There must be a conclusive determination of the rights of parties

The determination must be with regard to or any of the matters in contravention in the suit

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.

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.

Judgement

The "judgement" means a statement given by a judge on the grounds of a decree or order [Section 2(9)]. What is ordinarily called as an order is in fact a judgement. Also an order deciding a primary issue is a judgement.

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.

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

- (i) an order under Section 35A, i.e. for compensatory costs in respect of false or vexatious claims within pecuniary jurisdiction of the Court, but only for the limited ground that no order should have been made, or that such order should have been made for a lesser amount.
- (ii) an order under Section 91 or Section 92 refusing leave to institute a suit under Section 91 (Public nuisances and other wrongful acts affecting the public) or Section 92 (alleged breach of trust created for public purposes of a charitable or religious nature).
- (iii) an order under Section 95, i.e. compensation for obtaining arrest attachment or injunction on insufficient grounds.
- (iv) an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.
- (v) any order made under rules from which an appeal is expressly allowed by the rules.

No appeal lies from any order passed in appeal under this section.

In the case of other orders, no appeal lies except where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case which is to be set forth as a ground of objection in the memorandum of appeal.

A *decree*, shall be deemed to include the rejection of a plaint but not any adjudication from which an appeal lies or any order of dismissal for default. A preliminary decree decides the rights of parties on all or any of the matters in controversy in the suit but does not completely dispose of the suit. A preliminary decree may be appealed against and does not lose its appellate character by reason of a final decree having been passed before the appeal is presented. The Court may, on the application of any party to a suit, pass orders on different applications and any order which is not the final order in a suit is called an “interlocutory order”. An interlocutory order does not dispose of the suit but is merely a direction to procedure. It reserves some questions for further determination.

The main difference between an order and a decree is that when in an adjudication which is a decree appeal lies and second appeal also lies on the grounds mentioned in Section 100 of CPC. However, no appeal lies from an order unless it is expressly provided under Section 104 and Order 43 Rule 1. No second appeal in any case lies at all even in case of appealable orders [Section 104(2)]. A decree conclusively determines the rights and liabilities of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final but this is not the case in order.

A person in whose favour a decree has been passed not only includes a plaintiff but in cases like decree for specific performance of an agreement executable by either party, also includes a defendant.

STRUCTURE OF CIVIL COURTS

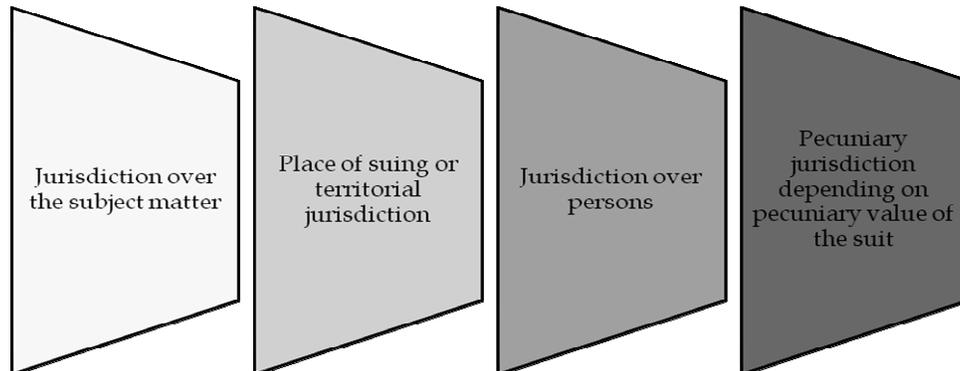
Section 3 of the Civil Procedure Code lays down that for the purposes of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District and every Court of Small Causes is subordinate to the High Court and District Court.

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

The jurisdiction to try certain matters by certain Court is limited by statute; e.g. a small cause court can try suits for money due under a promissory note or a suit for price of work done.

(ii) Place of suing or territorial jurisdiction

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.

(iii) Jurisdiction over persons

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.

(iv) Pecuniary jurisdiction depending on pecuniary value of the suit

Section 6 deal 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* — A Court tries and decides suits filed before it.
- (ii) *Appellate Jurisdiction* — A Court hears appeals against decisions or decrees passed by subordinate Courts.
- (iii) *Criminal and appellate Jurisdiction* — The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to try all civil suits unless barred : Section 9 of Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. The explanation appended to the Section 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 a religious rites or ceremonies.

Civil Courts have jurisdiction to entertain a suit of civil nature unless barred by law. Every person has an inherent right to bring a suit of a civil nature. Civil Court has jurisdiction to decide the question of its

jurisdiction although as a result of the enquiry it may be found that it has no jurisdiction over the matter. Jurisdiction depends not on the truth or falsehood of facts, but upon their nature. Jurisdiction is determinable at the commencement not at the conclusion of the inquiry (*Rex v. Boltan*, (1841) 1 QB 66, 74).

A suit is expressly barred if a legislation expressly says so and it is impliedly barred if a statute creates new right or liability and prescribes a particular tribunal or forum for its assertion. When a right is created by a statute and a special tribunal or forum is provided for its assertion and enforcement, the ordinary Civil Court would have no jurisdiction to entertain such disputes.

STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

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

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

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

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

Even though if a case is not governed by the provisions of the Section and matters in issue may not be identical, yet the courts have inherent powers to stay suit on principle analogous to Section 10.

Essential conditions for stay of suits:

-  The matter must be two suits instituted at different times
-  The matter in issue in the latter suit should be directly and substantially in issue in the earlier suit
-  Such suit should be between the same parties
-  Each earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court

If these conditions exist, the later suit should be stayed till the disposal of earlier suit, the findings of which operate as *res judicata* on the later suit.

For the applicability of Section 10, the two proceedings must be suits e.g. suit for eviction of tenant in a rent control statute cannot be sought to be stayed under Section 10 of Civil Procedure Code on the ground that tenant has earlier filed a suit for specific performance against the landlord on the basis of agreement of sale of disputed premises in favour of the tenant.

In such a case, it cannot be said that the matter in earlier suit for specific performance is directly and substantially in issue in later suit for eviction. The reason is that a suit for specific performance of contract has got nothing to do with the question regarding the relationship of landlord and tenant.

Regarding the inherent powers under Section 151, these would also not be used for staying the eviction suit as the same would frustrate the very purpose of the legislation. Therefore, invoking the powers of the Court under this Section, on the facts and circumstances of the case amounts to an abuse of the process of the Court and there can be no doubt that such a course cannot be said to subserve the ends of the justice (*N.P. Tripathi v. Dayamanti Devi*, AIR 1988 Pat. 123).

PLACE OF SUING (TERRITORIAL)

Section 15 lays down that every suit shall be instituted in the Court of the lowest grade 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;
 - I for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;
- (d) for the determination of any other right to or interest in immovable property;
- (e) for compensation for wrong to immovable property;
- (f) for the recovery of movable property actually distraint or attachment.

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

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

Where immovable property is situated within the jurisdiction of different Courts: Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated provided the value of the entire claim is summarized by such Court. (Section 17)

Where local limits of jurisdiction of Courts are uncertain: Where jurisdiction is alleged to be uncertain as being within the local limits of the jurisdiction of which of two or more Courts, any immovable property is situated, then any of the said Courts may proceed to entertain the suit after having recorded a statement to the effect that it is satisfied that there is ground for such alleged uncertainty. (Section 18)

Where wrong done to the person or to movable property : Where a suit is for compensation for wrong done

to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the Courts. (Section 19)

Other suits: Other suits to be instituted where defendants reside or cause of action arises, subject to the limitations provided by Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within local limits of whose jurisdiction the defendant, or each of the defendants (where there are more than one defendant) actually and voluntarily resides or carries on business or personally works for gain or where such defendants actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the Court is obtained or the defendant(s) who do not reside or carry on business or personally work for gain at such place summarize in such institution or, where the cause of action arises, wholly or in part. (Section 20).

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

Where there might be two or more competent courts which could entertain a suit consequent upon apart of cause of action having arisen therewith if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an agreement would be valid (*Angile Insulations v. Davy Ashmore India Ltd.*, (1995) 3 SCALE 203).

RES JUDICATA

Section 11 of the Civil Procedure Code deals with the doctrine of *Res Judicata* that is, bar or restraint on repetition of litigation of the same issues. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (*S.B. Temple v. V.V.B. Charyulu*, (1971) 1 SCJ 215). The doctrine of *res judicata* prevails over the doctrine of *lis pendens* where there is a conflict between the two.

It prevents two different decrees on the same subject. Section 11 says that once a *res* is *judicata*, it shall not be adjudged again. The principle applies to suits in Section 11 of the Code; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of giving finality to litigation. For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

(1) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit. The expression "directly and substantially in issue" means an issue alleged by one party and denied or admitted by the another either expressly or by necessary implications (*Lonakutty v. Thomman*, AIR 1976 SC 1645).

In the matter of taxation for levy of Municipal taxes, there is no question of *res judicata* as each year's assessment is final for that year and does not govern latter years (*Municipal Corporation v. Madan Mohan*, AIR 1976 43).

A suit for eviction on reasonable requirement was compromised and the tenant was allowed to continue as tenant for the subsequent suit for ejection on the ground of reasonable requirement, it was found that some reasonable requirement had been present during the earlier suit. The second suit was not maintainable.

- (2) The former suit has been decided—former suit means which is decided earlier.
- (3) The said issue has been heard and finally decided.

The issue or the suit itself is heard and finally decided, then it operates as *res judicata* and is not the reasons leading to the decision (*Mysore State E. Board v. Bangalore W.C. & S. Mills*, AIR 1963 SC 1128). However, no *res judicata* operates when the points could not have been raised in earlier suit. (See *Prafulla Chandra v. Surat Roit* AIR 1998 Ori. 41). But when a suit has been decided on merits, and the appeal is dismissed on a preliminary point, it amounts to the appeal being heard and finally decided and the decision operates as *res judicata* (*Mukunda Jana v. Kanta Mandal*, AIR 1979 NOC 116).

- (iv) Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above (*Isher Singh v. Sarwan Singh*, AIR 1965 SC 948).

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

Supreme Court in *Gouri Naidu v. Thandrothu Bodemma and others*, AIR 1997 SC 808, held that the law is well settled that even if erroneous, an inter party judgement binds the party if the court of competent jurisdiction has decided the lis. Thus, a decision that a gift made by a coparceners is invalid under Hindu Law between coparceners, binds the parties when the same question is in issue in a subsequent suit between the same parties for partition.

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

The rule of *res sub judice* relates to a matter which is pending judicial enquiry while *res Judicata* relates to a matter adjudicated upon or a matter on which judgement has been pronounced. *Res sub judice* bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. *Res Judicata* arises out of considerations of public policy viz., that there should be an end to litigation on the same matter. *Res-Judicata* presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case. It is however essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

An application for amendment of a decree is not a 'suit' and may be entertained. But if such an application is heard and finally decided, then it will debar a subsequent application on general principles of law analogous to *res judicata*. However, dismissal of a suit for default, where there has been no adjudication on the merits of the application, will not operate as *res judicata*. Similarly an application for a review of judgment if refused does not bar a subsequent suit for the same relief on the same grounds. In the case of conflicting decrees, the last decree alone is the effective decree which can operate as *res judicata*.

According to this provision of the Civil Procedure Code, 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.

According to Explanation to the Section, the expression 'former' suit has been set out as stated above. The competence of a Court to decide an issue or suit is to be determined irrespective of any provisions as to a right of appeal from the decision of such Court. It is stated in Explanation III that the matter must have been alleged by one party and either denied or admitted expressly or impliedly by the other. According to Explanation IV any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such (former) suit.

Constructive *res judicata* is the doctrine which has been provided for in Explanation IV (viz. matters or issues which could have been taken as ground of defence or attack in a former suit) as earlier referred to. This doctrine is based on the following grounds of public policy:

- (i) There should be an end to litigation;
- (ii) The parties to a suit should not be harassed to agitate the same issues or matters already decided between them;
- (iii) 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;
- (iv) It is a rule of convenience and not a rule of absolute justice.

Explanation V states that any relief claimed in the plaint but not expressly granted shall be deemed to have been refused. By Explanation VI it is provided that in the case of a representation suit or class action all persons interested in any public or private right claimed in common for themselves and others are to be deemed to claim under the persons so litigating and *res judicata* shall apply to them.

Explanations VII and VIII have been added by the Amendment Act of 1976. Explanation VII specifically lays down that the principles of *res judicata* apply to execution proceedings. The general principles of *res judicata* have been summarized in Explanation VIII. It provides that the decisions of a "Court of limited jurisdiction competent to decide such issue" operates as *res judicata* in a subsequent suit though the former Court had no jurisdiction to try the subsequent suit. The general principle of *res judicata* is wider in scope than Section 11 which is applied when a case does not come within four corners of Section 11. However, when the case falls under Section 11 but the conditions are not fulfilled, the general principles of *res judicata* cannot be resorted to. The conditions may be summarized as follows:

Conditions of *res judicata*:

- 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

Bar to further suit

Section 12 puts a bar to every suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action. Section comes into force only when a plaintiff is precluded by rules.

SET-OFF COUNTER-CLAIM AND EQUITABLE SET-OFF***Set-off***

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

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

Effect of Set-off

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

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

Equitable set-off

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

In India distinction between legal and equitable set-off is recognised. Order 8, Rule 6 contains provisions as to legal set-off. Order VIII, Rule 6A recognises the counter-claim by the defendant still an equitable set-off can be claimed independently of the Code. The Common Law Courts in England do not recognise equitable claims.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS***Temporary injunction***

The Court may grant temporary injunction to restrain any such act (as set out below) or make such other

order for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit; where it is proved by affidavit or otherwise:

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

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

Interlocutory orders

Power to order interim sale

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

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

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

- (a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein;
- (b) for all or any of the purposes as in (a) above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and
- (c) for all or any of the purpose as in (a) above authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)

Application for such order to be after notice—

- (1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.
- (2) An application by the defendant for such an order may be made at any time after appearance.
- (3) Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security subject to further direction of the Court. (Rule (10))

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

The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question. In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides. If the object of granting a temporary injunction is liable to be defeated by the delay, the Court while passing an order granting interim or temporary injunction, has a notice served on the defendant to show cause why the order granting the interim injunction should not be confirmed. On hearing the objection of the defendant to such injunction, the Court either confirms the interim injunction or cancels the order of injunction.

INSTITUTION OF SUIT

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

The main essentials of the suit are—



The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant. A suit for a tort may be brought either where the wrong was committed or where the defendant resides or carries on business. A suit for a breach of contract may be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain, or where any of the defendants so resides or works for gain or carries on business provided the leave of the Court is given or that the other defendants acquiesce in such situation. A suit for breach of contract may also be instituted where the cause of action arises that is, where the contract was made or where the breach was committed. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property or any property of it is situate. Claim for recovery of any immovable property could be for (a) mesne profits or arrear's of rent, (b) damages for breach of contract under which the property or any part thereof is held and (c) claims in which the relief sought is based on the same cause of action.

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

Regarding other suits, they shall be instituted in a Court within the local limits of whose jurisdiction:

- (a) the defendant or each of the defendants if there are more than one at the time of the

commencement of the suit actually or voluntarily resides or carries on business or personally works for gain or

- (b) any of the defendants, where there are more than one at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action wholly or in part arises.

Misjoinder of Parties — Where more than one persons joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of '*misjoinder of parties*'. To avoid such misjoinder, two factors are essential viz. (i) the right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants, (ii) there is a common question of law or fact. The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

"Cause of action" means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Thus, cause of action is a bundle of essential facts which the plaintiff has to prove in order to sustain his action. The cause of action must be antecedent to the institution of the suit. It consists of two factors (a) a right, and (b) an infringement for which relief is claimed.

Every breach of contract gives rise to a cause of action and a suit may be instituted to secure the proper relief in the place—

- (a) where the contract was made, or
- (b) where the breach has occurred, or
- (c) the place where money is payable.

The place of breach is the place where the contract had to be performed or completed.

Where the place of payment is not specified, it is to be ascertained with reference to the intention of the parties and the circumstances of each case.

Misjoinder of Causes of Action — If the plaintiffs are not jointly interested in all the causes of action there is *misjoinder of causes of action*.

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

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

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

If the defendant fails to file the written statement within the prescribed period of 30 days, he is allowed to file the same on such other days as specified by the Court for reasons to be recorded in writing but not later than ninety days from the date of service of summons (Order 8, R1). Provision though negatively worded is procedural. It does not deal with power of court or provide consequences of non-extension of time. The

provision can therefore be read as directory. (*Shaikh Salim Haji Abdul Khayumsab v. Kumar & Ors*, AIR 2006 SC 398.

The defendant may appear in person or by a duly instructed pleader or by a pleader accompanied by some person to be able to answer all material questions relating to the suit.

Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint. (Order 5)

If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance. The summons must contain a direction that it is for the settlement of issues only or for the final disposal of the suit. Every summons must be accompanied by a copy of the plaint. Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

The ordinary mode of service of summons i.e. direct service is by delivery or tendering a copy of it signed by the judge or competent officer of the Court to the person summoned either personally or to his agent or any adult male or female member of his family, against signature obtained in acknowledgement of the services.

DELIVERY OF SUMMONS BY COURT

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

- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.
- (2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means to transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court.

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

- (3) Where the defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply.
- (4) When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered

post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

Where the Court is satisfied that there is reason to believe that the person summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way the Court shall order the service of the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the person summoned is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. (O.5, R.20, 'substituted service')

Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.

The above provisions shall apply also to summons to witnesses.

In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed. In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on any director, or other principal officer of the corporation or (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business. (O.29, R.2)

Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

Defence — The defendant has to file a written statement of his defence within a period of thirty days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days.

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

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court (O.8, R.1 and 1A). However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handover to a witness merely to refresh his memory.

Besides, particulars of set-off must be given in the written statement. A plea of set-off is set up when the defendant pleads liability of the plaintiff to pay to him, in defence in a suit by the plaintiff for recovery of money. Any right of counter claim must be stated. In the written statement new facts must be specifically pleaded. The defendant must deal specifically with each allegation of fact of which he does not admit the truth. An evasive denial is not permissible and all allegations of facts not denied specifically or by necessary implication shall be taken to be admitted.

Appearance of parties and consequence of non-appearance — If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed (O.9, R. 3 and 4). If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed *ex-parte*.

In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment. Where the hearing of the suit is adjourned *ex-parte* and the defendant appears at or before such hearing and assigns a good cause for his previous non-appearance, the defendant may be heard in answer to the suit on such terms as to costs or otherwise.

The defendant is not precluded from taking part in the proceedings even though he may not be allowed to file a written statement. If the plaintiff is absent and the defendant is present at the hearing of the suit, the Court shall make an order for the dismissal of the suit, unless the defendant admits the claim of the plaintiff or a part thereof in which case the Court shall pass a decree in favour of the plaintiff in accordance with the admission of the defendant and shall dismiss the suit to the extent of the remainder (O.9, R.8).

In any case in which a decree is passed *ex-parte* against a defendant he may apply for setting aside the decree on the ground that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and the Court shall set aside the decree on such terms as to costs payment into Court or otherwise as it deems proper and shall appoint a day for proceeding with the suit (O.9, R.13).

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

- (i) He may file an appeal against the *ex-parte* decree under Section 96 of the C.P.C.
- (ii) He may file an application for review of the judgement. (O.47, R.1)
- (iii) He may apply for setting aside the *ex-parte* decree.
- (iv) A suit can also be filed to set aside an *ex-parte* decree obtained by fraud but no suit shall lie for non-service of summons.

It is open to a party at the trial of a suit to use in evidence any one or more of the answers or any part of the answer of the opposite party to interrogatories without putting in the others or the whole of such answers. But the court may direct that any connected answer should also be put in.

Discovery and interrogatories and production of documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts. Discovery may be of two kinds — (a) by interrogatories (b) by documents.

The objects of discovery are to:

- (a) ascertain the nature of the case of the adversary or material facts for the adversary's case.
- (b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.
- (c) narrow the points at issue.

- (d) avoid expense and effort in proving admitted facts.

Discovery by interrogations

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

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

Discovery by documents

All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court may on hearing the application either refuse or adjourn it, if it is satisfied that such discovery is not necessary at all or not necessary at the stage. Or if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents.

Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party. If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence (O.11, R.15), unless he satisfies the Court that such document relates only to his own title, he being a defendant to the suit or any other ground accepted by the Court. Documents not referred to in the pleadings or affidavits may be inspected by a party if the Court allows (O.11, R.18).

A party may refuse to produce the document for inspection on the following grounds :

- (i) where it discloses a party's evidence
- (ii) when it enjoys a legal professional privilege
- (iii) when it is injurious to public interest
- (iv) denial of possession of document.

If a party denies by an affidavit the possession of any document, the party claiming discovery cannot cross-examine upon it, nor adduce evidence to contradict it, because in all questions of discovery the oath of the party making the discovery is conclusive (*Kedarnath v. Vishwanath*, (1924) 46 All. 417).

Admission by parties

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

Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law.

It is incumbent on the Court at the first hearing of the suit after reading the plaint and the written statement and after ascertaining and examination of the parties if necessary regarding the material propositions of law and facts, to frame the issues thereon for decision of the case. Where the Court is of the opinion that the suit can be disposed off on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following—

- (i) Allegations made in the plaint and written statement,
- (ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,
- (iii) Allegations in answer to interrogatories,
- (iv) Contents of documents produced by the parties,
- (v) Statements made by parties or their representatives when examined,
- (vi) From examination of a witness or any documents ordered to be produced.

Hearing of the suit

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

Affidavit

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

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

Judgement

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

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

Following the decision of the Supreme Court in the above mentioned case, the Gujarat High Court in *Ramkishan Guru Mandir v. Ramavtar Bansraj*, AIR 2006 Guj. 34, set aside the judgment which was passed after two and a half years after conclusion of arguments holding that where a judgment was delivered after two years or more, public at large would have reasons to say bad about the Court and the judges.

The judgement must be dated and signed by the judge. Once the judgement is signed it can not afterwards be altered or added to except as provided under Section 152 or on review.

It is a substantial objection to a judgement that it does not dispose of the question as it was presented by the parties (*Reghunatha v. Sri Brozo Kishoro*, (1876) 3 I.A., 154).

If a judgement is unintelligible, the appellate court may set it aside and remand the case to the lower court for the recording of judgement according to law after hearing afresh the arguments of the pleaders (*Harbhagwan v. Ahmad*, AIR 1922 Lah. 122).

Decree

On judgement a decree follows. Every endeavour must be made to ensure that decree is drawn up expeditiously and in any case within a period of 15 days from the date on which the judgement is pronounced. It should contain the:

- (i) number of the suit(s);
- (ii) names and descriptions of the parties and their registered addresses;
- (iii) particulars of the claim;
- (iv) relief granted or other determination of the suit;
- (v) amount of cost incurred and by whom is to be paid.

Execution

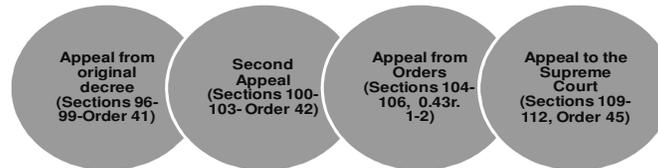
Execution is the enforcement of decrees or orders of the Court. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. (Section 36. For details refer Order 21)

APPEALS

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or

by rules having the force of statute (*Rangoon Botatoung Company v. The Collector, Rangoon*, 39 I.A. 197).

There are four kinds of appeals provided under the Civil Procedure Code:



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

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

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

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

Appeal from orders would lie only from the following orders on grounds of defect or irregularity in law—

- (i) an order under Section 35A of the Code allowing special costs, and order under Section 91 or Section 92 refusing leave to Institute a suit of the nature referred to in Section 91 or Section 92,
- (ii) an order under Section 95 for compensation for obtaining attachment or injunction on insufficient ground,
- (iii) an order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.
- (iv) appealable orders as set out under Order 43, R.1.

However no appeal shall lie from following orders—

- (i) any order specified in clause (a) and

- (ii) from any order passed in appeal under Section 100.

Appeals to the Supreme Court would lie in the following cases:

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

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

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

but in all such cases the appellate court shall record its reasons for admission of additional evidence.

The essential factors to be stated in an appellate judgement are (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled (O.41, R.31).

The judgement shall be signed and dated by the judge or judges concurring therein.

REFERENCE, REVIEW AND REVISION

Reference to High Court

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

Review

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

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

and the Court may make such order thereon as it thinks fit.

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 any Court subordinate thereto.

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.

SUITS BY OR AGAINST A CORPORATION

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. (O.29, R.1)

Service of summons

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

- (a) on the secretary or any director or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business. (O.29, R. 2)

Power of the Court to require personal attendance

The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. (O.29, R.3)

SUITS BY OR AGAINST MINORS

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, for whose property is under a Court of Wards, the age of majority is completed at the age of 21 years.

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority. However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit. (O.32, Rules 1 and 4).

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. (O.32, R.2).

Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor [O.32, R.3(1)]. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff [O.32, R.3(2)].

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree. [O.32, R.3(5)]

When minor attain majority

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

SUMMARY PROCEDURE

A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. (Order 37)

The rules for summary procedure are applicable to the following Courts:

- (1) High Courts, City Civil Courts and Small Courts;
- (2) Other Courts: In such Courts the High Courts may restrict the operation of order 37 by issuing a notification in the Official Gazette.

The debt or liquidated demand in money payable by the defendant should arise on a written contract or on an enactment or on a guarantee.

Institution of summary suits

Such suit may be instituted by presenting a plaint containing the following essentials:

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

Leave to defend

Order 37 rule 3 prescribes the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit. However, such leave shall not be granted where:

- (1) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a

- substantial defence or that the defences are frivolous or veracious, and
- (2) the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

On the hearing of such summon for judgement, the plaintiff shall be entitled to judgement provided the defendant has not applied for leave to defend or if such application has been made and is refused or where the defendant is permitted to defend but he fails to give the required security within the prescribed time or to carry out such other precautions as may have been directed by the Court.

After decree, the Court may, under special circumstances set-aside the decree and if necessary stay or set-aside execution, and may give leave to the defendant to appear and to defend the suit. (Rule 4 order 37)

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

LESSON ROUND-UP

- The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.
- The Code defines important terms that have been used thereunder and deals with different types of courts and their jurisdiction. Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication.
- Under the Code of Civil Procedure, a civil court has jurisdiction to try a suit if two conditions are fulfilled: (i) the suit must be of a civil nature; and (ii) the cognizance of such suit should not have been barred. Jurisdiction of a court may be of two kinds: jurisdiction over the subject matter; local or territorial jurisdiction; original and appellate jurisdiction; pecuniary jurisdiction depending on pecuniary value of the suit.
- The Code embodies the doctrine of res judicata that is, bar or restraint on repetition of litigation of the same issues. It enacts that since a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues. In the absence of such a rule there would be no end to litigation and the parties would be put to constant trouble, harassment and expenses.
- The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question.
- The Code also provides for making certain interlocutory orders. The court has power to order sale of any moveable property which is the subject-matter of the suit or attached before judgement in such suit which is subject to speedy and natural decay or for any just and sufficient cause desirable to be sold at once.
- Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.
- The main essentials of the suit are: (i) the opposing parties; (ii) the cause of action; (iii) the subject matter of the suit, and (iv) the relief(s) claimed.
- Every suit shall be instituted in the Court of the lowest grade to try it. The Code specifies the categories of suits that shall be instituted in the court within the local limits of whose jurisdiction the property is situated. This is subject to the pecuniary or other limitations prescribed by any law. The various stages in proceedings of a suit have been elaborately laid down under the Code.

Lesson 9

Indian Penal Code, 1860

LESSON OUTLINE

- Learning Objectives
- Introduction
- Jurisdiction of Indian Penal Code, 1860
- Fundamental Elements of Crime
- Stages of Crime
- Punishments
- Criminal conspiracy
- Definition of criminal conspiracy
- Punishment of criminal conspiracy
- Criminal Misappropriation of Property
- Dishonest misappropriation of property
- Dishonest misappropriation of property possessed by deceased person at the time of his death
- Criminal Breach of Trust
- Cheating
- Fraudulent Deeds and Dispositions of Property
- Forgery
- Defamation
- General exceptions
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

The Indian Penal Code, 1860 is the substantive law of crimes. It defines acts which constitute an offence and lays down punishment for the same. It lays down certain principles of criminal law. The procedural law through which the Indian Penal Code is implemented is the Criminal Procedure Code, 1973.

Indian Penal Code consists of 23 chapters and more than 511 sections. It has two parts- general principles and defences and specific offences.

The objective of the Indian Penal Code is to provide a general penal code for India.

The complexity of modern legislation demands a clear understanding of the substantive law of crimes. The students will understand the general penal code for India, Substantive as well as Procedural law of crimes.

The Indian Penal Code is a colonial legislation which was retained as the main penal law of the country even after India became independent in 1947.

INTRODUCTION

Crime is a social phenomenon. It is a wrong committed by an individual in a society. It arises first when a state is organized, people set up rules, the breaking of which is an act called crime. Law regulates the social interest, arbitrates conflicting claims and demands. The security of persons and property which is essential function for State is achieved through the instrumentality of criminal law. Crime being a relative conception is an act defined by State as a crime. The concept of crime changes from time to time and as per the society.

For determination of crime there is no fixed rule. Crime is what the law says it is. The difference between a criminal offence and a civil wrong is that while the former is considered a wrong against the society because of their grave nature, a civil wrong is a wrong done to an individual. It is believed that serious crimes threaten the very existence of an orderly society, and therefore, if such a crime is committed, it is committed against the whole society.

It should be kept in mind that what is criminal, illegal or unlawful may still be a socially acceptable practice. It is also likely that all that a society considers as reprehensible is not criminal in the eyes of law. The divergence of criminal law, however, with the moral and cultural standards of society cannot be too great because governments in framing and amending criminal laws cannot be ignorant of the societal standards.

In India, the base of the crime and punitive provision has been laid down in Indian Penal Code, 1860. In this Code the definition of crime has not been attempted or defined but according to its section 40 the word 'Offence' denotes a thing made punishable by the Code.

Indian Penal Code, 1860

The Indian Penal Code (IPC) is a colonial legislation which was retained as the main penal law of the country even after India became independent in 1947. The Indian Penal Code was passed in the year 1860 but it came into force on 1st January 1862, and it applies to the whole of India except the state of Jammu and Kashmir. The State of Jammu and Kashmir, in view of the special status under Article 370 of the Indian Constitution, has a separate penal code, though substantially of the same nature and character as the IPC.

The Indian Penal Code, 1860 is a substantive law of crimes. It defines acts which constitute an offence and lays down punishment for the same. It lays down certain principles of criminal law. The procedural law through which the IPC is implemented is the Criminal Procedure Code, 1973. IPC consists of 23 chapters and more than 511 sections. It has two parts - general principles and defences and specific offences.

Jurisdiction of Indian Penal Code, 1860

The geographical area or the subjects to which a law applies is defined as the jurisdiction of that law. Ordinarily, laws made by a country are applicable within its own boundaries because a country cannot have a legal machinery to enforce its laws in other sovereign countries. Thus, for most of the laws, the territorial jurisdiction of a law is the international boundary of that country. Countries, however, also make laws that apply to territories outside of their own country. This is called the extra-territorial jurisdiction.

Under the Indian Penal Code, 1860 criminal courts in India exercise jurisdiction either because a crime is committed by any person (national, or foreigner) within the Indian territory or because a crime though committed outside India, the person committing the crime is liable to be tried for it under any Indian law. The former is known as intra-territorial jurisdiction and the latter as known as extra-territorial jurisdiction.

Intra-territorial jurisdiction: Where a crime under any provision of IPC is committed within the territory of India the IPC applies and the courts can try and punish irrespective of the fact that the person who had committed

the crime is an Indian national or foreigner. This is called 'intra-territorial jurisdiction' because the submission to the jurisdiction of the court is by virtue of the crime being committed within the Indian territory. Section 2 of the Code deals with intra-territorial jurisdiction of the courts. The section declares the jurisdictional scope of operation of the IPC to offences committed within India. The emphasis on 'every person' makes it very clear that in terms of considering the guilt for any act or omission, the law shall be applied equally without any discrimination on the ground caste, creed, nationality, rank, status or privilege. The Code applies to any offence committed:

1. Within the territory of India as defined in Article 1 of Constitution of India.
2. Within the territorial waters of India, or
3. On any ship or aircraft either owned by India or registered in India.

It should be noted that it is not defence that the foreigner did not know that he was committing a wrong, the act itself not being an offence in his own country. In this regard the Supreme Court in *Mobarik Ali Ahmed v. State of Bombay*, 1957 AIR SC 857, held that it is obvious that for an Indian law to operate and be effective in the territory where it operates, i.e., the territory of India, it is not necessary that the laws should either be published or be made known outside the country in order to bring foreigners under its ambit. It would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India.

Exemption from intra-territorial jurisdiction of IPC:-

1. Article 361(2) of the Constitution protects criminal proceedings against the President or Governor of a state in any court, during the time they hold office.
2. In accordance with well-recognized principles of international law, foreign sovereigns are exempt from criminal proceedings in India.
3. This immunity is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India. This protection is extended to all secretaries and political and military attaches, who are formally part of the missions.

Extra –territorial jurisdiction:-Section 3 and section 4 of the IPC provide for extra-territorial jurisdiction. Where a crime is committed outside the territory of India by an Indian national, such a person may be tried and punished by the India courts. According to section 3 if anyone commits any offence beyond India which is punishable in our country under any Indian law, he is liable to be convicted and punished in the same manner as if the crime was committed in India. Section 4 expands on section 3, while at the same time clarifying that the provisions of the Code shall apply to first, in case of Indians, for any offence committed outside and beyond India; and second, in case of any person in any place without and beyond India for targeting computer resource located in India. Section 4 also talks about the applicability of IPC to any offence committed by any person on any ship or aircraft registered in India wherever it may be.

It is clear from these sections that courts in India have extra-territorial jurisdiction to try offences committed on land, high seas and air by Indian nationals or other. The procedure with regard to prosecuting cases of offences committed outside India has been provided in section 188 CrPC. The jurisdiction of a court over offences committed in high seas is based on the precept that a ship in the high seas is considered to be a floating island belonging to the nation whose flag the ship flies. It does not matter where the ship or boat is, whether it is in high seas or on rivers, whether it is moving or stationary, having been anchored for the time being. This jurisdiction called the 'admiralty jurisdiction'.

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:

1. *Human Being* – The first requirement for commission of crime is that the act must be committed by a human being. The human being must be under legal obligation to act in particular manner and be physically and mentally fit for conviction in case he has not acted in accordance with the legal obligation. Only a human being under legal obligation and capable of being punished can be the proper subject of criminal law.
2. *Mens rea*: The basic principle of criminal liability is embodied in the legal maxim ‘actus non facit reum, nisi mens sit rea’. It means ‘the act alone does not amount to guilt; the act must be accompanied by a guilty mind’. The intention and the act must both concur to constitute the crime. *Mens rea* is defined as the mental element necessary to constitute criminal liability. It is the attitude of mind which accompanies and directs the conduct which results in the ‘*actus reus*’. The act is judged not from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the act. ‘*Mens rea*’ is judged from the external conduct of the wrong-doer by applying objective standards.

Supreme Court in *GirjaNath v. State* said that *mens rea* is a loose term of elastic signification and covers a wide range of mental status and conditions the existence of which give criminal hue to *actus reus*. Intention, Negligence and recklessness are the important forms of *mens rea*.

- (i) *Intention*:- Intention is defined as ‘the purpose or design with which an act is done’. Intention indicates the position of mind, condition of someone at particular time of commission of offence and also will of the accused to see effects of his unlawful conduct. Criminal intention does not mean only the specific intention but it includes the generic intention as well. For example: A poisons the food which B was supposed to eat with the intention of killing B. C eats that food instead of B and is killed. A is liable for killing C although A never intended it.
- (ii) *Negligence*:- Negligence is the second form of *mens rea*. Negligence is not taking care, where there is a duty to take care. Negligence or carelessness indicates a state of mind where there is absence of a desire to cause a particular consequence. The standard of care established by law is that of a reasonable man in identical circumstances. What amounts to reasonable care differs from thing to thing depending situation of each case. In criminal law, the negligent conduct amounts to *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 own actions. Recklessness is a form of *mens rea*.

The word ‘*mens rea*’ as such is not used in the Indian Penal Code, 1860, but the idea underlying in it is seen in the entire Code. Generally, in the IPC, every offence is defined with precision embodying the necessary *mens rea* in express words. The *mens rea* or evil intent of the wrong-doer is indicated by the use of such words as- intentionally, voluntarily, fraudulently, dishonestly, maliciously, knowingly etc.

There are many exceptional cases where *mens rea* is not required in criminal law. Some of them are as follows:

- a. Where a statute imposes liability, the presence or absence of a guilty mind is irrelevant. The classical view of that ‘*no mens rea, no crime*’ has long been eroded and several laws in India and

abroad, especially regarding economic crimes and departmental penalties, have created severe punishment even where the offences have been defined to exclude *mens rea*. Many laws passed in the interest of public safety and social welfare imposes absolute liability. This is so in matters concerning public health, food, drugs, etc. There is absolute liability (*mens rea* is not essential) in the licensing of shops, hotels, restaurants and chemists establishments. The same is true of cases under the Motor Vehicles Act and the Arms Act, offences against the State like waging of war, sedition etc.

- b. Where it is difficult to prove *mens rea* and penalties are petty fines. In such petty cases, speedy disposal of cases is necessary and the proving of *mens rea* is not easy. An accused may be fined even without any proof of *mens rea*.
- c. In the interest of public safety, strict liability is imposed and whether a person causes public nuisance with a guilty mind or without guilty mind, he is punished.
- d. If a person violates a law even without the knowledge of the existence of the law, it can still be said that he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the law and hence did not intend to violate it is no defense and he would be liable as if he was aware of the law. This follows from the maxim 'ignorance of the law is no excuse'.

Corporate Body and Mens Rea

With the proliferation in juristic persons and a growth in their activities which increasingly touch upon the daily lives of ordinary people, criminal law has evolved to bring such persons within its ambit. For example, according to section 11 of the IPC, the word 'person' includes any Company or Association, or body of persons, whether incorporated or not. Thus companies are covered under the provisions of the IPC. Virtually in all jurisdictions across the world governed by the rule of law, companies can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences. The criminal intent of the 'alter ego' of the company/ body corporate, i.e., the person or group of persons that guide the business of the company, is imputed to the company.

In *State of Maharastra v. M/s Syndicate Transport*, AIR 1964 Bom 195, it was held that the question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of offence disclosed by the allegations in the complaint or in the chargesheet, the relative position of the officer or agent vis-à-vis the corporate body and other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act.

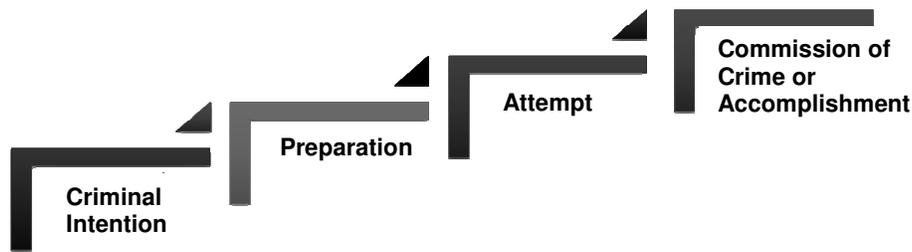
3. *Actus Reus (act or omission)*: The third essential element of crime is Actus Reus. A human being and an evil intent are not enough to constitute a crime for one cannot know the intentions of a man. Actus Reus means overt act or unlawful commission must be done in carrying out a plan with the guilty intention. Actus Reus is defined as a result of voluntary human conduct which law prohibits. It is the doing of some act by the person to be held liable. An 'act' is a willed movement of body.

A man may be held fully liable even when he has taken no part in the actual commission of the crime. For example, if a number of people conspire to murder a person and only one of them actually shoots the person, every conspirator would be held liable for it. A person will also be held fully responsible if he has made use of an innocent agent to commit a crime.

The Stages of Crime

The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, it

involves four important stages, viz.



1. **Criminal Intention**

Criminal intention is the first stage in the commission of offence. Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose. Law does not as a rule punish individuals for their evil thoughts or criminal intentions. The criminal court does not punish a man for mere guilty intention because it is very difficult for the prosecution to prove the guilty intention of a man.

Intention means doing any act with one's will, desire, voluntariness, malafides and for some purpose. In the IPC, all these varied expressions find place in the various sections of the Code. Intention can also be imputed under the law. For example, if a man drives in a rash and reckless manner resulting in an accident causing death of a person, the reckless driver cannot plead innocence by stating that he never intended to cause the death of the person. It may be true in the strict sense of term. But a reckless driver should know that reckless driving is likely to result in harm and can even cause death of the persons on the road, So, by virtue of definition of the word 'voluntarily' in the Code, a reckless driver who causes death of a person can be presumed or deemed to have intended to cause the death of the person.

2. **Preparation**

Preparation means to arrange necessary measures for commission of intended criminal act. Preparation itself is not punishable as it is difficult to prove that necessary preparations were made for commission of the offence. But in certain exceptional cases mere preparation is also punishable.

Under the IPC, mere preparation to commit offences is punishable as they are considered to be grave offences. Some of them are as follows:

- (i) Preparation to wage war against the Government (section 122).
- (ii) Preparation for counterfeiting of coins or Government Stamps (sections 233 to 235, 255 and 257).
- (iii) Possessing counterfeit coins, false weights or measurements and forged documents (section 242, 243, 259, 266 and 474).
- (iv) Making preparation to commit dacoity (section 399).

3. **Attempt**

Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. Section 511 of the IPC does not give any definition of 'attempt' but

simply provides for punishment for attempting to commit an offence. Attempt means the direct movement towards commission of a crime after necessary preparations have been made. When a person wants to commit a crime, he firstly forms an intention, then makes some preparation and finally does something for achieving the object; if he succeeds in his object he is guilty of completed offence otherwise only for making an attempt. It should be noted that whether an act amounts to an attempt to commit a particular offence is a question of fact depending on the nature of crime and steps necessary to take in order to commit it. The act constituting attempt must be proximate to the intended result.

Under the IPC, the sections on attempt can be divided into four broad categories:

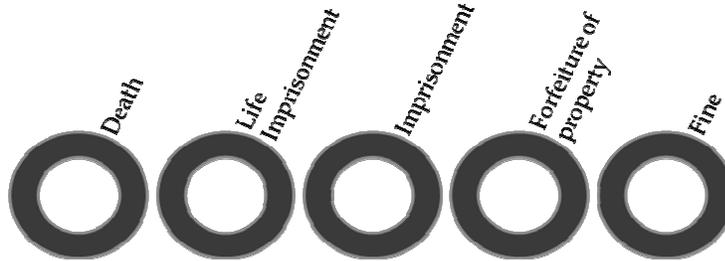
- (i) Those sections in which the commission of an offence and the attempt to commit are dealt within the same section, the extent of the punishment being the same for both the offence as also the attempt. The examples of this category are those offences against the State such as waging or attempting to wage war against the Government of India, assaulting or attempting to assault the President or Governor with intent to compel or restrain the exercise of lawful power, sedition, a public servant accepting or attempting to accept gratification, using or attempting to use evidence knowing it to be false, dacoity etc.
 - (ii) Those offences in which the attempt to commit specific offences are dealt side by side with the offences themselves, but separately, and separate punishments have been provided for the attempt other than that provided for the offences which have been completed. The examples of this category are attempt to commit an offence punishable with death or imprisonment for life including robbery, murder etc.
 - (iii) Attempt to commit suicide specifically provided under section 309 IPC.
 - (iv) The fourth category relates to the attempt to commit offences for which no specific punishment has been provided in the IPC. Such attempts are covered under section 511. This section of the Code provides that whoever attempts to commit an offence punishable by IPC with imprisonment for life or imprisonment, or cause such an offence to be committed, and in such attempt does any act towards commission of the offence, shall, where no express provision is made by IPC for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.
4. Commission of Crime or Accomplishment:- The last stage in the commission of crime is its accomplishment. If the accused succeeds in his attempt, the result is the commission of crime and he will be guilty of the offence. If his attempt is unsuccessful, he will be guilty for an attempt only. If the offence is complete, the offender will be tried and punished under the specific provisions of the IPC.

Presumption of Innocence and Burden of Proof

There is a presumption of innocence in favour of any person accused of committing any crime. It means that in the eyes of the law, the accused person is innocent till it is proven otherwise by the prosecution. So strong is this presumption that in order to rebut it, the prosecution must prove it 'beyond reasonable doubts' that the crime was committed by the accused. If the person accused of committing a crime, while defending himself, is able to introduce any doubt in the case of the prosecution, he will not be held guilty. Had there been no presumption of innocence in favour of the accused, it would have been very easy for a person to harass someone by accusing him of committing a crime.

Punishment

Punishments:- The punishments to which offenders are liable under the provisions of IPC are –



1. **Death:-** A death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The Supreme Court has ruled that death sentence ought to be imposed only in the 'rarest of rare cases'. The IPC provides for capital punishment for the following offences: (a) Murder (b) Dacoity with Murder. (c) Waging War against the Government of India. (d) Abetting mutiny actually committed. (e) Giving or fabricating false evidence upon which an innocent person suffers death (f) Abetment of a suicide by a minor or insane person; (g) Attempted murder by a life convict.

The capital punishment is awarded only in two categories of offences, namely treason and murder. In either of the cases, when the court decides that death penalty is the appropriate sentence to be imposed in the light of the gravity of matter and consequences of the offence committed and the absence of mitigating factors, then the court under the provisions of section 354(3), CrPC has to give special reasons as to why the court came to this conclusion.

2. **Life Imprisonment:-** Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.
3. **Imprisonment:-** Imprisonment which is of two descriptions namely –
 - (i) Rigorous Imprisonment, that is hard labour;
 - (ii) Simple Imprisonment
4. **Forfeiture of property:-** Forfeiture is the divestiture of specific property without compensation in consequence of some default or act forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions. The courts are empowered to forfeit property of the guilty under section 126 and section 127 of the IPC.
5. **Fine:-** Fine is forfeiture of money by way of penalty. It should be imposed individually and not collectively. When court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence.

Criminal conspiracy

Criminal conspiracy is covered under section 120A and 120-B of the IPC.

Definition of criminal conspiracy (Section 120A)

When two or more persons agree to do, or cause to be done,—

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

The ingredients of the offence of criminal conspiracy as laid down by the Supreme Court in *R. Venkatkrishnan v. CBI*, (2009) 11 SCC 737, are:

1. an agreement between two or more persons;
2. the agreement must relate to doing or causing to be done either
 - (i) an illegal act;
 - (ii) an act which is not illegal in itself but is done by illegal means.

According to *Halsbury's Laws of England*, 4th edn, the essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or by frustration or however else it may be.

In order to prove a criminal conspiracy which is punishable under section 120B there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. In *NCT of Delhi v. Navjot Sandhu*, 2005 CrLJ 3950 (SC), (Parliament attack case) the accused had never contacted the deceased terrorist on place but had helped one of the conspirators to flee to a safer place after incident was not held guilty as conspirator.

The proviso to this section is important. Having carved out an exception in favour of agreement to commit offence which is punishable per se without proof of an overt result of conspiracy or any overt act in pursuance of the agreement, other conspiracies need some acts besides the mere agreement to render it punishable.

Punishment of criminal conspiracy (Section 120B)

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

The punishment for conspiracy is the same as if the conspirator had abetted the offence. The punishment for

criminal conspiracy is more severe if the agreement is one to commit a serious offence and less severe otherwise.

Criminal Misappropriation of Property

Section 403 and 404 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property.

Dishonest misappropriation of property(Section 403)

Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) A takes property belonging to Z out of Z's possession, in good faith believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being, joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security or 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 an offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations

(a) 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.

(b) 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.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

Dishonestly is an essential ingredient of the offence and the Code 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 403 can be established. Firstly, that the property must be misappropriated or converted to the use of the accused, and, secondly, that he must misappropriate or convert it dishonestly.

In *Bhagiram Dome v. Abar Dome*, (1888) 15 Cal 388, 400, it has been held that under Section 403 criminal misappropriation takes place even when the possession has been innocently come by, but where, by a subsequent change of intention or from the knowledge of some new fact which the party was not previously acquainted, the retaining become wrongful and fraudulent.

In *Mohammad Ali v. State*, 2006 CrLJ 1368 (MP), fifteen bundles of electric wire were seized from the appellant but none including electricity department claimed that wires were stolen property. Evidence on records showed that impugned electric wire was purchased by the applicant from scrap seller. Merely applicant not having any receipt for purchase of impugned wire cannot be said to be guilty of offence punishable under Section 403 of the Code. Order of framing charge was, therefore, quashed by the Supreme Court and the accused was not held guilty under section 403 of the Indian Penal Code, 1860.

In *U. Dhar v. State of Jharkhand*, (2003) 2 SCC 219, there were two contracts- one between the principal and contractor and another between contractor and sub-contractor. On completion of work sub-contractor demanded money for completion of work and on non-payment filed a criminal complaint alleging that contractor having received the payment from principal had misappropriated the money. The magistrate took cognizance of the case and High Court refused to quash the order of magistrate. On appeal to the Supreme Court, it was held that matter was of civil nature and criminal complaint was not maintainable and was liable to be quashed. The Supreme Court also observed that money paid by the principal to the contractor was not money belonging to the complainant, sub-contractor, hence there was no question of misappropriation.

Dishonest misappropriation of property possessed by deceased person at the time of his death (Section 404)

Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in

the possession of a deceased person at the time of that person's death, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

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

Section 405 and 409 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property.

Criminal breach of trust (Section 405)

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 (19 of 1952) or not who deducts the employee's contribution from the wages payable to the employee for the 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 contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of 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.

(c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

The gist of the offence of criminal breach of trust as defined under section 405 of the Indian Penal Code, 1860 is 'dishonest misappropriation' or 'conversion to own use', another person's property.

Criminal Breach of Trust – Essential Ingredients

The essential ingredients of the offence of criminal breach of trust are as under;

1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or;
 - (ii) of any legal contract made touching the discharge of such trust.

The Supreme Court of India in *V.R. Dalal v. Yugendra Naranji Thakkar*, 2008 (15) SCC 625, has held that the first ingredient of criminal breach of trust is entrustment and where it is missing, the same would not constitute a criminal breach of trust. Breach of trust may be held to be a civil wrong but when *mens-rea* is involved it gives rise to criminal liability also. The expression 'direction of law' in the context of Section 405 would include not only legislations pure and simple but also directions, instruments and circulars issued by authority entitled therefor. In a landmark judgment of *Pratibha Rani v. Suraj Kumar*, AIR 1985 SC 628, the appellant alleged that her stridhan property was entrusted to her in-laws which they dishonestly misappropriated for their own use. She made out a clear, specific and unambiguous case against in-laws. The accused were held guilty of this offence and she was held entitled to prove her case and no court would be justified in quashing her complaint.

The Supreme Court in *Onkar Nath Mishra v. State* (NCT of Delhi), 2008 CrLJ 1391 (SC), has held that in the commission of offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation an obligation in relation to property over which dominion or control is acquired by accused. The second is a misappropriation or dealing with property dishonestly and contrary to the terms of the obligation created. In another case, *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.*, 2008 (13) SCC 678, it was

held that a cheque is property and if the said property has been misappropriated or has been used for a purpose for which the same had not been handed over, a case under Section 406 of the Code may be found to have been made out.

In *S.K. Alagh v. State of U.P. and others*, 2008 (5) SCC 662, where demand drafts were drawn in the name of company for supply of goods and neither the goods were sent by the company nor the money was returned, the Managing Director of the company cannot be said to have committed the offence under Section 406 of Indian Penal Code. It was pointed out that in absence of any provision laid down under statute, a director of a company or an employer cannot be held vicariously liable for any offence committed by company itself.

After analyzing all the cases we may conclude that for an offence to fall under this section all the four requirements are essential to be fulfilled.

1. The person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them or to put him in position of trustee.
2. The accused must be in such a position where he could exercise his control over the property i.e; dominion over the property.
3. The term property includes both movable as well as immovable property within its ambit.
4. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Punishment for criminal breach of trust.(Section 406)

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Criminal breach of trust by carrier(Section 407)

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.

Criminal breach of trust by clerk or servant(Section 408)

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.

Criminal breach of trust by public servant, or by banker, merchant or agent (Section 409)

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The acts of criminal breach of trust done by strangers is treated less harshly than acts of criminal breach of trust on part of the persons who enjoy special trust and also in a position to be privy to a lot of information or

authority or on account of the status enjoyed by them, say as in the case of a public servant. In respect of public servants a much more stringent punishment of life imprisonment or imprisonment up to 10 years with fine is provided. This is because of special status and the trust which a public servant enjoys in the eyes of the public as a representative of the government or government owned enterprises.

The persons having a fiduciary relationship between them have a greater responsibility for honesty as they have more control over the property entrusted to them due to their special relationship. Under this section the punishment is severe and the persons of fiduciary relationship have been classified as public servants, bankers, factors, brokers, attorneys and agents.

In *Bagga Singh v. State of Punjab*, the appellant was a taxation clerk in the Municipal Committee, Sangrur. He had collected arrears of tax from tax-payers but the sum was not deposited in the funds of the committee after collection but was deposited after about 5 months. He pleaded that money was deposited with the cashier Madan Lal, a co-accused, who had defaulted on the same but the cashier proved that he had not received any such sum and was acquitted by lower court. The mere fact that the co-accused cashier was acquitted was not sufficient to acquit accused in the absence of any proof that he had discharged the trust expected of him. As such the accused was liable under section 409 of Indian Penal Code, 1860.

In *Bachchu Singh v. State of Haryana*, AIR 1999 SC 2285, the appellant was working as 'Gram Sachiv' for eight gram panchayats. He collected a sum of Rs. 648 from thirty villagers towards the house tax and executed receipts for the same. As he was a public servant, and in that capacity he had collected money as house tax but did not remit the same, he was charged under Section 409 of Indian Penal Code, 1860. It was held that the appellant dishonestly misappropriated or converted the said amount for his own use and his conviction under section 409 of Indian Penal Code, 1860 was upheld by the Supreme Court.

In *Girish Saini v. State of Rajasthan*, a public servant was accused of neither depositing nor making entries of stationery required for official purpose. Accused public servant was in charge of the store in the concerned department at the time of commission of offence. Hence entrustment was proved. It was held accused could not take the benefit of misplacing of one of registers of company as he could not prove maintenance of two registers by department. Therefore, the accused was held guilty of committing criminal breach of trust.

Cheating

Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating. In most of the offences relating to property the accused merely get possession of thing in question, but in case of cheating he obtains possession as well as the property in it.

Section 415 provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamond articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

Cheating – Main Ingredients

The main ingredients of cheating are as under:

1. Deception of any person.
2. a. Fraudulently or dishonestly inducing that person
 - (i) to deliver any property to any person; or
 - (ii) to consent that any person shall retain any property; or
- (b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

The Supreme Court in *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors.*, (2005) 2 SCC 145, has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.

The Supreme Court in *M.N. Ojha and others v. Alok Kumar Srivastav and anr*, (2009) 9 SCC 682, has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.

In *T.R. Arya v. State of Punjab*, 1987 CrLJ 222, it was held that negligence in duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

Cheating by personation

As per section 416 a person is said to “cheat by personation” if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Punishment for cheating

Section 417 provides that whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect

According to section 418 whoever cheats with the knowledge that he is likely to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for cheating by personation

Section 419 states that whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating and dishonestly inducing delivery of property

As per section 420 whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Simple cheating is punishable under section 417 of the IPC. Section 420 comes into operation when there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving.

In *Kuriachan Chacko v. State of Kerala*, (2004) 12 SCC 269, the money circulation scheme was allegedly mathematical impossibility and promoters knew fully well that scheme was unworkable and false representations were being made to induce persons to part with their money. The Supreme Court held that it could be assumed and presumed that the accused had committed offence of cheating under section 420 of the IPC.

In *Mohd. Ibrahim and others v. State of Bihar and another*, (2009) 3 SCC (Cri) 929, the accused was alleged to have executed false sale deeds and a complaint was filed by real owner of property. The accused had a bonafide belief that the property belonged to him and purchaser also believed that suit property belongs to the accused. It was held that accused was not guilty of cheating as ingredients of cheating were not present.

In *Shruti Enterprises v. State of Bihar and ors*, 2006 CrLJ 1961, it was held that mere breach of contract cannot give rise to criminal prosecution under section 420 unless fraudulent or dishonest intention is shown right at the beginning of transaction when the offence is said to have been committed. If it is established that the intention of the accused was dishonest at the time of entering into the agreement then liability will be criminal and the accused will be guilty of offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be fastened on the accused and the only right which complainant acquires is to a decree of damages for breach of contract.

Fraudulent Deeds and Dispositions of Property

Fraudulent Deeds and Dispositions of Property are covered under section 421 to 424 of the Indian Penal Code, 1860. These sections deal with fraudulent conveyances referred to in section 53 of the Transfer of Property Act and the Presidency-towns and Provincial Insolvency Acts.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors (Section 421)

Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Guwahati High Court in *Ramautar Chaukhany v Hari Ram Todi & Anr*, 1982 CrLJ 2266, held that an offence under this section has following essential ingredients:

- (i) That the accused removed, concealed or delivered the property or that he transferred, it caused it to be transferred to someone;
- (ii) That such a transfer was without adequate consideration;
- (iii) That the accused thereby intended to prevent or knew that he was thereby likely to prevent the distribution of that property according to law among his creditors or creditors of another person;
- (iv) That he acted dishonestly and fraudulently.

This section specifically refers to frauds connected with insolvency. The offence under it consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors. It applies to movable as well as immovable properties. In view of this section, the property of a debtor cannot be distributed according to law except after the provisions of the relevant enactments have been complied with.

Dishonestly or fraudulently preventing debt being available for creditors (Section 422)

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.

This section, like the preceding section 421, is intended to prevent the defrauding of creditors by masking property.

The expression 'debt' has not been defined in the IPC or in the General Clauses Act but there are judicial pronouncements on the same. In *Commissioner of Wealth Tax v G.D. Naidu*, AIR 1966 Mad 74, it was held that the essential requisites of debt are- (1) ascertained or ascertainable, (2) an absolute liability, in present

or future, and (3) an obligation which has already accrued and is subsisting. All debts are liabilities but all liabilities are not debt.

The Supreme Court in *Mangoo Singh v. Election Tribunal*, AIR 1957 SC 871, has laid down that the word 'demand' ordinarily means something more than what is due; it means something which has been demanded, called for or asked for, but the meaning of the word must take colour from the context and so 'demand' may also mean arrears or dues.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration (Section 423)

Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge on property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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 an immovable 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 424)

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 two years, or with fine, or with both.

The essential ingredients to bring an offence under section 424 are as follows:

- (i) There is a property;
- (ii) That the accused concealed or removed the said property or assisted in concealing or removing the said property;
- (iii) That the said concealment or removal or assisting in removal or concealment was done dishonestly or fraudulently.

Or,

- (i) That the accused was entitled to a demand or claim;
- (ii) That the accused released the same;
- (iii) That he so released dishonestly or fraudulently.

Forgery

Forgery is defined under section 463 of the Indian Penal Code, 1860 and the punishment for it is prescribed under section 465.

Forgery (Section 463)

Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Punishment for forgery (Section 465)

Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The making of a false document or false electronic record is defined under section 464 of the Indian Penal Code, 1860.

The Supreme Court in *Ramchandran v. State*, AIR 2010 SC 1922, has held that to constitute an offence of forgery document must be made with dishonest or fraudulent intention. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The Supreme Court in *Parminder Kaur v. State of UP*, has held that mere alteration of document does not make it a forged document. Alteration must be made for some gain or for some objective.

Similarly, in *Balbir Kaur v. State of Punjab*, 2011 CrLJ 1546 (P&H), the allegation against the accused was that she furnished a certificate to get employment as ETT teacher which was found to be bogus and forged in as much as school was not recognized for period given in certificate. However the certificate did not anywhere say that school was recognized. It was held that merely indicating teaching experience of the accused, per-se, cannot be said to indicate wrong facts. So the direction which was issued for prosecution is liable to be quashed.

Defamation

Section 499 provides that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) A says— “Z is an honest man; he never stole B's watch”; intending to cause it to be believed that Z did

steal B's watch. This is defamation, unless it fall within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Exceptions

First Exception.—Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—Publication of reports of proceedings of courts.—It is not defamation to publish substantially true report of the proceedings of a Court of justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(a) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no farther.

(b) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, inasmuch as the opinion which express of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—Merits of public performance.—It is not defamation to express in good faith any opinion

respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z—“Z’s book is foolish; Z must be a weak man. Z’s book is indecent; Z must be a man of impure mind.” A is within the exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z’s character only so far as it appears in Z’s book, and no further.

(e) But if A says “I am not surprised that Z’s book is foolish and indecent, for he is a weak man and a libertine.” A is not within this exception, inasmuch as the opinion which he expresses of Z’s character is an opinion not founded on Z’s book.

Seventh Exception.—**Censure passed in good faith by person having lawful authority over another.**—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders, a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier- are within this exception.

Eighth Exception.—**Accusation preferred in good faith to authorised person.**—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z’s master; if A in good faith complains of the conduct of Z, a child, to Z’s father- A is within this exception.

Ninth Exception.—**Imputation made in good faith by person for protection of his or other’s interests.**—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Illustrations

(a) A, a shopkeeper, says to B, who manages his business—“Sell nothing to Z unless he pays you ready

money, for I have no opinion of his honesty.” A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.—**Caution intended for good of person to whom conveyed or for public good.**—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation

According to section 500 whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

According to Lord Macaulay, who had a major role in drafting of the Indian Penal Code, the essence of offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.

Kinds of Defamation

The wrong of defamation is of two kinds- libel and slander.

In libel, the defamatory statement is made in some permanent and visible form, such as writing, printing or pictures.

In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds.

The ambit of ‘publish’ is very wide. The publication of defamatory matter means that it is communicated to some person other than the person about whom it is addressed.

Printing or engraving matter known to be defamatory

Section 501 provides that whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

A person printing or engraving defamatory matter abets the offence of defamation and is guilty under section 501. Printing or engraving of defamatory material is not sufficient and the court is required to be satisfied that the accused knew or had good reasons to believe that such a matter was defamatory before holding a person guilty under section 501. In *Sankaran v. Ramkrishna Pillai*, AIR 1960 Ker 141, the defamatory matter was printed in Malayalam and the accused did not know the language, his *mens rea* was absent and he was not guilty.

Sale of printed or engraved substance containing defamatory matter

Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

To bring an offence under section 502, it must be:

- (i) That the published material was defamatory as per section 499 of the IPC.
- (ii) That the published material was either printed or engraved.
- (iii) That the accused knew that such matter contained defamatory imputation
- (iv) That the accused sold or offered for sale the defamatory matter.

General exceptions

The Indian Penal Code, 1860 also provides for general exceptions for a person accused of committing any offence under the Code to plead in his defense. General defences or exceptions are contained in sections 76 to 106 of the IPC. 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 105 of the Indian Evidence Act, 1872. The exceptions strictly speaking came within the following six categories. (1) Judicial acts (2) Mistake of fact (3) Accident (4) Trifling Act (5) Consent (6) Absence of Criminal Intention.

1. *Mistake of Fact- bound by law:-* According to section 76, if any one commits any act which he is bound to do or mistakenly believes in good faith that he is bound by law to do it, he is not guilty. The mistake or ignorance must be of fact, but not of law. If the mistaken facts were true, the act would not be an offence. Mistake of fact, is a general defence based on the Common Law maxim - *ignorantiafacitexcusat; igoranita juris non excusat-* (Ignorance of fact excuses; Ignorance of law does not excuse). In mistake of fact the accused does not possess *mens rea* or guilty mind.
2. *Act of Judge when acting judicially (section 77):-*If any judge in his authority in good faith believing authorized by law commits any act, no offence is attracted.
3. *Act done pursuant to the judgment or order of Court (section 78):-* When any act is committed on judgment or order of the Court of Justice which is in force, it is no offence even if the judgment or order of the Court is without any jurisdiction, though the person who executes the judgment and order must believe that the Court has the jurisdiction.

Section 77 protects judges from any criminal liability for their judicial acts. Section 78 extends this protection to ministerial and other staff, who may be required to execute orders of the court. If such immunity was not extended, then executing or implementing court orders would become impossible.

4. *Mistake of Fact-justified by law:-* According to section 79 of the IPC, if any one commits any act which is justified by law or by reason of mistake of fact and not by reason of mistake of law believes himself to be justified by Law.
5. *Accident in doing a lawful act:-* According to section 80, if any one commits any offence by accident or misfortune without malafide or without knowledge in performance of his legal duty in legal manner with proper care and caution is no offence.

The protection under this section will apply only if the act is a result of an accident or a misfortune. The word 'accident' is derived from the Latin word 'accidere' signifying 'fall upon, befall, happen, chance. It rather means an unintentional, an unexpected act. Thus, injuries caused due to accidents in games and sports are all covered by this section.

6. *Act likely to cause harm, but done without criminal intent, and to prevent other harm (section 81):-* Any act done by anyone without any criminal intent for saving or preventing harm to third person or property in good faith is no offence. According to the 'explanation' to this section, it is a question of

fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

7. *Act of a child under seven years of age (section 82)*:- If any child who is below seven years of age commits any offence, he is not guilty because it is the presumption of law that that a child below 7 years of age is incapable to having a criminal intention (*mens rea*) necessary to commit a crime.
- 8 *Act of a child above seven and under twelve of immature understanding (section 83)*:- If any minor child is in between seven and twelve years of age and not attained the maturity of what is wrong and contrary to law at the time of commission of offence in not liable to be convicted and punished.
- 9 *Act of a person of unsound mind (section 84)*:- Nothing done by any person of unsound mind is an offence if at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.
10. *Act of a person incapable of judgment by reason of intoxication caused against his will (section 85)*:- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.
11. *Offence requiring a particular intent or knowledge committed by one who is intoxicated (section 86)*:- In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. If the accused himself takes and consumes intoxicated thing or material with knowledge or intention and under intoxication he commits any offence he is liable for punishment.
12. *Act not intended and not known to be likely to cause death or grievous hurt, done by consent (section 87)*:- When anyone commits any act without any intention to cause death or grievous hurt and which is not within the knowledge of that person to likely to cause death or grievous hurt to any person who is more than eighteen years of age and has consented to take the risk of that harm, the person doing the act has committed no offence.

This section is based on the principle of '*volenti-non-fit injuria*' which means he who consents suffers no injury. The policy behind this section is that everyone is the best judge of his own interest and no one consents to that which he considers injurious to his own interest.

13. *Act not intended to cause death, done by consent in good faith for person's benefit (section 88)*:- Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Section 88 extends the operation of consent to all acts except that of causing death intentionally provided that the act is done in good faith for the benefit of the consenting party.

For example:- A, a surgeon, knowing that a particular operation is likely to cause the death of Z who suffers under the painful complaint but not intending to cause Z's death and intending in good faith Z's benefit, performs that operation on Z with Z's consent. A has committed no offence. But if surgeon while performing the operation leaves a needle inside the abdomen of the patient who die

due to septic- He would be liable criminally for causing death by negligence because he did not perform the operation with due care and caution.

14. *On consent of guardian if any act is done in good faith to it (section 89):-* This section gives power to the guardian of a child under 12 years of age or a person of unsound mind to consent to do an act done by a third person for the benefit of the child or a person of unsound mind. Anything done by the third person will not be an offence provided that it is done in good faith and for the benefit of the child or a person of unsound mind. This section gives protection to the guardians as well as other person acting with the consent of a guardian of a person under 12 years of age or a person of unsound mind.
15. *Consent (section 90):-*The consent is not valid if it is obtained from a person who is under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception. The consent is also not valid if it's given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent. The consent is given by a person who is under twelve years of age is also not valid unless the contrary appears from the context.
16. *Exclusion of acts which are offences independently of harm caused (section 91):-* The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.
17. *Act done in good faith for benefit of a person without consent (section 92):-* Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. This defense is subject to certain exceptions.
18. *Communication made in good faith (section 93):-* No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. For example: A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.
19. *Act to which a person is compelled by threats (section 94):-* Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence. For this defense to be valid the person acting under threat should not have himself put under such a situation.
20. *Act causing slight harm (section 95):-* Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

LESSON ROUND-UP

- The Indian Penal Code, 1860 is the substantive law of crimes. It defines acts which constitute an offence and lays down punishment for the same. It lays down certain principles of criminal law. The procedural law through which the Indian Penal Code is implemented is the Criminal Procedure Code, 1973.
- The basic function of criminal law is to punish the offender and to deter the incidence of crime in the society.
- The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, it involves four important stages, viz. (i) Criminal Intention (ii) Preparation (iii) Attempt (iv) Commission of Crime or Accomplishment.
- The punishments to which offenders are liable under the provisions of IPC are Death, Life imprisonment, Imprisonment, Forfeiture of property and fine.
- When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.
- 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 willfully suffers any other person so to do, commits “criminal breach of trust”.
- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.
- Fraudulent Deeds and Dispositions of Property are covered under section 421 to 424 of the Indian Penal Code, 1860. These sections deal with fraudulent conveyances referred to in section 53 of the Transfer of Property Act and the Presidency-towns and Provincial Insolvency Acts.
- Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.
- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.
- The Indian Penal Code, 1860 provides general exceptions for a person accused of committing any offence under the Code to plead in his defence. General defences or exceptions are contained in sections 76 to 106 of the IPC.

Lesson 10

Criminal Procedure Code, 1973

LESSON OUTLINE

- Learning Objectives
- Introduction
- Important Definitions
- Classes of Criminal Courts
- Power of Courts
- Arrest of Persons
- Summons and Warrants
- Summons
- Warrant of Arrest
- Proclamation and Attachment
- Summons to Produce
- Search Warrant
- Preventive action of the police and their powers to Investigate
- Information to the police and their powers to Investigate
- Powers of Magistrate
- Limitation for taking cognizance of certain
- Offences
- Summary Trials
- Lesson Round up
- Self-Test Questions

LEARNING OBJECTIVES

Criminal law occupies a pre-dominant place among the agencies of social control and is regarded as a formidable weapon that society has forged to protect itself against anti-social behaviour.

The law of criminal procedure is meant to be complimentary to criminal law. It is intended to provide a mechanism for the enforcement of criminal law. The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person. The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.

The law of criminal procedure is intended to provide a mechanism for the enforcement of criminal law. Without the proper procedural law the substantive criminal law which defines offences and provides punishment for them would be almost worthless.

The objective of this lesson is to impart knowledge to the students so that they develop proper perspective about the important provisions of the criminal procedure.

The Code of Criminal Procedure, 1973 is an Act to consolidate and amend the law relating to Criminal Procedure.

INTRODUCTION

The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure. Company Secretaries and the secretarial profession would have relatively less to do with the Code of Criminal Procedure than with other procedural laws, except for safeguarding against incurring of liability for criminal offences by Directors, Secretary, Manager or other Principal Officer under different corporate and industrial laws. Nevertheless, it is necessary that company secretaries and other secretarial staff should be familiar with some of the relevant features of the Code. It is an Act to consolidate and amend the law relating to the procedure to be followed in apprehending the criminals, investigating the criminal cases and their trial before the Criminal Courts. It is an adjective law but also contains provisions of substantive nature (e.g. Chapters VIII, IX, X and XI). Its object is to provide a machinery for determining the guilt of and imposing punishment on offenders under the substantive criminal law, for example, the Indian Penal Code (I.P.C.). The two Codes are to be read together. The Code also provides machinery for punishment of offences under other Acts.

IMPORTANT DEFINITIONS

Offence

Section 2(n) of the Cr.P.C. defines the word "offence" to mean any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871. However, the term is more elaborately defined in Section 40 of the I.P.C. which states that "offence" denotes a thing made punishable by the Code. Section 39 of the Cr. P.C. imposes a duty on every person who is aware of the commission of or of intention to commit an offence, to give information of certain offences which are specified in Clause (i) to (xii) of sub-Section (1). An offence is what the legislature classes as punishable. *Mens Rea* a bad intention or guilt is an essential ingredient in every offence.

Mens rea

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim *actus non facit ream nisi mens sit rea*. The act itself does not constitute guilt unless done with a guilty intent. Thus, unless an act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "there must be a mind at fault before there can be a crime". *Mens rea* is a subjective matter. Thus *mens rea* is an essential ingredient in every criminal offence.

The motive is not an intention. Intention involves foresight or knowledge of the probable or likely consequences of an injury. In short, *mens rea* is the state of mind which accompanies and directs the conduct resulting in the *actus reus*.

Bailable Offence and Non-bailable Offence

A "bailable offence" means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force. "Non-bailable" offence means any other offence. [Section 2(a)]

Cognizable Offence and Non-cognizable Offence

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

"Non-cognizable offence" means an offence for which, and "non-cognizable" case means a case in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer. [Section 2(c) and 2(l)]

In order to be a cognizable case under Section 2(c) of the Code, it would be enough if one or more (not ordinarily all) of the offences are cognizable.

(Note: It may be observed from the First Schedule that non-cognizable offences are usually bailable while cognizable offences are generally non-bailable).

Complaint

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report. [Section 2(d)]

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:



There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. (*Mohd. Yousuf v. Afaq Jahan*, AIR 2006 SC 705).

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173.

Bail

It means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

An "anticipatory bail" is granted by the High Court or a Court of Session, to a person who apprehends arrest

for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (*State of Assam v. R.K. Krishna Kumar* AIR 1998 SC 144).

Inquiry

It means every inquiry other than a trial, conducted under this Code by a Magistrate or Court. [Section 2(g)]

- the inquiry is different from a trial in criminal matters;
- inquiry is wider than trial;
- it stops when trial begins.

Investigation

It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Section 2(h)]

The three terms — 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal case. The first stage is reached when a police officer either on his own or under orders of a Magistrate investigates into a case (Section 202). If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he is of different opinion, he sends that case to a Magistrate and then begins the second stage—a trial or an inquiry. The Magistrate may deal with the case himself and either convict the accused or discharge or acquit him. In serious offences the trial is before the Session's Court, which may either discharge or convict or acquit the accused. (Chapter XVIII)

Judicial Proceeding

It includes any proceeding in the course of which evidence is or may be legally taken on oath. The term judicial proceeding includes inquiry and trial but not investigation. [Section 2(i)]

Pleader

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the permission of the Court to act in such proceeding. [Section 2(q)]

It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor. [Section 2(u)]

Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.

Summons and Warrant Cases

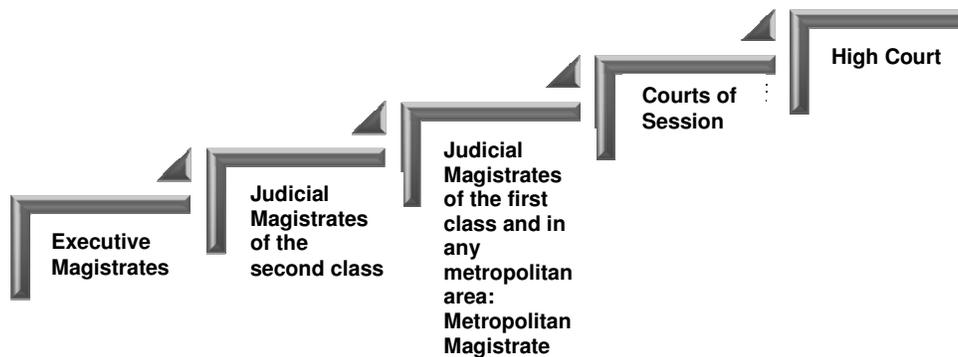
"Summons case" means a case relating to an offence and not being a warrant case. [Section 2(w)] A "Warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. [Section 2(x)]

Those cases which are punishable with imprisonment for two years or less are summons cases, the rest are

all warrant cases. Thus, the division is based on punishment which can be awarded. The procedure for the trial of summons cases is provided by Chapter XX and for warrant cases by Chapter XIX.

CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:



Besides this, the Courts may also be constituted under any other law. The Supreme Court is also vested with some criminal powers. Article 134 confers *appellate* jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.

POWER OF COURTS

Chapter III of Cr.P.C. deals with power of Courts. One of such power is to try offences. Offences are divided into two categories:

- (a) those under the Indian Penal Code; and
- (b) those under any other law.

According to Section 26, any offence under the Indian Penal Code, 1860 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law and if not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.

This Section is a general Section and is subject to the other provisions of the Code.

Power of the Court to pass sentences:

(a) Sentences which High Courts and Sessions Judges may pass

According to Section 28, a High Court may pass any sentence authorised by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of

imprisonment for life or of imprisonment for a term exceeding ten years.

Thus, Section 26 of the Code enumerates the types of Courts in which different offences can be tried and then under Section 28, it spells out the limits of sentences which such Courts are authorised to pass.

(b) Sentences which Magistrates may pass

Section 29 lays down the quantum of sentence which different categories of Magistrates are empowered to impose. The powers of individual categories of Magistrates to pass the sentence are as under:

- (i) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.
- (ii) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding five thousand rupees, or of both.
- (iii) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.
- (iv) A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the First class.

(c) Sentence of imprisonment in default of fine

Where a fine is imposed on an accused and it is not paid, the law provides that he can be imprisoned for a term in addition to a substantive imprisonment awarded to him, if any. Section 30 defines the limits of Magistrate's powers to award imprisonment in default of payment of fine.

It provides that the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law provided that the term:

- (i) is not in excess of the powers of the Magistrate under Section 29; and
- (ii) where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1/4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(d) Sentences in cases of conviction of several offences at one trial

Section 31 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.

ARREST OF PERSONS

Section 41 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant. These include:

- (a) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
- (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or
- (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

- (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
- (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
- (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
- (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
- (h) who being a released convict, commits a breach of any rule, relating to notification of residence or change of or absence from residence; or
- (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issues the requisition. (Section 41)

Arrest on refusal to give name and residence

If any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours if his true name and address cannot be ascertained or fails to execute a bond or furnish sufficient sureties. In that event he shall be forwarded to the nearest Magistrate having jurisdiction. (Section 42)

Arrest by a private person

A private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender (*Section 43*). This right of arrest arises under the Common Law which applies to India Ramaswamy Aiyar (1921) ILR 44 Mad. 913.

Arrest by Magistrate

Under Section 44 clause (1), the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody. Under in clause 2, the Magistrate has power to arrest a person for which he is competent and has also been authorised to issue a warrant. However, Section 45 protects members of Armed Forces from arrest where they do something in discharge of their official duties. They could be arrested only after obtaining the consent of the Central Government.

Arrest how made

Section 46 sets out the manner in which an arrest is to be made. The Section authorises a police officer or other person making an arrest to actually touch or confine the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance. The Section does not give a right to cause the death of a person who is not accused of an offence punishable with death sentence or life imprisonment. The word "arrest" when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one's personal liberty to go where he pleases. The word "arrest" consists of taking into custody of another person under authority empowered by

law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

Section 47 is an enabling provision and is to be used by the police officer with regard to exigencies of a situation. Section 48 authorises a police officer to pursue the offender in to any place in India for the purpose of effecting his arrest without warrant. Ordinarily, a police officer is not at liberty to go outside India and to arrest an offender without a warrant, but if he can arrest an offender without warrant who escapes into any place in India, he can be pursued and arrested by him without warrant. (See also Section 60)

Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay and subject to the provisions relating to bail, Article 22(2) of the Constitution of India also provides for producing the arrested person before the Magistrate within 24 hours.

When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 167 order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

Officers in-charge of the concerned police stations shall report to the Magistrate the cases of all persons arrested without warrant, within the limits of their respective police stations whether such persons have been admitted to bail or otherwise. (Section 58)

A person arrested by a police officer shall be discharged only on his own bond or on bail or under the special order of a Magistrate, (Section 59). If a person in lawful custody escapes or is rescued, the person, from whose custody he escaped or was rescued, is empowered to pursue and arrest him in any place in India and although the person making such arrest is not acting under a warrant and is not a police officer having authority to arrest, nevertheless, the provisions of Section 47 are applicable which stipulates provisions relating to search of a place entered by the person sought to be arrested.

SUMMONS AND WARRANTS

The general processes to compel appearance are:

- (1) Summons (Section 61)
- (2) Warrants (Section 70)

SUMMONS

A summon is issued either for appearance or for producing a document or thing which may be issued to an accused person or witness. Every summons issued by the Court shall be in writing, in duplicate, signed by the Presiding Officer of such Court or by such officer as is authorised by the High Court and shall bear the seal of the Court (Section 61). The summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and time of the day when, the attendance of the person summoned is required.

Service of summons

The summons shall be served by a police officer or by an officer of the Court or other public servant (Section 62). In case the service cannot be effected by the exercise of due diligence, the serving officer can perform substituted service by affixing one of the duplicates of the summons to some conspicuous part of the house or homestead in which person summoned ordinarily resides, and thereupon the Court, after making such enquiries as it thinks fit may either declare that the summons has been duly served or order fresh service, as it considers proper (Section 65).

The service of summons on corporate bodies, and societies

The service of summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the 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.

The word "corporation" in this Section means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860. Thus, the societies may not be formally incorporated, yet they fall within the purview of this section. (Section 63)

When personal service of summons cannot be effected under Section 62, the extended service under Section 64 can be secured by leaving one of the duplicates with some adult male member of his family residing with him who may also be asked to sign the receipt for that. A servant is not a member of the family within the meaning of Section 64.

In the case of a Government Servant, the duplicate copy of the summons shall be sent to the head of the office by the Court and such head shall thereupon cause the summons to be served in the manner provided by Section 62 and shall return it to the Court under his signature with the endorsement required by Section 62. Such signature shall be evidence of due service. (Section 66)

WARRANT OF ARREST

Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. (Section 70) The form of warrant of arrest is Form No. 2 of the Second Schedule. The requisites of a warrant are as follows:

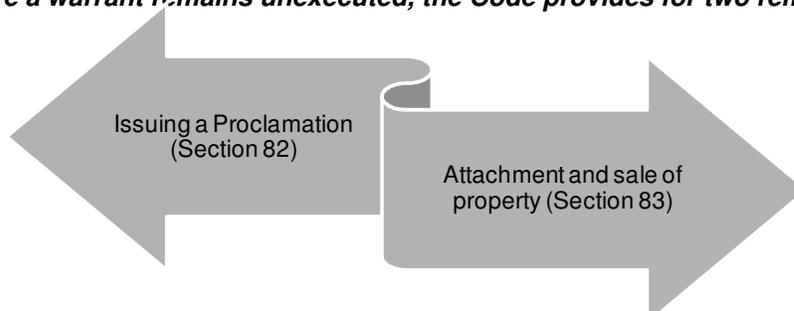
1. It must be in writing.
2. It must bear the name and designation of the person who is to execute it;
3. It must give full name and description of the person to be arrested;
4. It must state the offence charged;
5. It must be signed by the presiding officer; and
6. It must be sealed.

Such warrant is only for protection of a person before the concerned Court and not before the police officer.

Under Section 76 the police officer or other person executing the warrant of arrest shall (subject to the provisions of Section 71 as to security) bring the person arrested before the Court without unnecessary delay provided that such delay shall not in any case exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

PROCLAMATION AND ATTACHMENT

Where a warrant remains unexecuted, the Code provides for two remedies:



If a Court has reason to believe 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 not less than 30 days from the date of publishing such proclamation. (Section 82)

While issuing proclamation, the Magistrate must record to his satisfaction that the accused has absconded or is concealing himself. 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 this Code. This can be compelled to be produced by issuing summons (Sections 91 and 92) or a warrant (Sections 93 to 98).

SEARCH WARRANT

According to Section 93, a search warrant can be issued only in the following cases:

Where the Court has reason to believe that a person summoned to produce any document or other thing will not produce it

Where such document or other thing is not known to the Court to be in the possession of any person

Where a general inspection or search is necessary. However, a search warrant may be general or restricted in its scope as to any place or part thereof.

But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a Magistrate other than a District Magistrate or Chief Judicial Magistrate, nor would such warrant be issued so as to affect Sections 123 and 124 of the Indian Evidence Act, 1872 or the Bankers' Book Evidence Act, 1891.

In terms of Section 97 any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class who has reasons to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant for the search of the person so confined. The person if found shall be immediately produced before the Magistrate for making such orders as in the circumstances of the case he thinks proper.

(i) Security for keeping the peace and for good behaviour

The provisions of Chapter VIII are aimed at persons who are a danger to the public by reason of the commission of certain offences by them. The object of this chapter is prevention of crimes and disturbances of public tranquillity and breach of the peace.

Security for keeping the peace on conviction

When a Court of Session or Court of a Magistrate of first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take

security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

The offences specified under sub-section (2) are as follows:

- (a) any offence punishable under Chapter VIII of the India Penal Code 1860.
- (b) any offence which consists of or includes, assault or using criminal force or committing mischief;
- (c) any offence of criminal intimidation;
- (d) any other offence which caused, or was intended or known to be likely to cause a breach of the peace.

However, if the conviction is set-aside on appeal or otherwise, the bond so executed shall become void. (Section 106)

Security for keeping the peace in other cases

When an Executive Magistrate receives information that any person is likely to:

- (i) commit a breach of peace; or
- (ii) disturb the public tranquillity; or
- (iii) do any wrongful act that may probably occasion a breach of the peace; or disturb the public tranquillity;

he may require such person to show cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as the Magistrate deem fit. (Section 107)

(ii) Maintenance of public order and tranquillity

A—Unlawful assemblies

Dispersal of assembly by use of civil force

Any Executive Magistrate or officer in-charge of a police station or, in the absence of such officer in-charge, any other officer not below the rank of sub-inspector may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and it shall be thereupon the duty of the members of such assembly to disperse accordingly.

If any such assembly does not disperse or conducts itself in a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to above may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly. (Section 129)

Use of armed forces to disperse assembly

If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces and to arrest and confine such persons in order to disperse the assembly or to have them punished.

Section 132 protects persons for any act purporting to be done under Sections 129 to 131. No prosecution

shall be instituted against such persons in any criminal Court except with the sanction of Central Government if the person is an officer or member of the armed forces or with the sanction of State Government in any other case. (*Section 130*)

B—Public nuisances

Conditional order for removal of nuisance

Section 133 lays down the following public nuisances which can be proceeded against:

- (1) the unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
- (2) carrying on any trade or occupation, or keeping of any goods or merchandise, injurious to the health of the community; or
- (3) the construction of any building or the disposal of any substance, as is likely to cause conflagration or explosion; etc.
- (4) the building, tent or structure near a public place.
- (5) the dangerous animal requiring destroying, confining or disposal.

For initiating prevention under this Section the Magistrate should keep in mind that he is acting purely in the public interest. For the applicability of clause A, the public must have the right of way which is being obstructed.

Power to issue order in urgent cases of nuisance or apprehended danger

As per Section 144 of the Code where in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, in such cases the Magistrate may by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent, obstruction, annoyance of injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.

An order under this Section may be passed ex-parte in cases of emergency or in cases where the circumstances do not admit of the serving of notice in due time upon the person against whom the order is directed. An order under this Section can remain in force for two months, and may be extended further for a period not exceeding six months by the State Government if it considers necessary.

PREVENTIVE ACTION OF THE POLICE AND THEIR POWERS TO INVESTIGATE

Section 149 authorises a police officer to prevent the commission of any cognizable offence. If the police officer receives the information of a design to commit such an offence, he can communicate such information to his superior police officer and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence. The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented

The arrested person can be detained in custody only for 24 hours unless his further detention is required under any other provisions of this Code or of any other law. (Sections 150 and 151) Section 152 authorises a police officer to prevent injury to public property.

Inspection of weights and measures

Any officer incharge of the police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false, and if he finds in such place any false weights, measures or instruments he may seize the same and shall give information of such seizure to a Magistrate having jurisdiction. (Section 153)

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE***Information in cognizable cases***

Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. (Section 154)

The above information given to a police officer and reduced to writing is known as First Information Report (FIR). Although such words are not mentioned in the Criminal Procedure Code. The investigation of the case proceeds on this information only. Thus, the principal object of this Section is to set the criminal law in motion and to obtain information about the alleged criminal activities so as to punish the guilty.

For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in-charge of the police station as indicated in Section 154 of the Code. (*Mohd. Yousuf v. Afaq Jahan*, AIR 2006 SC 708.)

Any person aggrieved by a refusal on the part of an officer incharge of a police station to record the information may send the substance of such information in writing and by post to the Superintendent of Police concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him.

A copy of the information as recorded under sub-section (1) shall be given to the informant free of cost.

Information as to non-cognizable cases and investigation of such cases

When information is given to an officer incharge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate. (Section 155)

The police officer is not authorised to investigate a non-cognizable case without the order of Magistrate having power to try such cases, and on receiving the order, the police officer may exercise the same powers in respect of investigation as he may exercise in a cognizable case.

Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. [Section 155(4)]

Police officer's powers to investigate cognizable case

In case of a cognizable offence the police officer may conduct investigations without the order of a

Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorised by the Magistrate in this behalf. Any Magistrate empowered under Section 190 may order such investigation as above mentioned. Sections 160 and 161 authorise a police officer making an investigation to require the attendance of and may examine orally any person who appears to be acquainted with the facts and circumstances of the case. (Section 156)

Search by police officer

This Section authorises general search if the police officer has reason to believe that anything necessary for the purpose of an investigations may be found. The officer acting under this sub-section must record in writing his reasons for making of a search. But, the illegality of search will not affect the validity of the articles or in any way vitiate the recovery of the articles and the subsequent trial. (Section 165)

Whenever any person is arrested or detained in custody and it appears that the investigation cannot be completed within the period of twenty four hours as laid down in Section 57 and that there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or other competent investigation officer shall promptly transmit to the nearest judicial Magistrate a copy of the entries in the diary relating to the case, and shall forward the accused to such Magistrate at the same time (required to be mentioned day by day under Section 172). The Magistrate may then authorise the detention of the accused in custody for a term not exceeding of fifteen days. (Section 167) Every investigation must be completed without undue delay. On completion of investigation, the competent police officer under the Code shall forward a police report with the prescribed details to a Magistrate empowered to take cognizance of the offence and send along with the report all documents or relevant extracts on which the prosecution intends to rely. (Section 173)

POWERS OF MAGISTRATE

Cognizance of an offence by Magistrate

Section 190 relates to cognizance of offences by Magistrates. The Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it are fulfilled otherwise the Court does not obtain jurisdiction to try the offence (*Mohd. Safi*, AIR 1966 SC 69).

Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon:

- (1) receiving a complaint of facts constituting such offence;
- (2) a police report of such facts;
- (3) information received from any person other than a police officer;
- (4) his own knowledge that such offence has been committed.

When a Magistrate takes cognizance of an offence upon information received from any person other than a police officer or upon his own knowledge then the accused is informed that he is entitled to have the case inquired into or tried by another Magistrate and if the accused objects to further proceedings before the Magistrate taking cognizance, the case is transferred to other Magistrate as is specified by the Chief Judicial Magistrate. (Section 191)

The Chief Judicial Magistrate may after taking cognizance of an offence transfer the case for inquiry or trial to any competent Magistrate subordinate to him. Similarly a first class Magistrate may transfer a case to such other competent Magistrate to try as the Chief Judicial Magistrate specifies. (Section 192)

Cognizance of an offence by Courts of Session

The Court of Session does not take cognizance of any offence, as a Court of original jurisdiction unless the case has been committed to it by a competent Magistrate. The Additional Sessions Judge and Asstt. Sessions Judge try such cases as the High Court may direct or the Sessions Judges may make over to them. (Sections 193 and 194)

Complaints to Magistrates

A Magistrate taking cognizance of an offence on complaint examines the complainant and the witnesses if any upon oath and then the substance of such examination is reduced to writing and signed by the complainant and witnesses and also by the Magistrate.

However, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses. If a public servant in the discharge of his official duties or a Court has made the complaint or if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192. Further, if the Magistrate makes over the case to another Magistrate, under Section 192 after examining the complainant and the witnesses, they need not to be re-examined by the latter Magistrate. (Section 200)

If a complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall return it for presentation to the proper Court if the complaint is in writing, and if the complaint is oral, he should direct the complainant to the proper Court. (Section 201)

The Magistrate enquiring into a case may take evidence of witnesses on oath but where the offence is triable by the Court of Session; he shall call upon the complainant to produce all his witnesses and examines them on oath. He may dismiss the complaint if after considering the statement on oath and the result of the investigation or enquiry, there is no sufficient ground for proceeding and may record his reasons for doing so. (Sections 201 to 203)

On the other hand if the Magistrate is of opinion that there is sufficient ground for taking cognizance of an offence he may either issue summons for attendance of the accused if the case appears to be a summons-case or he may in a warrant case issue a warrant or summons for the accused to be produced at a certain time before such Magistrate. It is important that no summon or warrant shall be issued against the accused unless a list of prosecution witnesses has been filed. In a proceeding instituted on the complaint in writing a copy of the complaint is to be sent with every summons or warrant. (Section 204)

Every charge under this Code shall state the offence with which the accused is charged specifying the law and the name of the offence, particulars of time and place of the alleged offence (Sections 211 and 212). For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately (Section 218). If more than one offence is committed by the same person in one series of acts so connected together as to form the same transaction, he may be charged with and tried at one trial for every such offence (Section 220). Persons accused of the same offence, committed in the course of the same transaction, or abetment of such offence may be charged jointly and tried together.

A person who has once been tried by a Court of competent jurisdiction for an offence and is convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence. A person discharged under Section 258 (i.e. a summons-case where there is judgement of acquittal by a Judicial Magistrate) shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which such Court is subordinate.

The judgement in every trial in any Criminal Court of original jurisdiction shall be pronounced by the presiding officer by delivering or reading out the whole of the judgement or the operative part of the judgement in open Court. (Section 353) Every judgement should be written in the language of the Court and should contain the point or points for determination, the decision thereon and the reasons for the decision. It should specify the offence and the Section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced (Section 354). Except as otherwise specified in the Code, no court when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error (Section 362). A copy of the judgement and also if so desired a certified copy are to be given to the accused free of cost. (Section 363)

No appeal shall lie from any judgement or order of Criminal Court except as provided for by this Code (Section 372). In the case of an acquittal, the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Every appeal in the case of appealable orders shall be made in the form of a petition in writing presented by the appellant or his pleader and shall be accompanied by a copy of the judgement or order appealed against. No appeal shall be dismissed summarily unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same (Section 384). After perusing such record and hearing the parties, the appellate Court may dismiss the appeal if there are no sufficient grounds for interfering or alter the findings and acquit or discharge the accused or order re-trial by a competent court subordinate to the Appellate Court (Section 386). An Appellate Court may if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate. (Section 391)

A Court may refer a case to High Court if it is of the opinion that it involves a question as to validity of any Act, Ordinance or Regulation and the Court is of opinion that such Act, Ordinance, or Regulation is inoperative or invalid but has not been declared so by the High Court or the Supreme Court. The Court has to state setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court. The High Court passes such order as it deems fit and causes a copy of such order to be sent to the Court making the reference which shall dispose of the case conformably to the said order. The High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 in the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge. If an appeal lies, but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

Under Section 438, provisions have been made for a person who 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 and that Court may if it thinks fit direct that in the event of such arrest, the person shall be released on bail on such conditions which the Court may include in such directions.

Bail may be taken 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 is brought before a Court, and is prepared at any time while in custody or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Such police officer or the Court if it thinks fit may instead of taking bail from such person discharge him on executing a bond without sureties for his appearance as may be required (Section 436). In case any surety becomes insolvent or dies, the Court by whose order such bond was taken, or a Magistrate (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. (Section 447)

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

In general, there is no limitation of time in filling complaints under the Code. But delay may hurdle the investigation. Further, the Indian Limitation Act provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVI has been introduced in the Code prescribing limitation period for taking cognizance of certain offences. (Sections 467 to 473)

Except as otherwise specifically provided in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation mentioned below:

- (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; and
- (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

The period of limitation in relation to offences which may be tried together shall be determined with reference to the gravity of the offence where the punishment inflicted for such offence is more severe or the most severe.

Commencement of the period of limitation

The period in relation to an offender commences (a) on the date of the offence; (b) if the commission of the offence was not known to the person aggrieved or to the police officer, the first day on which either such offence comes to the knowledge of such person or to any police officer, whichever is earlier; (c) where the identity of the offender is not known, the first day on which such identity becomes known either to the person aggrieved or the police officer whichever is earlier. (Section 469)

The object of Section 468 is to prescribe the period of limitation and the Court is enjoined not to take cognizance of an offence specified in sub-section (2) after the expiry of such period of limitation. The object is to prevent the parties from filing the case after a long time so that the material evidence may not vanish. Section 469 fixes the day from which the period of limitation should begin to run. However, Section 470 provides provisions for exclusion of time in certain cases. These are as under:

- (a) the period during which another prosecution was diligently prosecuted (the prosecution should relate to the same facts and is prosecuted in good faith);
- (b) the period of the continuance of the stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;
- (c) where notice of prosecution has been given, the period of notice;
- (d) where previous sanction or consent for the institution of any prosecution is necessary, the period required for obtaining such consent or sanction including the date of application for obtaining the sanction and the date of the receipt of the order;
- (e) the period during which the offender is absent from India or from territory outside India under Central Govt. Administration; and
- (f) period when the offender is absconding or concealing himself. (Section 470)

If limitation expires on a day when the Court is closed, cognizance can be taken on the day the Court re-opens. (Section 471)

Continuing offence — In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues. (Section 472)

Extension of period of limitation — The Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied that (i) the delay is properly explained or (ii) it is necessary to do so in the interests of justice. (Section 473)

SUMMARY TRIALS

Summary trial means the "speedy disposal" of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years.

Section 260(1) of the Criminal Procedure Code sets out the provisions for summary trials. It says:

- (a) any Chief Judicial Magistrate;
- (b) any Metropolitan Magistrate;
- (c) any Magistrate of the First class who is specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences:
 - (i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;
 - (ii) theft under Section 379, Section 380 or Section 381 of the Indian Penal Code, where the value of the property stolen does not exceed ₹200;
 - (iii) receiving or retaining stolen property, under Section 411 of the Indian Penal Code, where the value of such property, does not exceed ₹200;
 - (iv) assisting in the concealment or disposal of stolen property, under Section 414 of the Indian Penal Code, where the value of such property does not exceed ₹200;
 - (v) offences under Sections 454 and 456 of the Indian Penal Code;
 - (vi) insult with intent to provoke a breach of the peace, under Section 504 of the Indian Penal Code;
 - (vii) abetment of any of the foregoing offences;
 - (viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;
 - (ix) any offence constituted by an act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.

Sub-section (2) states that 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 in this Code. Summary trial is a speedy trial by dispensing with formalities or delay in proceedings.

Section 262 envisages procedure for summary trials. Sub-section (1) lays down that in all summary trials the summons-case procedure should be followed irrespective of the nature of the case i.e. whether it is a summons-case or a warrant case. Sub-section (2) laying down the limit of the sentence of imprisonment states that no sentence of imprisonment for a term exceeding 3 months shall be passed in any conviction in summary trials.

Record in summary trials

The Magistrate shall enter in the prescribed form the following particulars in every case tried summarily:

- (1) the serial number of the case;

- (2) the date of the commission of the offence;
- (3) the date of the report or complaint;
- (4) the name of the complainant (if any);
- (5) the name, parentage and residence of the accused;
- (6) the offence complained of and the offence proved, and the value of the property in respect of which the offence has been committed if the case comes under clause (ii) (iii) or (iv) of Section 260(1).
- (7) the plea of the accused and his examination if any;
- (8) the findings;
- (9) the sentence or other final order;
- (10) the date on which proceedings terminated.

The register containing the particulars mentioned above forms the record in a summary trial.

Judgement 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 a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

LESSON ROUND-UP

- The law of criminal procedure is meant to be complimentary to criminal law. It is intended to provide a mechanism for the enforcement of criminal law. The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person.
- For the purpose of the Code all offences have been classified into different categories. Firstly, all offences are divided into two categories – cognizable offences and non-cognizable offences; secondly, offences are classified into bailable and non-bailable offences; and thirdly, the Code classifies all criminal cases into summons cases and warrant cases.
- The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.
- The Code contemplates two types of arrests – (a) arrest with a warrant; and (b) arrest without a warrant. Where a person has been concerned in a non-cognizable offence, he cannot, except in a few cases be arrested without a warrant. Powers to arrest without a warrant are mainly conferred on the police. The Code envisages the various circumstances under which a police officer may arrest a person without a warrant.
- Further, a private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender. Furthermore, the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody.
- Whether the arrest to be made is with a warrant or without a warrant, it is necessary that in making such an arrest, the police officer or other person making such an arrest actually touches or confines the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance.
- Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay.

- Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Where a warrant remains unexecuted, the Code provides for two remedies (i) issuing a proclamation; and (ii) attachment and sale of property.
- The main processes for compelling production of things and documents are (a) summons issued by a court; (b) warrant order issued by a police officer in charge of a police station; (c) search and seizure with or without a warrant. These processes may be used – (i) for the investigation, inquiry or trial in respect of an offence; or(ii) for any other proceeding generally taken as a preventive or precautionary measure.
- In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorized by the Magistrate in this behalf.
- Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon: (i) receiving a complaint of facts constituting such offence; (ii) a police report of such facts; (iii) information received from any person other than police officer; (iv) his own knowledge that such offence has been committed.
- Summary trial means the “speedy disposal” of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years. The kinds of offences that can be tried summarily have been stipulated under the Code. In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

SELF-TEST QUESTIONS

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

1. Is the Code of Criminal Procedure a substantive or an adjective law, or both?
2. Distinguish between:
 - (a) Cognizable and Non-cognizable offences
 - (b) Inquiry, Investigation and Trial
 - (c) Bailable and Non-bailable offences
 - (d) F.I.R. and Complaint.
3. What are the various classes of Criminal Courts? Discuss their powers.
4. How can arrest be affected by the police? When can police arrest without warrant? Can a private person cause arrest without warrant?
5. Discuss the procedure for search and seizure: (i) of persons (ii) of things.



Lesson 11

Indian Evidence Act, 1872

LESSON OUTLINE

- Learning Objective
- Introduction
- Relevancy of facts connected with the fact to be proved
- Statements about the facts to be proved
- Opinion of third persons
- Facts in which evidence can't be given (Privileged communications)
- Oral, Documentary and circumstantial evidence
- Presumptions
- Estoppel
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as "Law of Evidence". The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence.

"Evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

The object of this study lesson is to impart basic knowledge to the students regarding law relating to Evidence.

Law are not invented. They grow out of circumstances.

-Azarias

INTRODUCTION

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as "Law of Evidence".

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence.

The Act extends to the whole of India except the State of Jammu and Kashmir and *applies to all judicial proceedings in or before any Court*, including Court-martial (other than the Court-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

Judicial Proceedings

The Act does not define the term "judicial proceedings" but it is defined under Section 2(i) of the Criminal Procedure Code as "a proceeding in the course of which evidence is or may be legally taken on oath".

However, the proceedings under the Income Tax are not "judicial proceedings" under this Act. That apart, the Act is also not applicable to the proceedings before an arbitrator.

An affidavit is a declaration sworn or affirmed before a person competent to administer an oath. Thus, an affidavit per se does not become evidence in the suits but it can become evidence only by consent of the party or if specifically authorised by any provision of the law. They can be used as evidence only under Order XIX of the Civil Procedure Code.

Evidence: The term evidence is defined under Section 3 of the Evidence Act as follows :

"Evidence" means and includes:

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- (2) all documents (including electronic records) produced for the inspection of the Court; such documents are called documentary evidence.

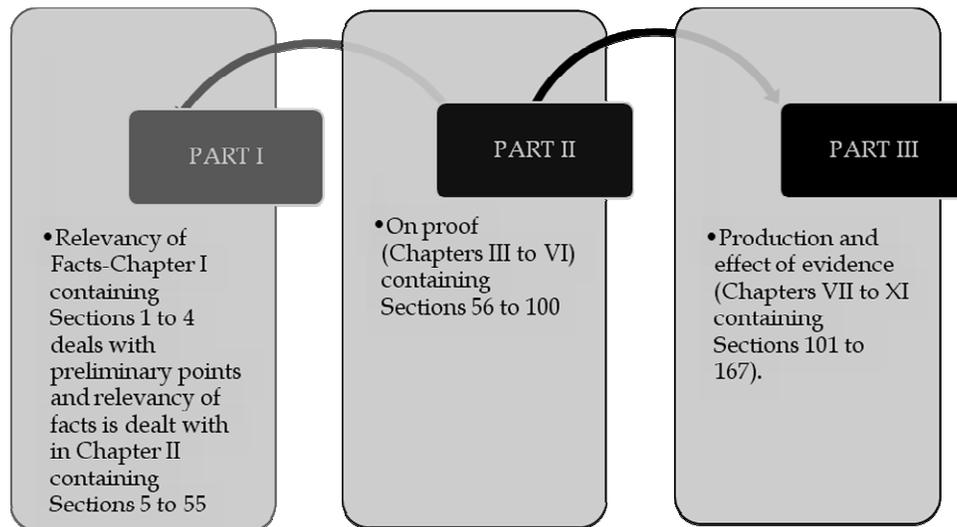
The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

Evidence under Section 3 of the Indian Evidence Act, 1872 may be either oral or personal (i.e. all statements which the Court permits or requires to be made before it by witnesses, and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue. There must be an open and visible connection between the principal fact and the evidentially facts. Facts are which form part of the same transaction, though not in issue, place or at different times and places.

In general the rules of evidence are same in civil and criminal proceedings but there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, specially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt.

Scheme of the Act:

The Act is divided into three parts:



Relevancy of Facts: Sections 6 to 55 of the Act deal with relevancy of facts. A fact is also known as Factum Prolans or a fact that proves. The question arises what then the term "fact" signifies?

Fact

According to Section 3, "fact" means and includes:

- (a) anything, state of things, or relation of things capable of being perceived by the senses;
- (b) any mental condition of which any person is conscious.

Thus facts are classified into physical and psychological facts.

Illustrations

- (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
- (b) That a man heard or saw something, is a fact.
- (c) That a man said certain words, is a fact.
- (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at the specified time conscious of a particular sensation, is a fact.
- (e) That a man has a certain reputation, is a fact.

Illustrations (a), (b) and (c), are the examples of physical facts whereas the illustrations (d) and (e) are the examples of psychological bids.

Evidence may be given of facts in issue and relevant facts.

According to Section 5, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

The Explanation appended to Section 5, however, makes it clear that this section shall not enable any

person to give evidence of a fact to which he is disentitled to prove by any provision of the law.

Illustrations

- (a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:-

- A's beating B with the club;
- A's causing B's death by such beating;
- A's intention to cause B's death.

- (b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

It is evident that only facts in issue and relevant facts may be given in evidence. To understand their relevancy it is necessary to know their meanings. These terms are defined in Section 3. It is explained as follows:-

Relevant Fact

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. (Section 3)

Where in a case direct evidence is not available to prove a fact in issue then it may be proved by any circumstantial evidence and in such a case every piece of circumstantial evidence would be an instance of a "relevant fact".

Logical relevancy and legal relevancy

A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probably the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. Relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Of course every fact legally relevant will be found to be logically relevant; but every fact logically relevant is not necessarily relevant under the Act as common sense or logical relevancy is wider than legal relevancy. A judge might in ordinary transaction, take one fact as evidence of another and act upon it himself, when in Court, he may rule that it was legally irrelevant. And he may exclude facts, although logically relevant, if they appear to him too remote to be really material to the issue.

Legal relevancy and admissibility

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on the grounds of public policy, or on some other ground. Similarly every admissible fact is not necessarily relevant. The tenth Chapter of the Act makes a number of facts receivable in evidence, but these facts are not "relevant" under the second Chapter which alone defines relevancy.

Facts in issue

According to Section 3 the expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or

disability, asserted or denied in any suit or proceedings, necessarily follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration

A is accused of the murder of B.

At his trial the following facts may be in issue:

- that A caused B's death;
- that A intended to cause B's death;
- that A had received grave and sudden provocation from B;
- that A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

A fact in issue is called as the principal fact to be proved or *factum probandum* and the relevant fact the evidentiary fact or *factum probans* from which the principal fact follows. The fact which constitute the right or liability called "fact in issue" and in a particular case the question of determining the "facts in issue" depends upon the rule of the substantive law which defines the rights and liabilities claimed.

Facts in issue and issues of fact

Under Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary in the case. These are called issues of fact but the subject matter of an issue of fact is always a fact in issue. Thus when described in the context of Civil Procedure Code, it is an 'issue of fact' and when described in the language of Evidence Act it is a 'fact in issue'. Thus as discussed above, distinction between facts in issue and relevant facts is of fundamental importance.

Classification of relevant facts

Principles of Sections relating to relevancy of facts are mere rules of logic. Relevant facts may be classified in the following form:

- (a) facts connected with the facts to be proved; (Sections 6 to 16)
- (b) statement about the facts to be proved e.g. admission, confession;(Sections 17 to 31)
- (c) statements by persons who cannot be called as witnesses; (Sections 32 to 33)
- (d) statements made under special circumstances; (Sections 34 to 38)
- (e) how much of a statement is to be proved; (Section 39)
- (f) judgements of Courts of justice, when relevant; (Sections 40 to 44)
- (g) opinions of third persons, when relevant; (Sections 45 to 51)
- (h) character of parties in Civil cases and of the accused in criminal cases. (Sections 52 to 55)

Two fundamental rules on which the law of evidence is based are: (a) no facts other than those having rational probative value should be admitted in evidence and, (b) all facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

The Court 'may presume' a fact as may be provided by the Act, unless and until it is disproved or may call for proof of it. The court shall presume a fact whenever it is directed by this Act, and shall regard such fact as proved unless and until it is disproved (Section 4). Presumption has been defined as an inference, affirmative or affirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, admitted or established by legal evidence to the satisfaction of the tribunal. It is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills). Presumption is either of a fact or law. These presumptions which are inference are always rebuttable. Presumption of law is either conclusive or rebuttable.

The Act also provides that when one fact is declared by this Act to be conclusive proof of another, the court shall on the proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

RELEVANCY OF FACTS CONNECTED WITH THE FACT TO BE PROVED

The facts coming under this category are as follows:

(1) *Res gestae or facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.*

Section 6 embodies the rule of admission of evidence relating to what is commonly known as *res gestae*. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the *res gestae* and admitted as evidence. The obvious ground for admission of such evidence is the spontaneity and immediacy of the act or declaration in question.

Illustration

A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

The word 'by-standers' means the persons who are present at the time of the beating and not the persons who gather on the spot after the beating (46 P.L.R. 353); (1945) Lah. 146).

(b) A is accused of waging war against the 'Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, although A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Thus, the evidence about the fact which is also connected with the same transaction, cannot be said to be inadmissible.

The above section lays down the rule which in English text books is treated under the head of *res gestae*. It may be broadly defined as matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the same transaction.

The essence of the doctrine of *res gestae* is that the facts which, though not in issue are so connected with

the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue (AIR 1957 Cal. 709).

(2) *Facts constituting the occasion, or effect of, or opportunity or state of things for the occurrence of the fact to be proved whether it be a fact or another relevant fact.* (Section 7)

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B known to A, which afforded an opportunity for the administration of poison, are relevant facts.

The above transaction provides that, though they are not part of the same transaction, are relevant if they are the occasions caused or effects of facts of an issue.

(3) *Motive, preparation and previous or subsequent conduct.*

According to Section 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive means which moves a person to act in a particular way. It is different from intention. The substantive law is rarely concerned with motive, but the existence of a motive, from the point of view of evidence would be a relevant fact, in every criminal case. That is the first step in every investigation. Motive is a psychological fact and the accused's motive, will have to be proved by circumstantial evidence. When the question is as to whether a person did a particular act, the fact that he made preparations to do it, would certainly be relevant for the purpose of showing that he did it.

The Section makes the conduct of certain persons relevant. Conduct means behaviour. The conduct of the parties is relevant. The conduct to be relevant must be closely connected with the suit, proceeding, a fact in issue or a relevant fact, i.e., if the Court believes such conduct to exist, it must assist the Court in coming to a conclusion on the matter in controversy. It must influence the decision. If these conditions are satisfied it is immaterial whether the conduct was previous to or subsequent to the happening of the fact in issue.

Illustrations

(a) A is tried for the murder of B.

The fact that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence - "the polic is coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of properly acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint she said that she had been ravished is not relevant as conduct under this Section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) the question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under

this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

What is relevant under Section 8 is the particular act upon the statement and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved.

(4) *Facts necessary to explain or introduce relevant facts.*

According to Section 9, such facts are -

- (i) which are necessary to explain or introduce a fact in issue or relevant fact, or
- (ii) which support or rebut an inference suggested by a fact in issue or relevant fact, or
- (iii) which establish the identity of a person or thing whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or
- (iv) which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts which establish the identity of an accused person are relevant under Section 9.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left house, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

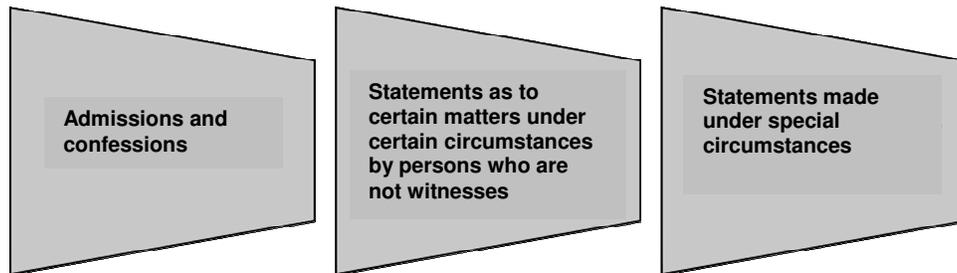
(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it - "A says you are to hide this". B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

STATEMENTS ABOUT THE FACTS TO BE PROVED

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are :



(i) *Admissions and Confessions*

Sections 17 to 31 lay down the first exception to the general rule known as admissions and confessions.

Admissions

An admission is defined in Section 17 as a statement, oral or documentary or *contained in electronic form* which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances mentioned under Sections 18 to 20. Thus, whether a statement amounts to an admission or not depends upon the question whether it was made by any of the persons and in any of the circumstances described in Sections 18-20 and whether it suggests an inference as to a fact in issue or a relevant fact in the case. Thus admission may be verbal or contained in documents as maps, bills, receipts, letters, books etc.

(However, the word 'statement' has not been defined in the Act. Therefore the ordinary dictionary meaning is to be followed which is "something that is stated.")

An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter (Section 18) or by a "reference" (Section 20).

An admission is the best evidence against the party making the same unless it is untrue and made under the circumstances which does not make it binding on him.

An admission by the Government is merely relevant and non conclusive, unless the party to whom they are made has acted upon and thus altered his detriment.

An admission must be clear, precise, not vague or ambiguous. In *Basant Singh v. Janky Singh*, (1967) 1 SCR 1, The Supreme Court held:

"(1) Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admission. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true.

(2) All the statements made in the plaint are admissible as evidence. The Court is, however, not bound to accept all the statements as correct. The Court may accept some of the statements and reject the rest.”

Admission means conceding something against the person making the admission. That is why it is stated as a general rule (the exceptions are in Section 21), that admissions must be self-harming; and because a person is unlikely to make a statement which is self-harming unless it is true evidence of such admissions as received in Court.

These Sections deal only with admissions oral and written. Admissions by conduct are not covered by these sections. The relevancy of such admissions by conduct depends upon Section 8 and its explanations.

Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the record produced is in question. (Section 22A)

Confessions

Sections 24 to 30 deal with confessions. However, the Act does not define a confession but includes in it admissions of which it is a species. Thus confessions are special form of admissions. Whereas every confession must be an admission but every admission may not amount to a confession. Sections 27 to 30 deal with confessions which the Court will take into account. A confession is relevant as an admission unless it is made:

- (i) to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused;
- (ii) to a Police Officer; or
- (iii) to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.

Thus, a statement made by an accused person if it is an admission, is admissible in evidence. The confession is evidence only against its maker and against another person who is being jointly tried with him for an offence.

Section 30 is an exception to the general rule that confession is only an evidence against the confessor and not against the others.

The confession made in front of magistrate in a native state recorded is admissible against its maker is also admissible against co-accused under Section 30.

The Privy Council in *Pakala Narayanaswami v. Emperor*, (1929) PC 47, observed that:

No statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. All confessions are admissions but not *vice versa*.

A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, is not of itself a confession. For example, an admission that the accused was the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession of the knife or revolver. A confession cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime.

According to Section 24, confession caused by inducement, threat or promise is irrelevant. To attract the prohibition contained in Section 24 of the Evidence Act the following six facts must be established:

- (i) that the statement in question is a confession;
- (ii) that such confession has been made by an accused person;
- (iii) that it has been made to a person in authority;
- (iv) that the confession has been obtained by reason of any inducement, threat or promise proceeded from a person in authority;
- (v) such inducement, threat or promise, must have reference to the charge against the accused person;
- (vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

To exclude the confession it is not always necessary to prove that it was the result of inducement, threat or promise. It is sufficient if a legitimate doubt is created in the mind of the Court or it appears to the Court that the confession was not voluntary. It is however for the accused to create this doubt and not for the prosecution to prove that it was voluntarily made. A confession if voluntary and truthfully made is an efficacious proof of guilt.

Confessions Vs. Admissions

A confession, however, is received in evidence for the same reason as an admission, and like an admission it must be considered as a whole. Further there can be an admission either in a civil or a criminal proceedings, whereas there can be a confession only in criminal proceedings. An admission need not be voluntary to be relevant, though it may effect its weight; but a confession to be relevant, must be voluntary. There can be relevant admission made by an agent or even a stranger, but, a confession to be relevant must be made by the accused himself. A confession of a co-accused is not strictly relevant, though it may be taken into consideration, under Section 30 in special circumstances.

Confessions are classified as: (a) judicial, and (b) extra-judicial. Judicial confessions are those made before a Court or recorded by a Magistrate under Section 164 of the Criminal Procedure Code after following the prescribed procedure such as warning the accused that he need not to make the confession and that if he made it, it would be used against him. Extra-judicial confessions are those which are made either to the police or to any person other than Judges and Magistrates as such.

An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence. It will have to be proved just like any other fact. The value of the evidence depends upon the truthfulness of the witness to whom it is made.

In *Ram Khilari v. State of Rajasthan*, AIR 1999 SC 1002, the Supreme Court held that where an extra-judicial confession was made before a witness who was a close relative of the accused and the testimony of said witness was reliable and truthful, the conviction on the basis of extra judicial confession is proper.

In another case, the Supreme Court has further held that the law does not require that the evidence of an extra-judicial confession should be corroborated in all cases. When such confession was proved by an independent witness who was a responsible officer and one who bore no animus against the accused, there is hardly any justification to disbelieve it. Also, where the Court finds that the confession made by the accused to his friend was unambiguous and unmistakably conveyed that the accused was the perpetrator of the crime and the testimony of the friend was truthful, reliable and trustworthy, a conviction based on such extra-judicial confession is proper and no corroboration is necessary. Much importance could not be given to

minor discrepancies and technical errors (*Vinayak Shivajirao Pol v. State of Maharashtra*, 1998 (1) Scale 159).

Illustrations

1. A undertakes to collect rents from C on behalf of B. B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B. A statement by C that he owed rent to B, is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

2. The question is, whether a horse sold by A to B is sound.

A says to B—"Go and ask C, C knows all about it". C's statement is an admission.

3. The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B holds that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

4. A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because if A were dead, it would be admissible under Section 32, clause (2).

5. A and B are jointly tried for the murder of C. It is proved that A said—"B and I murdered C". The Court may consider the effect of this confession as against B.

6. A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried. (If there is joint trial Section 30 applies)

Illustrations 5 and 6 are exceptions to the general rule that a confession is only evidence against the person who makes the confession. These are based on Section 30 of the Act.

(ii) Statements by persons who cannot be called as witnesses

Certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

- (a) That the statement must relate to a fact in issue or relevant fact,
- (b) That the statement must fall under any of following categories:
 - (i) the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;
 - (ii) statement made in the course of business;
 - (iii) Statement which is against the interest of the maker;
 - (iv) a statement giving the opinion as to the public right or custom or matters of general interest;

- (v) a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;
- (vi) a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belong;
- (vii) a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;
- (viii) a statement made by a number of persons expressing their feelings or impression;
- (ix) evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same as in the first proceeding.

Illustrations

- (a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the course of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

- (b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

- (c) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

- (d) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his own son, is a relevant fact.

(e) A sues B for libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(iii) Statements made under special circumstances

The following statements become relevant on account of their having been made under special circumstances:

- (i) Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a

person with liability; (Section 34)

- (ii) Entries made in public or official records or an *electronic record* made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; (Section 35)
- (iii) Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; (Section 36)
- (iv) Statement as to fact of public nature contained in certain Acts or notification; (Section 37)
- (v) Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, *electronic record*, book or of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. (Section 39)

OPINION OF THIRD PERSONS WHEN RELEVANT

The general rule is that opinion of a witness on a question whether of fact or law, is irrelevant. However, there are some exceptions to this general rule. These are:

(i) Opinions of experts. (Section 45)

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant. Similarly the opinions of experts on typewritten documents as to whether a given document is typed on a particular typewriter is relevant.

As a general rule the opinion of a witness on a question whether of fact, or of law, is irrelevant. Witness has to state the facts which he has seen, heard or perceived, and noted the conclusion, form of observations. The functions of drawing inferences from facts is a judicial function and must be performed by the Court. However, to this general rule, there are some exceptions as indicated in Section 45. Opinions of experts are relevant upon a point of (a) foreign law (b) science (c) art (d) identity of hand writing (e) finger impression special knowledge of the subject matter of enquiry become relevant.

(ii) Facts which support or are inconsistent with the opinions of experts are also made relevant. (Section 46)

(iii) Others: In addition to the opinions of experts, opinion of any other person is also relevant in the following cases:

- (a) Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question; (Section 47)
- (b) Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate; (Section 47A)
- (c) Opinion as to the existence of any general right or custom if the person giving the opinion is likely to be aware of the existence of such right or custom; (Section 48)
- (d) Opinion as to usages etc. words and terms used in particular districts, if the person has special means of knowledge on the subject; (Section 49)
- (e) Opinion expressed by conduct as the existence of any relationship by persons having special means of knowledge on the subject. (Section 50)

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN (PRIVILEGED COMMUNICATIONS)

There are some facts of which evidence cannot be given though they are relevant, such as facts coming under Sections 122, 123, 126 and 127, where evidence is prohibited under those Sections. They are also referred to as 'privileged communications'

A witness though compellable to give evidence is privileged in respect of particular matters within the limits of which he is not bound to answer questions while giving evidence. These are based on public policy and are as follows:

- (i) Evidence of a Judge or Magistrate in regard to certain matters; (Section 121)
- (ii) Communications during marriage; (Section 122)
- (iii) Affairs of State; (Section 123)
- (iv) Official communications; (Section 124)
- (v) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime; (Section 125)
- (vi) In the case of professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 126 and 129). But this privilege is not absolute and the client is entitled to waive it.

Under Section 122 of the Act, communication between the husband and the wife during marriage is privileged and its disclosure cannot be enforced. This provision is based on the principle of domestic peace and confidence between the spouses. The Section contains two parts; the first part deals with the privilege of the witness while the second part of the Section deals with the privilege of the husband or wife of the witness.

Evidence as to affairs of State

Section 123 applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 123, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Professional communications

Section 126 to 129 deal with the professional communications between a legal adviser and a client, which

are protected from disclosure. A client cannot be compelled and a legal adviser cannot be allowed without the express consent of his client to disclose oral or documentary communications passing between them in professional confidence. The rule is founded on the impossibility of conducting legal business without professional assistance and securing full and unreserved communication between the two. Under Sections 126 and 127 neither a legal adviser i.e. a barrister, attorney, pleader or vakil (Section 126) nor his interpreter, clerk or servant (Section 128) can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any document with which any such person has become acquainted in the course and for the purpose of such employment.

In general it is not open to a party to test the credit or impeach the "truthfulness of a witness offered by him. But the Court can in its discretion allow a party to cross examine his witness" if the witness unexpectedly turns hostile. (Section 154)

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

As discussed above, all facts (except two Sections 56 and 58) which are neither admitted nor are subject to judicial notice must be proved. The Act divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section 59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.

Thus, the two broad rules regarding oral evidence are:

- (i) all facts except the contents of documents may be proved by oral evidence;
- (ii) oral evidence must in all cases be "direct".

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

Direct evidence

In Section 60 of the Evidence Act, expression "oral evidence" has an altogether different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradiction to "circumstantial" or "presumptive evidence". According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:

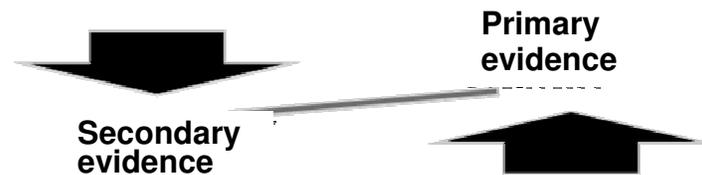
- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
- if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act

impliedly enacts what is called the rule against hearsay. Since the evidence as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

Documentary evidence

A "*document*" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence. Section 60 provides that the contents of a document must be proved either by primary or by secondary evidence.



Primary evidence

"*Primary evidence*" means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

Secondary evidence

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, "*secondary evidence*" means and includes.

- (1) certified copies given under the provisions hereafter contained;
- (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of

numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

Special Provisions as to Evidence Relating to Electronic Record

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

Under Section 65B(1) any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. The conditions in respect of a computer output related above, have been stipulated under Section 65B(2) of the Evidence Act.

Circumstantial evidence

In English law the expression direct evidence is used to signify evidence relating to the 'fact in issue' (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (*facta probandum*). However, under Section 60 of the Evidence Act, the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

PRESUMPTIONS

The Act recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved. There are three categories of presumptions:

- (i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.
- (ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.
- (iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms "conclusive proof", "shall presume" and "may presume". The term "conclusive proof" specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term "shall presume" indicates rebuttable presumptions of law; the term "may presume" indicates presumptions of fact. 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.

ESTOPPEL

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused

or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115). However, there is no estoppel against the Statute. Where the Statute prescribes a particular way of doing something, it has to be done in that manner only. Other relevant Sections are Sections 116 and 117.

Principle of Estoppel

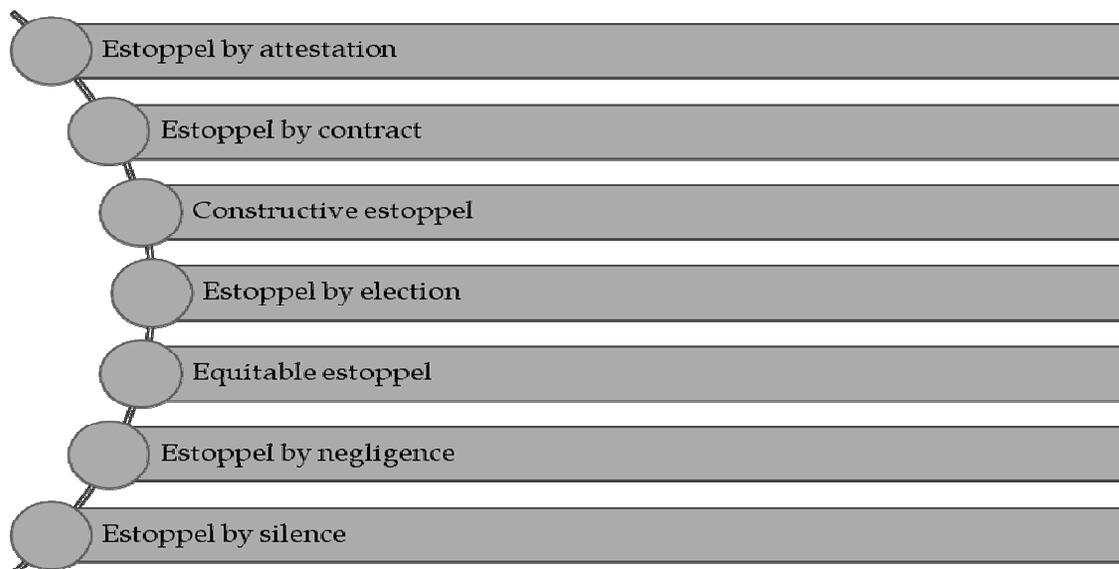
Estoppel is based on the maxim '*allegans contraria non est audiendus*' i.e. a person alleging contrary facts should not be heard. The principles of estoppel covers one kind of facts. It says that man cannot approbate and reprobate, or that a man cannot blow hot and cold, or that a man shall not say one thing at one time and later on say a different thing.

The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it (*Sorat Chunder v. Gopal Chunder*).

Estoppel is a rule of evidence and does not give rise to a cause of action. Estoppel by record results from the judgement of a competent Court (Section 40, 41). It was laid down by the Privy Council in *Mohori Bibee v. Dharmodas Ghosh*, (1930) 30 Cal. 530 PC, that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

In *Biju Patnaik University of Tech. Orissa v. Sairam College*, AIR 2010 (NOC) 691 (Orissa), one private university permitted to conduct special examination of students prosecuting studies under one time approval policy. After inspection, 67 students were permitted to appear in the examination and their results declared. However, university declined to issue degree certificates to the students on the ground that they had to appear for further examination for another condensed course as per syllabus of university. It was held that once students appeared in an examination and their results declared, the university is estopped from taking decision withholding degree certificate after declaration of results.

Different kinds of Estoppel:



LESSON ROUND-UP

- The law of Evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the court, is regulated by a set of rules and principles known as law of Evidence”.
- The word evidence in the 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 the Act may be either oral or personal (i.e. all statements which the court permits or requires to be made before it by witnesses), and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue.
- The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are: (i) Admissions and confessions; (ii) Statements as to certain matters under certain circumstances by persons who are not witnesses; and (iii) Statements made under special circumstances.
- All facts which are neither admitted nor are subject to judicial notice must be proved. The Act divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.
- A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved. There are three categories of presumptions: (i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances; (ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved; (iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.
- The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

SELF-TEST QUESTIONS

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

1. What is oral, documentary and circumstantial evidence?
2. Differentiate between Primary Evidence and Secondary Evidence.
3. Explain in Brief Principal of Estoppel.
4. Write a short note on Admissions and Confession.
5. State the cases in which opinion of expert is relevant.

Lesson 12

Special Courts, Tribunal under Companies Act and other Legislations

LESSON OUTLINE

- Learning objective
- Introduction
- Background of Establishment of NCLT and NCLAT
- Constitution of National Company Law Tribunal
- Powers Exercise by NCLT under Companies Act, 2013
- Constitution of Appellate Tribunal
- Benches of Tribunal
- Orders of Tribunal
- Appeal from orders of Tribunal
- Expedient disposal by Tribunal and Appellate Tribunal
- Appeal to Supreme Court
- Procedure before Tribunal and Appellate Tribunal
- Power to punish for contempt
- Delegation of Powers
- Right to legal representative
- Limitation
- Institution of Proceedings, Petition, Appeals etc. before NCLT
- Institution of Appeal-Procedure before NCLAT
- Special Courts
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

Tribunal is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals

Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

Therefore, students should be well versed in this subject so as to understand role, working and purpose of constitution of NCLT, NCLAT and Special Court.

INTRODUCTION

The term 'Tribunal' is derived from the word 'Tribunes', which means 'Magistrates of the Classical Roman Republic'. Tribunal is referred to as the office of the 'Tribunes' i.e., a Roman official under the monarchy and the republic with the function of protecting the plebeian citizen from arbitrary action by the patrician magistrates. A Tribunal, generally, is any person or institution having an authority to judge, adjudicate on, or to determine claims or disputes – whether or not it is called a tribunal in its title.

'Tribunal' is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals.

The difference between a Court and a Tribunal is the manner of deciding a dispute. However, the *Supreme Court in Virindar Kumar Satyawadi v. The State of Punjab, AIR 1956 SC 153* observed that:

'What distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court.'

Tribunals basically deal with the cases under special laws and therefore they provide special adjudication, outside Courts. In *State of Gujarat v. Gujarat Revenue Tribunal Bar Association, (2012) 10 SCC 353* it was observed that:

'.....a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court.'

To overcome the situation that arose due to the pendency of cases in various Courts, domestic tribunals and other Tribunals have been established under different Statutes, hereinafter referred to as the Tribunals. A 'tribunal' in the legal perspective is different from a domestic tribunal. The 'domestic tribunal' refers to the administrative agencies designed to regulate the professional conduct and to enforce discipline among the members by exercising investigatory and adjudicatory powers. Whereas, Tribunals are the quasi-judicial bodies established to adjudicate disputes related to specified matters which

exercise the jurisdiction according to the Statute establishing them. The Tribunal has to exercise its powers in a judicious manner by observing the principles of natural justice or in accordance with the statutory provisions under which the Tribunal is established. There may be a lis between the contending parties before a statutory authority, which has to act judiciously to determine the same. There may not be a lis between the contending parties, the tribunal/authority may have to determine the rights and liabilities of the subject. In both the situations, it will be known as *aquasi-judicial* function. The word 'quasi' means 'not exactly'. (Law Commission of India Report 272)

"Where a statutory authority is empowered to take a decision which affects the rights of persons and such an authority under the relevant law required to make an enquiry and hear the parties, such authority is quasi-judicial and decision rendered by it is a quasi-judicial act." (*Rex v. Electricity Commissioners, (1924) 1 KB 171.*)

BACKGROUND OF ESTABLISHMENT OF NCLT & NCLAT

On the recommendations of the Justice Eradi Committee on Law Relating to Insolvency and Winding up of Companies, a specialized institution for corporate justice i.e. Tribunal was to be set up. The Committee examined not only the Companies Act, 1956 but also the other relevant laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the recommendations of the United Nations and International Monetary Fund Report - "Orderly and Effective Insolvency Procedures- Key Issues".

In *L. Chandrakumar v. Union of India* (A.I.R. 1997 SC 1125), a question was raised as to whether the setting up of the Tribunals and excluding the jurisdiction of the High Court was constitutional? A ruling was made by the seven-judge bench of the Supreme Court that the power of 'judicial analysis' of the High Court under Article 226 of the Constitution cannot be eliminated by the Parliament.

The Supreme Court under Article 32 and High Court under Article 226 form the basic structure of the Constitution of India. The jurisdiction of the High Court cannot be exiled, and on the other hand, the Tribunals may function as the supplemental part of the judiciary system.

The Tribunals may continue to act like courts of first instance in respect of the areas of law for which they have been constituted. The following paragraph from R. Gandhi's judgement clarified the above point:

"Parliament is thus competent to enact law with regard to the incorporation, regulation and winding up of Companies. The power of regulation would include the power to set up an adjudicatory machinery for resolving the matters litigated upon, and which concern the working of the companies in all their facets. The Law Commission, as noted by the Supreme Court in the case of *L. Chandrakumar*, had also recommended the creation of specialist Tribunals in places of generalist Courts. Creation of Tribunals and Appellate Tribunals and vesting in those Tribunals the powers exercised by the High Court with regard to company matters cannot be said to be unconstitutional."

It was further recommended in *L. Chandrakumar's* case that the Tribunals were playing vital part of our Judiciary system, and it is necessary to ensure that a Tribunal is a setup to deal with those cases under special laws as may be applicable therein, thus providing specialized adjudications. Further, the Tribunals cannot decide those disputes which are basically criminal in nature.

Likewise, where the case involves substantial question of law, it cannot be decided by tribunals as this comes under the purview of the higher judiciary. By the enactment of the Companies (Second Amendment)

Act, 2002 to further amend the Companies Act, 1956, the controversial phase for the validity of the 'National Company Law Tribunal' (herein after referred as 'Tribunal') and 'National Company Law Appellate Tribunal' (herein after referred as 'Appellate Tribunal') was set in motion before the Court of Law and it seemed to be a never-ending fight. But such controversy was set to rest with the decision of Supreme Court in the case - *Union of India v. R. Gandhi, President, Madras Bar Association* (2010) 11 SCC, wherein the constitutional validity of the Tribunal and Appellate Tribunal was upheld as per the Supreme Court ruling on 14th May, 2015 and it has provided a path to the Central Government to notify the Tribunal and Appellate Tribunal in India under the provisions of the Companies, 2013 (hereinafter referred as 'CA, 2013')

After a long journey of fourteen years the controversial phase has come to an end with the constitution of the Tribunal and the Appellate Tribunal as notified by the Central Government w.e.f. 1st June, 2016. The new judicial forum, apart from exercising the powers of the erstwhile CLB, will also carry out the work, as currently being carried out by High Courts with regard to company matters for over the six decades and the same has to be done with great care so that the Tribunal will be efficient and effective alternate institutional forum to the High Courts and the Company Law Board (herein after referred as 'CLB'), Board of Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA Act, 1985) and for the other Authorities as well.

Tribunal is a quasi-judicial body and the primary objective of constituting the Tribunals is to provide a simpler, speedier and more accessible dispute resolution mechanism in Company Law matter specifically apart from other laws for which it is empowered. The Tribunal was established under Section 408 of the Companies Act, 2013 vide Notification No. S.O.1935 (E) dated 1st June, 2016 and become effective with the same date.

National Company Law Tribunal (NCLT) & the Appellate Tribunal have been constituted by the Central Govt. under section 408 & 410 of the Companies Act, 2013 (the Act) to exercise and discharge the powers and functions conferred on NCLT. The Appellate Tribunal is required to hear appeals against the orders of the NCLT.

CONSTITUTION OF NATIONAL COMPANY LAW TRIBUNAL.

As per section 8 of the Companies Act, 2013 The Central Government shall, by notification, constitute, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

POWERS EXERCISE BY NCLT COMPANIES ACT, 2013

| <i>Powers of NCLT</i> | <i>Section under Companies Act, 2013</i> |
|--|--|
| Chapter –I “Preliminary” | |
| To allow certain companies or body corporate to have a different financial year | 2(41) |
| Chapter –II “Incorporation of Company and matters incidental thereto” | |
| In case a company has got incorporated by furnishing any false or incorrect information or by suppression of any material fact or information, NCLT can pass such orders as it thinks fit. | 7(7) |

| | |
|--|------------------------|
| Any assets remaining on wind-up of Section 8 company may be transferred to another company having similar objects with the approval of Tribunal or transferred to the Rehabilitation and Insolvency Fund u/s 269. | 8(9) |
| Conversion of a public company into a private company requires the approval of NCLT. | Proviso of 14(1) |
| Chapter -IV “Share Capital and Debentures” | |
| Not less than ten percent of the issued shares of a class, who did not consent to a variation, may apply to the Tribunal for cancelling the variation. | 48(2) |
| NCLT can approve issue of further redeemable preference shares when a company is unable to redeem its existing unredeemed preference shares or to pay dividend thereon. | 55(3) |
| NCLT can order forthwith redemption of such preference shares the holder of which have not consented to the issue of further redeemable preference shares. | Proviso of 55 (3) |
| To make an order imposing prohibition on delivery of certificates for the securities issued by a company. | 56(4) |
| The transferee of shares in a private company may appeal to the NCLT within one month from the receipt of notice of refusal or within sixty days from the date on which the instrument of transfer or intimation of transmission was delivered to the company. | 58(3) |
| The transferee in a public company within sixty days of refusal to register transfer or transmission, or within ninety days of delivery of instrument of transfer or of intimation of transmission may apply to the NCLT for relief. | 58(4) |
| To dismiss appeal against refusal to register transfer and transmission of shares OR to direct rectification of register and payment of damages by company. | 58(5) |
| To order rectification of register of members on transfer or transmission of shares. | 59(2) |
| To direct a Company or depository to set right a contravention of SCRA or SEBI Act or any other law, resulting by transfer of securities and to rectify concerned registers and records held by the Company or depository. | 59 (4) |
| To approve Consolidation and division of share capital resulting in change in voting percentage of shareholders. | Proviso under 61(1)(b) |
| Where the terms of conversion of debentures into shares of a company ordered by the Government are not acceptable to the company, the company may appeal to the Tribunal for making such order as it may deem fit. | Proviso under 62(4) |
| Confirmation by NCLT for reduction of capital in a company limited by shares or guarantee and having share capital. | 66(1) |
| Where the assets of a company are insufficient to discharge the debentures, the debenture trustee may apply to the NCLT. | 71(9) |
| NCLT to order redemption of debentures forthwith by payment of principal and | 71(10) |

| | |
|--|----------------------------------|
| interest due thereon. | |
| Chapter V “Acceptance of Deposits by Companies” | |
| To direct the company to make repayment of the matured deposits or for any loss or damage incurred by him as a result of non-payment. | 73(4) |
| On an application by the company, NCLT may allow further time to the company to repay the amount of deposit or part thereof and the interest payable. | 74(2) |
| Chapter –VII “Management and Administration” | |
| On the application of a member, the Tribunal may call or direct the calling of an annual general meeting if default is made in holding the Annual General Meeting. | 97(1) |
| In case it is impracticable to call a meeting, the Tribunal may either <i>suomoto</i> , or on application of a director or member of the company who is entitled to vote at the meeting, order to call meeting i.e extra ordinary general meetings and give such directions as may be necessary. | 98(1) |
| The Tribunal may direct that inspection of minute book of general meeting be given to a member. | 119(4) |
| Chapter –VIII “ Declaration and Payment of Dividend” | |
| To sanction utilization of IEPF for reimbursement of legal expenses incurred on class action suits by members, debentures or depositors. | 125 (3)(d) |
| Chapter –IX “Accounts of Companies” | |
| The Tribunal may allow a company to recast its financial statements. | 130(1) |
| With the approval of NCLT, company may prepare revised financial statement for any of the three preceding financial years. | 131(1) |
| Chapter-X “Audit and Auditors” | |
| To restrict copies of representation of the auditor to be removed to be sent out. | 140 (4) |
| The Tribunal may, on the application of the company or any aggrieved person, order that copy of representation by the Auditor need not be sent to members nor read at the meeting. | Second proviso of 140(4)(iii)(b) |
| Where NCLT is satisfied that the Auditor has acted in a fraudulent manner, it may order that the Auditor may be changed | 140(5) |
| Chapter- XI “Appointment and Qualifications of Directors” | |
| Regarding removal of director, NCLT may order that representation from the director need not be sent to the members and nor read at the meeting. | 169(4)(b) proviso |
| Chapter –XIV “ Inspection, Inquiry and Investigation” | |
| To order investigation of the affairs of the company. | 210(2) |

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| The Tribunal may ask the Central Government to investigate into the affairs of the company in other cases on application where the business of the company is being conducted with intent to defraud creditors, persons concerned in the formation of the company or management of its affairs have been guilty of fraud, misfeasance or other misconduct and members have not been given all the information with respect to the affairs of the Company. | 213 |
| To order investigation of ownership of Company. | 216 (2) |
| NCLT may pass suitable orders for the protection of the employees in respect of investigation under section 210,212,213 or 219. | 218(1) |
| To order freezing of assets of company on inquiry and investigation in case of complaint made by its members, for a period of three years. | 221(1) |
| To impose restrictions in connection with securities. | 222(1) |
| To entertain petition for winding up of a Company or Body Corporate in pursuance of Inspector's report. | 224(2) |
| To hear petition for winding up of a Company presented by Central Govt. | 224(2) |
| NCLT may, on application of Central Government, pass order for disgorgement of assets and other matters. | 224(5) |
| To pass orders after inspector's intimation of pendency in investigation proceedings. | 226 1 st Proviso |
| Chapter –XV “Compromises, Arrangements and Amalgamations” | |
| With reference to compromise or arrangements between the company and its creditors and members, Tribunal may order a meeting of creditors or class of creditors or members of the company. | 230(1) |
| To sanction compromise or arrangement agreed to at the meeting of creditors/ members ordered by the Tribunal. | 230 (6) |
| To dispense with calling of meeting of members/ creditors for approving compromise or arrangement. | 230(9) |
| To pass orders on an application on grievance in respect of takeover offer of companies other than listed companies. | 230 (12) |
| To enforce compromise and arrangement as sanctioned under Section 230. | 231(1) |
| If the Tribunal is satisfied that the compromise or arrangement sanctioned under Section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company. | 231(2) |
| To sanction the scheme of merger and amalgamation. | 232(1) |
| To call meeting of creditors or members for facilitating merger and amalgamation of | 232 (2) |

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| companies. | |
| If the Central Government is of the opinion that the scheme filed under section 233 is not in public interest, it may file an application before the Tribunal within Sixty days of receipt of the scheme under sub section (2). | 233(5) |
| To entertain the application made by the dissenting shareholders of the scheme approved by the majority. | 235(2) |
| Any aggrieved person in respect of compensation made by the prescribed authority may make appeal to the Tribunal within 30 days. | 237(4) |
| Appeal to the tribunal against the refusal of the Registrar to register the circular. | 238(2) |
| Chapter- XVI “Prevention of Oppression and Mismanagement” | |
| Complaints of oppression and mismanagement will be heard by the Tribunal. | 241(1) |
| Where the company’s affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, Tribunal may pass necessary orders. | 242(1)(a) |
| To make an order where winding up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the Company should be wound up. | 242(1)(b) |
| Tribunal may pass orders for regulation of conduct of affairs of the company in future. | 242(2)(a) |
| To make an order for purchase of shares or interests of any members of the company by other members thereof or by the company. | 242(2)(b) |
| To make an order for reduction of share capital consequent to purchase of shares of the company in the manner envisaged under Section 242(2)(b) | 242(2)(c) |
| The Tribunal can restrict on the transfer or allotment of the shares of the company. | 242(2)(d) |
| To terminate, set aside or modify any agreement, however arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the NCLT, be just and equitable in the circumstances of the case. | 242(2)(e) |
| To terminate, set aside or modify any agreement between the company and any person other than the managing director, any other director or manager referred to in Clause (e) of sub-section (2) of Section 242. Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned. | 242(2)(f) |
| To set aside any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within 3 months before the date of the application made pursuant to section 241, which would, if made or done by or | 242(2)(g) |

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| against an individual, be deemed in his insolvency to be a fraudulent preference. | |
| Removal of the managing director, manager or any of the directors of the company. | 242(2)(h) |
| Recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilization of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims. | 242(2)(i) |
| Manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made. | 242(2)(j) |
| Appointment of such number of persons as directors, who may be required by the NCLT to report to be NCLT on such matters as the NCLT may direct. | 242(2)(k) |
| Imposition of costs as may be deemed fit by the NCLT | 242(2)(l) |
| Any other matter for which, in the opinion of the NCLT, it is just and equitable that provision should be made | 242(2)(m) |
| In case of termination or modification of certain agreements by the Company with managing directors or other directors, leave be granted by the NCLT. | 243(1) |
| To pass specified order in receipt of application by members or depositors or any class of them in case if they are of the opinion that the management or conduct of the affairs of the company is being conducted in a manner prejudicial to the interests of the company or its members or depositors. | 245(1) |
| To punish for the contempt of the Tribunal in cases where a fraudulent application is made u/s 241(Oppression and Mismanagement) and 245(Class Action Suits). This power shall apply for Sections 337 to 341. | 246 |
| Chapter –XVIII “Removal of Name of Companies from the Register of Companies” | |
| To wind up a company the name of which has been struck off by registrar from Register of Companies. | 248 (8) |
| Tribunal may order restoration of the name of a company to the Register of companies in case of an appeal made to the tribunal within three years of the order of the Registrar. | 252(1) |
| To entertain the application made by the secured creditors of a company representing 50 per cent or more of its outstanding amount of debt and the company has failed to pay the debt within a period of 30 days of the service of the notice of demand. | 253(1) |
| NCLT may appoint an interim administrator within seven days of receipt of application under Section 256. | 254(1),(3) |
| NCLT may appoint interim administrator to be the company administrator in case of an application made by the creditors that the company can be revived. | 258 |

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| NCLT can delineate or direct the functions and duties of the Company administrator. | 260 |
| To sanction the scheme of revival and rehabilitation of sick industrial companies as prepared in Section 261, Companies Act, 2013. | 262 |
| To implement the scheme of revival and rehabilitation of sick industrial companies. | 264 |
| Where the scheme is not approved by the creditors, NCLT may issue orders for the winding up of the sick company. | 265 |
| To assess damages against the delinquent Directors in the course of the scrutiny or implementation of any scheme or proposal and pass suitable orders. | 266 |
| To punish in case of making a false or incorrect evidence to the NCLT or the NCLAT. | 267 |
| Chapter-XX “Winding Up” | |
| To pass order of winding up of the company. | 270 (1) |
| To wind up companies under various circumstances. | 271 (1) |
| To decide about the inability of the company to pay its debts. | 271(2)(c) |
| To grant leave to prospective creditor for filing petition of winding up. | 272 (6) |
| On receipt of petition for winding up, NCLT may either dismiss the petition with or without costs; make any interim order as it thinks fit; appoint a provisional liquidator of the company till the making of a winding up order, make an order for the winding up of the company with or without costs; or any other order as the NCLT thinks fit. | 273 (1) |
| NCLT may ask the company to file its objections, if any, along with a statement of its affairs within 30 days of the order in the manner prescribed. | 274 |
| NCLT shall appoint Official Liquidator from the panel maintained by the Central Government, as the Company Liquidator. | 275(1) |
| To limit and restrict the powers of the Official Liquidator or Provisional Liquidator as the case may be. | 275(3) |
| It can remove the Provisional Liquidator or the Company Liquidator as the Liquidator of the company on specified grounds. | 276(1) |
| Where loss or damage is caused due to fraud or misfeasance or where liquidator fails to exercise due care or diligence in the performance of its powers, NCLT can pass orders to recover loss or damage from the liquidator. | 276(3) |
| To give intimation of order for winding up to Company Liquidator, Provisional Liquidator and Registrar of Companies. | 277(1) |
| On application of company liquidator, NCLT to constitute winding up committee. | 277(4) |
| To put stay on suits or other legal proceedings on winding up order. | 279(1) |
| To give directions on report of Company Liquidator | 282(1) |

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| During liquidation, the custody of companies' property passes to the NCLT. | 283(1) |
| The list of contributories and application of assets in all cases where rectification is required will be settled by the Tribunal. | 285(1) |
| To constitute an advisory committee to advise the Company Liquidator and to report to the NCLT. | 287(1) |
| To stay the proceedings of winding up on application of promoter, shareholders or creditors or any other interested person. | 289(1) |
| To issue directions and to exercise control on the powers of the Company liquidator. | 290 |
| To issue directions and to exercise overall control on the powers of the liquidator. | 290 (1) |
| To sanction the appointment of professionals (CA, CS, CWA or Legal Practitioners) for assistance to Company Liquidator in the performance of his functions and duties. | 291(1) |
| To Confirm, reverse or modify the act or decision complained of for the company liquidator. | 292 (4) |
| For better accountability in company's winding up, NCLT to order the audit of accounts of Company Liquidator. | 294(1) |
| To exercise control on inspection of books by creditor or contributory. | 293 (2) |
| To cause accounts of the company liquidator to be audited. | 294 (3) |
| To pass an order requiring any contributory for the time being on the list of contributories to pay any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call. | 295(1) |
| To make calls on the contributories on the list for payment of money to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves. | 296 |
| To adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto. | 297 |
| To make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up | 298 |
| To summon persons suspected of having property of company in case the person is capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, of affairs of the company. | 299 |
| To order examination of promoters, directors in case the Company Liquidator is of the opinion that a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation. | 300 |
| In case a person is having property, accounts or papers of the company in his possession and is trying to leave India or abscond NCLT to order detention and | 301 |

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| arrest of such person. | |
| NCLT, after considering the report of the company liquidator, shall pass order dissolving the company. | 302 |
| To hear winding up petition where company is being wound up voluntarily. | 306 (3) (b) |
| Where in a voluntary winding-up the company liquidator reports that a fraud has been committed, NCLT may pass such order and give such directions as are necessary. | 317 |
| When the affairs of the company have been completely wound up, NCLT can pass order for dissolution of the company in a voluntary winding up. | 318(5) |
| To vary, confirm or set aside arrangement between the company and its creditors. | 321 (2) |
| To determine questions in winding up or exercise powers as to staying of proceedings etc. | 322 (1) |
| NCLT determines the questions arising out of winding up of the company where an application has been made for determining any question arising in the course of winding up of the Company, or exercise the staying of proceedings or any other matter with respect to the enforcing of the calls. | 322(3) |
| To give an option to company to declare the transaction relating to transfer of property, delivery of goods etc as fraudulent preference and to restore the position as if the company had not given such preference. | 328 (1),(2) |
| To determine liabilities and rights of certain fraudulently preferred persons who acted as surety or guarantor or creditor to the company. | 331 (3) |
| To grant leave to disclaim the onerous property in case of a company likely to be wound up. | 333 |
| To pass orders against avoidance of transfers including actionable claims or alteration in the status of members of company etc, after commencement of winding up. | 334 (2) |
| To grant permission to enforce any attachment, distress or execution after the commencement of winding up. | 335(1) |
| To direct liability for fraudulent conduct of business to any person on application of Company Liquidator. | 339(1) |
| To assess damages against delinquent directors, manager, liquidator or officer of the Company for misapplication, retainer, misfeasance or breach of trust. | 340 |
| Liability of partners or directors of the company under Section 339, Companies Act, 2013 relating to fraudulent conduct of business or under section 340, Companies Act, 2013 relating to misfeasance or breach of trust can be extended by the NCLT. | 341 |
| The delinquent officers and members of the Company who are found to be guilty of any offence in relation to the company are liable to be prosecuted by the NCLT. | 342 |

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| To sanction powers to be exercised by liquidator for payment to creditors in full etc. | 343 (1) |
| To direct the manner for disposal of books and papers of company after the complete winding up of the company or of the company likely to be dissolved. | 347 (1)(a) |
| To permit company liquidator to open account in a bank other than scheduled bank for the deposit of the monie received. | Proviso of 350 (1) |
| To disallow the payment of remuneration in part or in full to the liquidator in case money is required to be deposited in Company Liquidation Account and Undistributed asstes Account is not deposited by the liquidator. | 352 (8) (c) |
| To pass order to make the default good by filing the returns etc to the company liquidator on request of any creditor or contributory or the Registrar. | 353 |
| To ascertain the wishes of creditors or contributors by calling their meetings in all matters relating to winding up of the company. | 354 |
| To declare dissolution of company void on an application made by the Company Liquidator of the Company or by any other person at any time within 2 years from the date of dissolution. | 356 |
| Chapter- XXI “ Companies Authorised to Register under this Act” | |
| To grant leave to initiate suits or any legal proceedings against the company or any contributory after passing of winding up order. | 373 |
| Powers regarding winding up of unregistered company in case of inability of the Company to pay its debts or it is consider equitable and just to wind up the company or the company is carrying business only for the purpose of winding up. | 375 (3) |
| To exercise powers or to do nay act for winding up of Unregistered Companies. | 377 |
| Chapter- XXVII “National Company Law Tribunal and Appellate Tribunal ” | |
| NCLT can rectify any mistake in any order passed by it, within 2 years from the date of order. | 420 |
| General Power to amend any defect or error in any proceeding before NCLT and to make all necessary amendments for the purpose of determining the real question or issue raised by or depending on such proceeding. | |
| The NCLT shall have the powers of a Civil Court under the Code of Civil Procedure, 1908. In this regard, the NCLT can pass order in the following circumstances: <ul style="list-style-type: none"> a) Summoning and enforcing the attendance of any person and examining him on oath; b) requiring the discovery and production of documents; c) receiving evidence on affidavits; d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act 1872, requisitioning any public record or document or copy of such record or document from any office; | 424(2) |

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| <p>e) issuing commissions for the examination of witnesses or documents</p> <p>f) dismissing a representation for default or deciding it ex-parte;</p> <p>g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and</p> <p>h) any other matter which may be prescribed by the Central Government.</p> <p>Matters prescribed by the Central Government for the purpose, are as under:-</p> <ol style="list-style-type: none"> 1. Granting stay or order status quo 2. Ordering injunction or cease and desist; 3. Appointing commissioner(s) for the purpose under the Companies Act, 2013 4. Exercising limited power to review its decision to the extent of correcting clerical or arithmetical mistakes or any accidental slip or omission as provided in rule 140 of NCLT Rules, 2013; 5. Passing such order or orders as it may deem fit and proper in the interest of justice. | |
| Power of Bench of NCLT to call for further information or evidence. | |
| Where the applicant appears but respondent does not appear at the hearing, NCLT has the Power to hear and decide a petition or application ex parte. | |
| NCLT to dispose of application or petition expeditiously within 3 months from the date of presentation before it. Extension period of 90 days may be granted for disposal. | 422 |
| NCLT has the power to regulate its own procedure for the purpose of discharging its functions under the Companies Act, 2013. | 424(1) |
| Power to pass order after giving the parties to any proceeding before it a reasonable opportunity of being heard, thereby observing the principles of natural justice. The NCLT shall send a copy of every order passed to the parties concerned. | 424 |
| Power of NCLT to pass orders and directions to prevent abuse of its process or to secure the ends of justice. | |
| Power of NCLT to make orders necessary for meeting the ends of justice or to prevent abuse of process of NCLT is absolute and inherent and nothing in the NCLT Rules, 2013 shall limit such power of the NCLT. | |
| NCLT has the powers to issue commission for examination of witnesses or documents. | 424(2)(e) |
| Power to punish for contempt The NCLT shall have the same jurisdiction, powers and authority in respect of contempt of themselves as a High Court has and may exercise, for the purpose, the powers under the provisions of the Contempt of Courts Act, 1971. Powers of High Court under Contempt of Courts Act, 1971 The High Court has and exercises the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts | 425 |

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| subordinate to it as it has and exercises in respect of contempt of itself. Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860) These powers of the NCLT shall have the effect subject to the modification prescribed in Section 425 of the Companies Act, 2013, namely as under:- The reference to a High Court shall be construed as including a reference to the NCLT and the NCALT; and The reference to Advocate-General in section 15 of the Contempt of Courts Act, 1971 shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf. | |
| NCLT has the power to delegate powers to any officer or employee or any person to inquire in to the matter connected with any proceeding and report to it. | 426 |
| To impose such conditions or restrictions as it thinks fit subject to the payment of fee, while according approval, sanction, consent, confirmation etc. giving directions or granting exemptions. | 426 |
| NCLT can seek assistance of Chief Metropolitan Magistrate, Chief Judicial Magistrate, or District Collector to take possession of property, books of accounts or other documents on behalf of the NCLT. | 429 |
| Chapter- XXVIII “Special Courts” | |
| NCLT can compound certain offences in certain cases before the investigation has been initiated or pending. | 441 |
| Offences punishable with fine only, either before or after the institution of any prosecution, can be compounded by 22NCLT. | 441 |
| Chapter- XXIX “Miscellaneous” | |
| Power to accord approval, sanction, consent, confirmation or recognition to, or in relation to, any matter. | 459 |

CONSTITUTION OF APPELLATE TRIBUNAL.

The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against the orders of the Tribunal or of the National Financial Authority.

BENCHES OF TRIBUNAL

(1) There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(2) The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(3) The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member:

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

(4) The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016.

(5) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

ORDERS OF TRIBUNAL

(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

APPEAL FROM ORDERS OF TRIBUNAL

(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal, the Appellate Tribunal shall, after giving the parties to the appeal a

reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

EXPEDITIOUS DISPOSAL BY TRIBUNAL AND APPELLATE TRIBUNAL

(1) Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

(2) Where any application or petition or appeal is not disposed of within the period specified in sub-section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary.

APPEAL TO SUPREME COURT

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL

(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

- (a) in the case of an order against a company, the registered office of the company is situate; or
- (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

POWER TO PUNISH FOR CONTEMPT

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—

- (a) the reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and
- (b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.

DELEGATION OF POWERS

The Tribunal or the Appellate Tribunal may, by general or special order, direct, subject to such conditions, if any, as may be specified in the order, any of its officers or employees or any other person authorised by it to inquire into any matter connected with any proceeding or, as the case may be, appeal before it and to report to it in such manner as may be specified in the order.

RIGHT TO LEGAL REPRESENTATION

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

LIMITATION

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

INSTITUTION OF PROCEEDINGS, PETITION, APPEALS ETC. BEFORE NCLT

Part III of the National Company Law Tribunal Rules, 2016 dealing with the Institution of proceedings, petition, appeals etc. before NCLT.

Procedure of Appeal

- (1) Every appeal or petition or application or caveat petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form;
- (2) The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.
- (3) Appeal or petition or application or counter objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.
- (4) Where Saka or other dates are used, corresponding dates of Gregorian Calendar shall also be given.
- (5) Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.
- (6) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.
- (7) These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.
- (8) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.
- (9) Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

Particulars to be set out in the address for service

The address for service of summons shall be filed with every appeal or petition or application or caveat on behalf of a party and shall as far as possible contain the following items namely:-

- (a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house;
- (b) the name of the town or village;
- (c) the post office, postal district and PIN Code, and
- (d) any other particulars necessary to locate and identify the addressee such as fax number, mobile number, valid e-mail address, if any .

Initialing alteration

Every interlineations, eraser or correction or deletion in any appeal or petition or application or document shall be initialed by the party or his authorised representative presenting it.

Presentation of petition or appeal

(1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

(2) Every petition or application or appeal may be accompanied by documents duly certified by the authorised representative or advocate filing the petition or application or appeal duly verified from the originals.

(3) All the documents filed in the Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed under these rules.

(5) In the pending matters, all applications shall be presented after serving copies thereof in advance on the opposite side or his authorised representative.

(6) The processing fee prescribed by these rules, with required number of envelopes of sufficient size and notice forms shall be filled along with memorandum of appeal.

Number of copies to be filed

The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or petition or application or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

Lodging of caveat.

(1) Any person may lodge a caveat in triplicate in any appeal or petition or application that may be instituted before this Tribunal by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the form prescribed and contain such details and particulars or orders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up:

Provided, that the Tribunal may pass interim orders in case of urgency.

(2) The caveat shall remain valid for a period of ninety days from the date of its filing.

Endorsement and Verification

(1) At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorised representative.

(2) Every petition or appeal shall be signed and verified by the party concerned in the manner provided the NCLT Rules.

Translation of document

(1) A document other than English language intended to be used in any proceeding before the Tribunal shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by authorised representative engaged on behalf of parties in the case or by any other advocate or authorised representative whether engaged in the case or not or if the advocate or authorised representative engaged in the case authenticates such certificate or prepared by a translator approved for the purpose by the Registrar on payment of such charges as he may order.

(2) Appeal or petition or other proceeding shall not be set down for hearing until and unless all parties confirm that all the documents filed on which they intend to rely are in English or have been translated into English and required number of copies are filed into Tribunal.

Production of authorisation for and on behalf of an association

Where an appeal or application or petition or other proceeding purported to be instituted by or on behalf of an association, the person or persons who sign (s) or verify (ies) the same shall produce along with such application, for verification by the Registry, a true copy of the resolution of the association empowering such person(s) to do so:

Provided that the Registrar may at any time call upon the party to produce such further materials as he deems fit for satisfying himself about due authorization:

Provided further that it shall set out the list of members for whose benefit the proceedings are instituted.

Interlocutory applications

Every Interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in prescribed form and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing an affidavit supporting the application.

Rights of a party to appear before the Tribunal

(1) Every party may appear before a Tribunal in person or through an authorised representative, duly authorised in writing in this behalf.

(2) The authorised representative shall make an appearance through the filing of Vakalatnama or Memorandum of Appearance in Form No. NCLT. 12 representing the respective parties to the proceedings.

(3) The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Tribunal.

(4) The officer authorised by the Central Government or the Regional Director or the Registrar of Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor.

(5) During any proceedings before the Tribunal, it may for the purpose of its knowledge, call upon the Registrar of Companies to submit information on the affairs of the company on the basis of information available in the MCA21 portal. Reasons for such directions shall be recorded in writing.

(6) There shall be no audio or video recording of the Bench proceedings by the parties or their authorised representatives.

INSTITUTION OF APPEALS - PROCEDURE BEFORE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Part III of the National Company Law Appellate Tribunal Rules, 2016 dealing with the provisions relating to Institution of appeals – Procedure before NCLAT.

Procedure for proceedings

(1) Every appeal to the Appellate Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type-written or printed in double spacing on one side of standard paper with an inner margin of about four centimeters width on top and with a right margin of 2.5 cm, and left margin of 5cm, duly paginated, indexed and stitched together in paper book form.

(2) The cause title shall state “In the National Company Law Appellate Tribunal” and also set out the proceedings or order of the authority against which it is preferred.

(3) Appeal shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

(4) Where Saka or other dates are used, corresponding dates of Gregorian calendar shall also be given.

(5) Full name, parentage, description of each party and address and in case a party sue or being sued in a representative character, shall also be set out at the beginning of the appeal and need not be repeated in the subsequent proceedings in the same appeal.

(6) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party and these numbers shall not be changed and in the event of the death of a party during the pendency of the appeal, his legal heirs or representative, as the case may be, if more than one shall be shown by subnumbers.

(7) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

(8) Every proceeding shall state immediately after the cause title and the provision of law under which it is preferred.

Particulars to be set out in the address for service

The address for service of summons shall be filed with every appeal on behalf of a party and shall as far as possible contain the following items namely:-

- (a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house;
- (b) the name of the town or village;
- (c) the post office, postal district and PIN Code; and
- (d) any other particular necessary to identify the addressee such as fax number, mobile number and e-mail address, if any.

Initialling alteration

Every interlineation, eraser or correction or deletion in any appeal shall be initialled by the party or his authorised representative.

Presentation of appeal

(1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

(2) Every appeal shall be accompanied by a certified copy of the impugned order.

(3) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.

(5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.

(6) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal.

Number of copies to be filed

The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

Endorsement and verification

At the foot of every appeal or pleading there shall appear the name and signature of the authorised representative and every appeal or pleadings shall be signed and verified by the party concerned in the manner provided by these rules.

Translation of document

(1) A document other than English language intended to be used in any proceeding before the Appellate Tribunal shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by the authorised representative engaged on behalf of parties in the case.

(2) The Registrar may order translation, certification and authentication by a person approved by him for the purpose on payment of such fee to the person, as specified by the Chairperson.

(3) Appeal or other proceeding shall not be set down for hearing until and unless all parties confirm that all the documents filed on which they intend to rely are in English or have been translated into English and required number of copies are filed with the Appellate Tribunal.

Appearance of authorised representative

Subject to provisions of Section 432 of the Act, a party to any proceedings or appeal before the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or

company secretaries of cost accountants or legal practitioners of any other person to present his case before the Appellate Tribunal.

Where an advocate is engaged to appear for and on behalf of the parties, he shall submit Vakalatnama.

The professionals like chartered accountants or company secretaries or cost accountants shall submit Memorandum of Appearance.

While appearing before the Appellate Tribunal, the authorised representative shall wear the same professional dress as prescribed in their Code of Conduct.

SPECIAL COURTS

As per Section 435 of the Companies Act, the Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

A Special Court shall consist of—

- A single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and
- A Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences, who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

Offences Triable by Special Courts (Section 436)

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

- (a) all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;
- (b) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

- (c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the

Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him under that section; and

- (d) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years:

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

Application of Code to Proceedings before Special Court

Section 438 states that save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be, and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

LESSON ROUND-UP

- Tribunal is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals.
- Tribunal is a quasi-judicial body and the primary objective of constituting the Tribunals is to provide a simpler, speedier and more accessible dispute resolution mechanism in Company Law matter specifically apart from other laws for which it is empowered.
- Any person aggrieved by an order of the National Company Law Tribunal may prefer an appeal to the National Company Law Appellate Tribunal. No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.
- Any person aggrieved by any order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order.
- The National Company Law Tribunal and the National Company Law Appellate Tribunal shall have the

same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971.

- A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.
- The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.
- The Central Government may, for the purpose of providing speedy trial of offences under Companies Act, 2013 by notification, establish or designate as many Special Courts as may be necessary. The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be, and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

SELF-TEST QUESTIONS

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

1. What is the difference between a Court and a Tribunal?
2. Discuss the power of NCLT under Companies Act, 2013 regarding Winding Up of the Company.
3. What are the provisions relating to appeal from the orders of National Company Law Tribunal to National Company Law Appellate Tribunal?
4. Discuss briefly the procedure of appeal before the National Company Law Tribunal.
5. What is Special Courts? What are the offenses triable by Special Courts?

Lesson 13

Arbitration and Conciliation Act, 1996

LESSON OUTLINE

- Lesson Outline
- Learning Objective
- Introduction
- Law of Arbitration in India
- Arbitration
- Types of Arbitration
- Arbitration Agreement
- Appointment of Arbitrators
- Arbitral procedure
- Arbitral Tribunal
- Appointment of experts by Arbitral Tribunal
- Fast Track Procedure
- Arbitral Award
- Appeals
- Enforcement of Foreign Award
- Arbitration and Conciliation
- Conciliation
- Arbitral Proceedings
- Appointment of Conciliator
- Confidentiality
- Role of Conciliator
- International Commercial Arbitration
- Alternate Disputes Resolution
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a Court of Law. The settlement of dispute is arrived by the judgment of the third person (or more persons) who are called Arbitrators. The parties repose confidence in the judgement of the arbitrator and show their willingness to abide by his decision.

The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic tribunal. It is, therefore, a reference of the matter of disputes to the decision of one or more persons between the disputing parties.

United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 and the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The Arbitration and Conciliation Act, 1996 is based on United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Therefore, students should be well versed in this subject so as to understand Arbitration, Conciliation, International Commercial Arbitration and Alternate Disputes Resolution.

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

INTRODUCTION

The history of the law of arbitration in India commences with Act VIII of 1859 which codified the procedure of Civil Courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. These provisions were in operation when the Indian Contract Act, 1872, came into force which permitted settlement of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882 but not much change was brought about by the law relating to arbitration proceedings. It was in the year 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matter submitted to the arbitration was the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency town. Then came the Code of Civil Procedure of 1908. Schedule II to the said Code contained the provisions relating to the law of arbitration which extended to the other parts of British India.

The Civil Justice Committee in 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., the Arbitration Act of 1940. This Act as its preamble indicates is a consolidating and amending Act and is an exhaustive code insofar as the law relating to arbitration is concerned. Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or it may be arbitration in a suit.

With the passage of time the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective. Besides, arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms.

Arbitration and Conciliation Act, 1996

With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called Arbitration and Conciliation Act, 1996 has been passed. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognizes the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a

more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Important Definitions

Arbitration

Section 2(1) (a) of the Act, defines the term “arbitration” as to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitrator

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. But “arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.

The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference there under shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
3. The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
 - (a) Where the arbitration agreement expressly provides that no reasons are to be given, or
 - (b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the

dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.

The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves, analysis of the dispute to reach a logical conclusion. Award can be divided into four parts i.e. general, findings of fact, submissions of the parties and conclusions of the tribunal. The tribunal should explain its view of the evidence and reasons of its conclusions. The preamble of the award may contain reference to the arbitration agreement, constitution of the tribunal, procedure adopted by the tribunal etc. and the second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of the tribunal. The points at issue may be divided into two heads i.e. issue of fact and issue of law.

4. The award should be dated i.e. the date of making of the award should be mentioned in the award.
5. Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.
6. The arbitral tribunal may include in the sum for which award is made, interest upto the date of award and also a direction regarding future interest.
7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Arbitral Tribunal

“Arbitral tribunal” means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)].

Court

Court means:-

- (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
- (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. [Section 2(1)(e)]

International Commercial Arbitration

“International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

- (i) an individual who is a national of, or habitually resident in, any country other than India; or

- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country.[Section 2(1)(f)]

Legal Representative

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.[Section 2(1)(g)]

Party

Party means a party to an arbitration agreement. [Section 2(1)(h)]

Arbitration Agreement

“Arbitration agreement” means an agreement referred to in Section 7[Section 2(1)(b)].

Under Section 7, the Arbitration agreement has been defined to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- An arbitration agreement shall be in writing.
- An arbitration agreement is in writing if it is contained in-
 - a document signed by the parties;
 - an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
 - an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Power to refer parties to arbitration where there is an arbitration agreement

Section 8(1) provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

Further sub-section (2) states that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

It may be noted that where the original arbitration agreement or a certified copy thereof is not available with

the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

Sub-section (3) states that notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

Interim measures etc. by Court

Section 9(1) states that a party may, before, or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

- i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- ii. for an interim measure of protection in respect of any of the following matters, namely:-
 - a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - b. securing the amount in dispute in the arbitration;
 - c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any part) or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - d. interim injunction or the appointment of a receiver;
 - e. such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Further, sub-section (2) states that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

Under sub-section (3) once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Number of arbitrators

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Appointment of Arbitrators

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

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

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

- a. a party fails to act as required under that procedure; or
- b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11 (3) states that failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

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

- a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- b. the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made upon request of a party, "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

Section 11 (5) says that 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, 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".

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

- a. a party fails to act as required under that procedure; or
- b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11(6A) states that the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) or Section 11(5) or Section 11(6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

Under Section 11(6B) the designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

Section 11(7) provides that a decision on a matter entrusted by Section 11(4) or Section 11(5) or Section 11(6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by

such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

Section 11 (8) says that 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-

- (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";

Under Section 11(9) 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.

Section 11(10) provides that the Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by Section 11(4) or Section 11(5) or Section 11(6), to it.;

Section 11(11) states that where more than one request has been made under Section 11(4) or subsection Section 11(5) or Section 11(6) to "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.

Under Sub-section 12(a) where the matters referred to in Section 11 (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court; and

Sub-section 12 (b) provides that where the matters referred to in Sub-section 11(4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections 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) of the Act is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.;

Section 11(13) states that an application made under this section 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 may be, as expeditiously as possible and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Section 11(14) says 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.

Explanation -For the removal of doubts, it is hereby clarified that Section 11(14) stated 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.

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 and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

Grounds for challenge

Section 12(1) provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

- (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1- The grounds stated in the Fifth Schedule of the Act shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2- The disclosure shall be made by such person in the form specified in the Sixth Schedule of the Act.

According to Section 12(2), an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub section (1) unless they have already been informed of them by him.

Section 12(3) states an arbitrator may be challenged only if-

- a. circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- b. he does not possess the qualifications agreed to by the parties.

Section 12(4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.

Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Act shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

Challenge procedure

Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party

agrees to the challenge. It is also provided that where an award is set aside on an application made under sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Failure or impossibility to act as an arbitrator

As per Section 14(1), the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if he becomes *de jure* or *de facto* unable to perform his functions, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2).

According to Section 14(3) if, under section 14 or section 13(3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

Termination of Mandate and Substitution of Arbitrator

(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].

Competence of arbitral tribunal to rule on its jurisdiction

Section 16 deals with competence of arbitral tribunal to rule on its jurisdiction. According to section 16(1) the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

- a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

As per Section 16(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator, (Sub-section 2).

Section 16(3) provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

The arbitral tribunal may, in either of the cases referred to, in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified. Further, the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

Interim measures ordered by arbitral tribunal

Section 17(1) provides that a party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

- (a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Sub-section (2) states that Subject to any orders passed in an appeal under section 37 of the Act, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.

Equal treatment of parties

According to Section 18 of the Act, the parties shall be, treated with equality and each party shall be given a full opportunity to present his case.

Determination of rules of procedure

Section 19 deals with determination of rules of procedure. It says that:

1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872
2. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part,

conduct the proceedings in the manner it considers appropriate.

4. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Place of arbitration

As per Section 20(1) the parties are free to agree on the place of arbitration and sub-section (2) states that if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Commencement of arbitral proceedings

According to Section 21 of the Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Language

Section 22(1) provides that the parties are free to agree upon the language or languages to be used in the arbitral proceedings and under sub-section (2) if they fail to reach an agreement, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

Sub-section (3) states that the agreement or determination, unless otherwise specified shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

As per sub-section (4) the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defence

Section 23(1) provides that within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

Sub-section (2) states that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Sub-section (2A) provides that the respondent, in support of his case, may also submit a counter claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Sub-section (3) states that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Hearings and written proceedings

Sub-section (1) of section 24 provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause

Sub-section (2) states that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

Sub-section (3) says that all statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. (Section 24)

Default of a party

Section 25 provides that unless otherwise agreed by the parties, where, without showing sufficient cause,-

- a. the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;
- b. the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.
- c. a party fails to appear at an oral hearing or to produce documentary evidence. the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Expert appointed by arbitral tribunal

Sub-section (1) of section 26 provides that subject to agreement between the parties, the arbitral tribunal may-

- a. appoint one or more expert to report to it on specific issues to be determined by the arbitral tribunal, and
- b. require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection.

Section 26 (2) states that if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Further Section 26 (3) provides that the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

Court assistance in taking evidence

According to Section 27(1) the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

Under Section 27 (2) the application shall specify-

- a. the names and addresses of the parties and the arbitrators,
- b. the general nature of the claim and the relief sought,-
- c. the evidence to be obtained, in particular,-
 - i. the name and addresses of any person to be heard as witness or expert witness and a statement of the subject- matter of the testimony required;
 - ii. the description of any document to be produced or property to be inspected.

Section 27 (3) provides that the Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal. Under Section 27 (4) the Court may, while making an order, issue the same processes to witnesses as it may issue in suits tried before it.

Section 27 (5) provides that persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court. As per Section 27 (6) the expression "Processes" includes summons and commissions for the examination of witnesses and summons to produce documents.

Rules applicable to substance of dispute

Section 28(1) provides that where the place of arbitration is situate in India,-

- a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
- b. in international commercial arbitration,-
 - i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
 - ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
 - iii. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

As per Section 28(2) the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

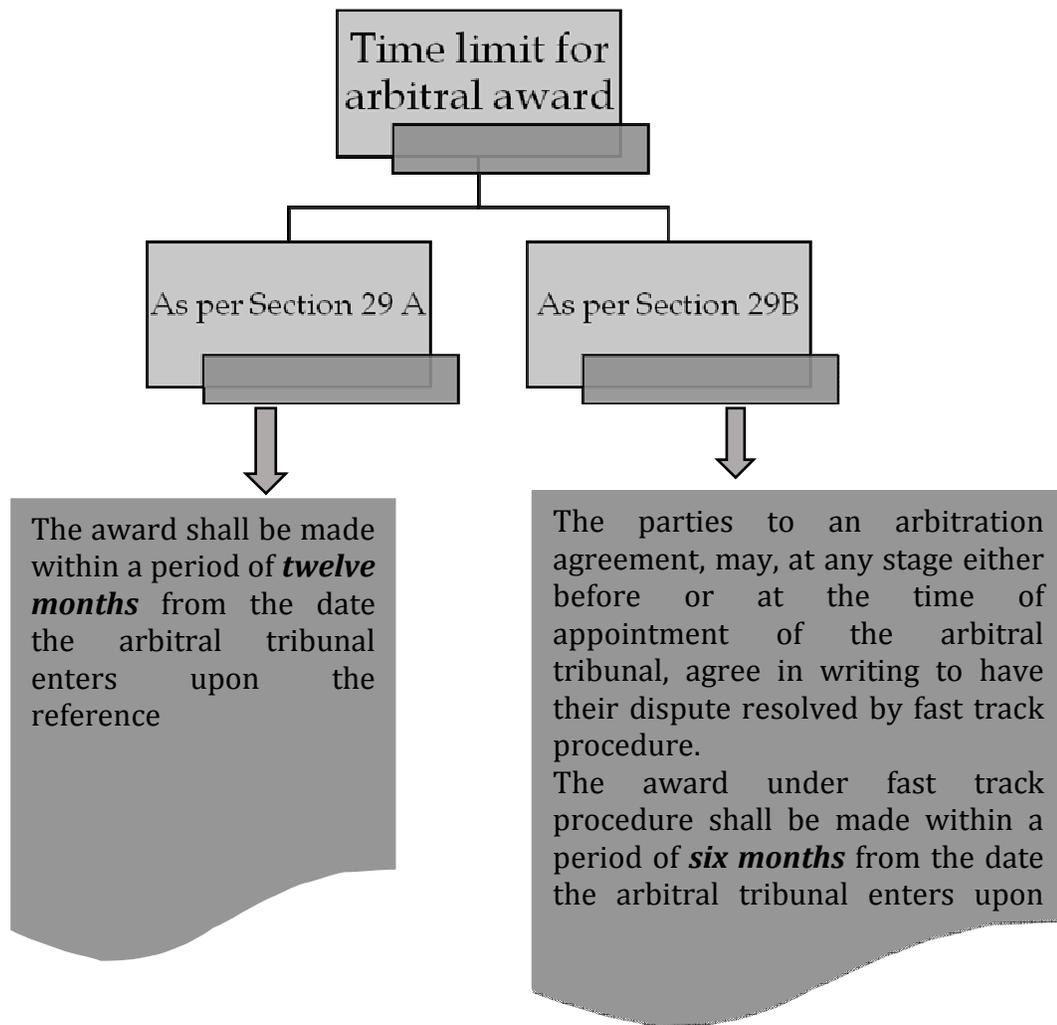
Under Section 28(3) while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Decision making by panel of arbitrators

As per section 29(1) unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

However section 29(2) states that notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Time limit for arbitral award



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

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

Section 29A(2) states that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

Under Section 29A(3) the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

Section 29A(4) states that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this subsection, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

As per Section 29A(5) the extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

Section 29A (6) provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

Section 29A (7) states that in the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

Section 29A (8) provides that it shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

As per Section 29A (9) an application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.(Section 29A)

Fast track procedure

Section 29B(1) provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

Section 29B (2) states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Section 29B (3) says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

- (a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
- (b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

- (c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
- (d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

Section 29B(4) states that the award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

Section 29B(5) provides that if the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

Section 29B (6) says that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

Settlement

Section 30 (1) provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Under Section 30 (2) if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

As per Section 30 (3) an arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

Section 30 (4) states that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

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.

Regime for costs

Section 31A (1) provides that in relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine-

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid.

Explanation.-For the purpose of this sub-section, "costs" means reasonable costs relating to-

- (i) the fees and expenses of the arbitrators, Courts and witnesses;
- (ii) legal fees and expenses;
- (iii) any administration fees of the institution supervising the arbitration; and
- (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

Under Section 31A (2) if the Court or arbitral tribunal decides to make an order as to payment of costs,-

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; or
- (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

Section 31A (3) provides that in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including-

- (a) the conduct of all the parties;
- (b) whether a party has succeeded partly in the case;
- (c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and
- (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

Under Section 31A (4) the Court or arbitral tribunal may make any order under this section including the

order that a party shall pay-

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) 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 recognizes a legitimate interest on his part in, obtaining a final settlement of the dispute,
- b. the parties agree on the termination of the proceedings, or
- c. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Correction and interpretation of award; additional award

Section 33(1) provides that within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties

- a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
- b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Further Section 33 (2) states that if the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

Further Section 33 (3) states that the arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

Section 33 (4) provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an

additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Section 33 (5) provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

Under Section 33 (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

Section 33 (7) states that section 31 shall apply to a connection or interpretation of the arbitral award or to an additional arbitral award made under this section.

Application for setting aside arbitral award

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

Section 34 (2) states that an arbitral award may be set aside by the Court only if-

- a. the party making the application furnishes proof 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 I.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 ; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

As per Section 34(2A) an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

Section 34 (3) provides that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Under Section 34(4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

As per Section 34(5) an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Under Section 34(6) an application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Finality of arbitral awards

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively.

Enforcement

Section 36(1) provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

Further Section 36(2) provides that where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

Section 36(3) states that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral

award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

Appealable orders

Section 37(1) provides that 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.

Deposits

As per Section 38(1) the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.

Further Section 38 (2) states that the deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

Section 38 (3) provides that upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Lien on arbitral award and deposits as to costs

Section 39(1) provides that subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

Section 39 (2) states that if in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

As per Section 39 (3) an application under sub-section (2) may be made by any party unless the fees

demande 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.

Under Section 39 (4) the Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Arbitration agreement not to be discharged by death of party thereto

Section 40 (1) provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Section 40 (2) states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

As per Section 40 (3) nothing in this section shall affect the operation or any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of insolvency

As per Section 41(1) where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

Further, Section 41 (2) states that where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

As per Section 41 (3) the expression "receiver" includes an Official Assignee.

Jurisdiction

Section 42 provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Limitations

Section 43(1) provides that the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

Section 43(2) states that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.

As per Section 43 (3) where an arbitration agreement to submit future disputes to arbitration provides that

any claim to which the agreement applies shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

Section 43(4) states that where the Court orders that an arbitral award be set aside, the period between the commencement of the, arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

ENFORCEMENT OF CERTAIN FOREIGN ARBITRAL AWARDS

Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

Awards made under New York convention or Geneva Convention

Any foreign award, whether made under New York Convention or Geneva Convention, which would be enforceable under the respective provisions of the Act applicable to the award, have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Power of judicial authority to refer parties to arbitration

Section 45 provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

When foreign award binding

Section 46 states that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 47 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-

- a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- b. the original agreement for arbitration or a duly certified thereof; and

c. such evidence as may be necessary to prove that the award is a foreign award.

Further Section 47 (2) states that if the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.-In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for enforcement of foreign awards

Section 48 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use one or more of the following grounds for the purpose of opposing enforcement of a foreign award, namely:

- (i) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a difference not contemplated by or not 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 matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
- (vi) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
- (vii) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 -For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Enforcement of foreign awards

As per section 49 where the Court is satisfied that the foreign award is enforceable, the award is executable as a decree of the Court.

Appealable orders

Section 50(1) provides that an appeal shall lie from the order refusing to-

- a. refer the parties to arbitration under section 45;
- b. enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court is not affected or taken away by virtue of these provisions.

Power of judicial authority to refer parties to arbitration

Section 54 provides that notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908, a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case (the agreement or the arbitration cannot proceed or becomes inoperative).

Foreign awards when binding

Section 55 provides that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 56(1) provides that the party applying for the enforcement of a foreign award shall, at the time of application produce before the Court-

- a. the original award or a copy thereof duly authenticated. in the manner required by the law of the country in which it was made;
- b. evidence proving that the award has become final; and
- c. such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

Further Section 56(2) provides that where any document requiring to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation 1. — In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original

civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Explanation 2. — In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for enforcement of foreign awards

Sub-section (1) of section 57 provides that in order that a foreign award may be enforceable under the Act, it shall be necessary that –

The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

The subject-matter of the award is capable of settlement by arbitration under the law of India;

The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

The enforcement of the award is not contrary to the public policy or the law of India.

Explanation 1 — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 — For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Further sub-section (2) provides that even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that,-

- a. the award has been annulled in the country in which it was made;
- b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

- c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

As per sub section (3) if the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Enforcement of foreign awards

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Appealable orders

Sub-section (1) of section 59 provides that an appeal shall lie from the order refusing-

- a. to refer the parties to arbitration under section 54; and
- b. to enforce a foreign award under section 57, to the court authorized by law to hear appeals from such order.

Further, sub-section (2) provides that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CONCILIATION

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

Basically, these processes can be successful only if the personality of the conciliator or the mediator is such that he is able to induce the parties to come to a settlement. The Act gives a formal recognition to conciliation in India. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

Application and scope

Section 61(1) provides that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part III of the Arbitration and Conciliation Act, 1996 shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

As per Section 61 (2), Part III of the Arbitration and Conciliation Act, 1996 shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

Commencement of conciliation proceedings

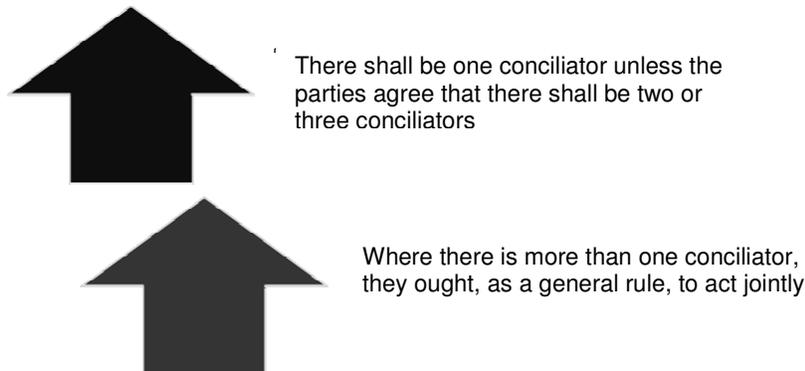
Sub-section (1) of section 62 provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

Sub-section (2) states that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

Further sub-section (3) states that if the other party rejects the invitation, there will be no conciliation proceedings.

Sub-section (4) provides that if the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

Number of conciliators



Appointment of conciliators

Sub-section (1) of section 64 provides that subject to sub-section (2),-

- a. in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;
- b. in conciliation proceedings with two conciliators, each party may appoint one conciliator;
- c. in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Further sub-section (2) provides that parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,-

- a. a party may respect such an institution or person to recommend the names of suitable individuals to act as conciliator, or
- b. the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of statements to conciliator

Sub-section (1) of section 65 provides that the conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

Further sub-section (2) provides that the conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

Sub-section (3) states that at any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate

Explanation. — In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or, three conciliators, as the case may be.

Conciliator not bound by certain enactments

Section 66 provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Role of conciliator

Sub-section (1) of section 67 provides that the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Further Sub-section (2) provides that the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

As per sub-section (3) the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

Sub-section (4) states that the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Administrative assistance

Section 68 provides that in order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Communication between conciliator and parties

Sub-section (1) of section 69 provides that the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Further sub-section (2) states that unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of information

Section 70 provides that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate: Provided that when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of parties with conciliator

Section 71 provides that the parties shall in good faith co-operate with the conciliator and, in particular, shall endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by parties for settlement of dispute

Section 72 provides that each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement agreement

Sub-section (1) of section 73 provides that when it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Further sub-section (2) provides that if the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

Sub-section (3) states that when the parties sign the settlement agreement, it shall be, final and binding on the parties and persons claiming under them respectively

As per sub-section (4) the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and effect of settlement agreement

Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

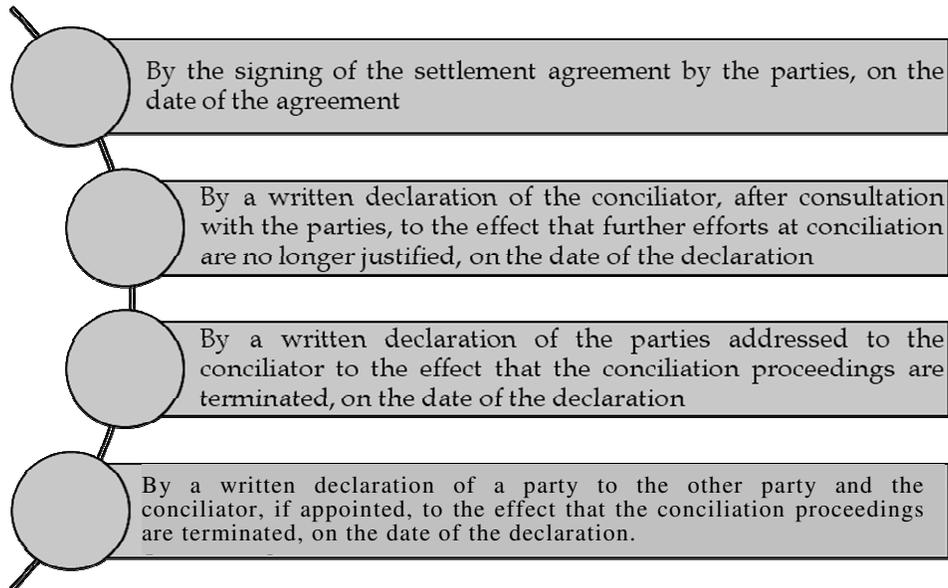
Confidentiality

Section 75 provides that notwithstanding anything contained in any other law for the time being in force, the

conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of conciliation proceedings

The conciliation proceedings shall be terminated-



Resort to arbitral or judicial proceedings

Section 77 provides that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Costs

Sub-section (1) of section 78 states that upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

Further, sub-section (2) states that for the purpose of sub-section (1), "costs" means reasonable costs relating to-

- a. the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;
- b. any expert advice requested by the conciliator with the consent of the parties;
- c. any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68;
- d. any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

As per sub-section (3) the costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Deposits

Sub-section (1) of section 79 states that the conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

Further, sub-section (2) states that during the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

As per sub-section (3) if the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

Sub-sections (4) provide that upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

Role of conciliator in other proceedings

| | |
|--|--|
| | The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings |
| | The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings |

Admissibility of evidence in other proceedings

Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

- a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- b. admissions made by the other party in the course, of the conciliation proceedings;
- c. proposals made by the conciliator;
- d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Power of High Court to make rules

Section 82 provides that the High Court may make rules consistent with this Act as to all proceedings before the Court under this Act.

Removal of difficulties

Sub-section (1) of section 83 provides that if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the

difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

Further sub-section (2) provides that every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Power to make rules

Sub-section (1) of section 84 provides that the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

Further sub-section (2) provides that every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities. The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world. The ICADR is a Society registered under Societies Registration Act, 1860, it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

Areas in which ADR works

Almost all disputes including commercial, civil, labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

LESSON ROUND-UP

- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration. The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts. Part one deals with Arbitration; Part two deals with enforcement of

certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.

- The present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.
- The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences.
- Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.
- The Alternative Dispute Resolution (ADR) processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial. The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world.

SELF-TEST QUESTIONS

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

1. What are the grounds to challenge the appointment of an Arbitrator under the Arbitration and Conciliation Act, 1996? Discuss.
2. What do you understand by an arbitration agreement?
3. What are the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996?
4. What are the provisions relating to settlement of the dispute under the Arbitration and Conciliation Act, 1996?
5. Part I of the Arbitration and Conciliation Act, 1996 applicable only to all the arbitrations which take place within the territory of India. Comment.

Lesson 14

Indian Stamp Act, 1889

LESSON OUTLINE

- Learning Objectives
- Important Definitions
- Instruments chargeable with Duty
- Extent of liability of Instruments to Duty
- Valuation for Duty under the Act
- Apportionment
- Persons liable to pay Duty
- Methods of Stamping
- Use of Adhesive Stamps
- Mode of cancellation of Adhesive Stamps
- Denoting Duty
- Time of Stamping Instruments
- Adjudication as to Stamps
- Instruments not duly Stamped Treatment and Consequences
- Admission of Instruments
- Admission of improperly stamped instruments
- Dealing with Instruments Impounded
- Prosecution for offences against Stamp Law
- Allowance and Refund
- Criminal Offences, etc.
- Lesson Round-up
- Self-Test Questions

LEARNING OBJECTIVES

The Indian Stamp Act, 1899 is a fiscal legislation dealing with tax on transactions. The tax is levied on in the shape of stamps recording the transactions. Supreme Court, in the case of AV Fernandez v. State of Kerala AIR 1957 SC 657, explained the law relating to interpretation of fiscal statutes as: "In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

In our country, documents are often executed without proper legal advice and lawyers are faced with a difficult situation when they find that the document to be put in the court is not properly stamped. Sometimes people are unduly taxed by overzealous officers. Therefore, it is essential for the students to be familiar with the law relating to stamp duties.

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments.

INTRODUCTION

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. The Act is divided into eight Chapters and there is a schedule which contains the rates of stamp duties on various instruments.

| Union List | The State Legislature | Amendments, entry 44 |
|--|---|---|
| <ul style="list-style-type: none"> • Union List, Entry 91 gives power to the Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. The power to reduce or remit duties on these instruments is vested in the Union Government as per Section 9 of the Act. | <ul style="list-style-type: none"> • State List, entry 63 confers on the States power to prescribe the rates of stamp duties on other instruments. As per "Principles" for levy of duty fall in the Concurrent List, entry 44. | <ul style="list-style-type: none"> • The amendments to the Central Act effected by the States are in the shape of amendment of sections of the Central Act, adding new sections, adding separate schedules, modifying in schedules, etc. Some States, for their convenience, have passed separate legislation to cover the matters coming under State's domain. As a result, the rates of stamp duties in different States on other instruments category differ from State to State for the same instrument. |

IMPORTANT DEFINITIONS

Section 2 of the Act contains definitions of various terms used in the Act. Some important definitions are discussed below:

Banker

"Banker" includes a bank and any person acting as a banker [Section 3 of the Negotiable Instruments Act defines a banker as including persons or a corporation or company acting as bankers]. [Section 2(1)]

Bill of Lading

"Bill of Lading" includes a 'through bill lading' but does not include a mate's receipt. [Section 2(4)]

A bill of lading is a receipt by the master of a ship for goods delivered to him for delivery to X or his assigns. Three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship and one is forwarded to X, the consignee, who, on receipt of it, acquires property in the goods. It is a written evidence of a contract for the carriage and delivery of goods by sea, for certain freight.

When goods are delivered on board a ship, the receipt is given by the person incharge at that time. This receipt is known as the mate's receipt. The shipper of the goods returns this receipt to the master before the ship leaves and receives from him bill of lading for the goods, signed by the master.

Conveyance

The term “conveyance” includes a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred *inter vivos*¹ and which is not otherwise specifically provided for by Schedule. It does not include a will. [Section 2(10)]

Thus, all transfers of property whether movable or immovable, on sale (which are not otherwise specially provided for by the Schedule), are chargeable as conveyances. Transfers which are otherwise provided for in the Schedule are Composition Deed, Exchange of Property, Gift, Lease, Mortgage, Reconveyance, Release, Settlement, Transfer, Transfer of Lease and (Declaration of) Trust.

Instrument

Section 2(14) defines an “instrument” to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The definition is an inclusive definition, and is not necessarily restricted to those documents which are specifically mentioned in the definition. Briefly stated, an instrument includes conveyances, leases, mortgages, promissory notes and wills, but not ordinary letters or memoranda or accounts.

Following instances may be noted:

- (i) An unsigned draft document is not an “instrument” (because it does not create or purport to create any right, etc).
- (ii) An entry in a register, containing the terms of hiring of machinery is an “instrument”, where it is authenticated by the thumb impression of the hirer. (Reason is, that it purports to create, a liability etc.)
- (iii) A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a *particular period and that it will be repaid with interest on the due date* is an “instrument”.

[These examples show, that the law looks to the substance and effect (or intended effect) of the text of the instrument and not the physical *medium* through which it is recorded.]

- (iv) Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act. *Ashok Kalam Capital Builders v. State & Anr.*, AIR 2010 (NOC) 736 (Del).

Executed / Execution

Under Section 1(12), the words “executed” and “execution” (used with reference to instruments), mean “signed” and “signature” respectively.

Signature includes mark by an illiterate person. [Section 3(52), General Clauses Act, 1897]

An instrument which is chargeable with stamp duty only on being “executed” is not liable to stamp duty until it is signed.

The Collector can receive the stamp duty without penalty and certify an instrument as duly stamped, as from the date of execution. (Sections 37 and 40)

According to Section 2(13), “impressed stamp” includes:

- (a) labels affixed and impressed by the proper officer; and

¹ The expression “*inter vivos*” means during lifetime.

- (b) stamps embossed or engraved on stamp paper.

The rules framed under the Act invariably prescribe to what documents impressed stamps are to be used. The term includes both a stamp impressed by the Collector and also a stamp embossed on stamp paper. Special adhesive stamps are labels (*Ganga Devi v. State of Bihar*, 1 LR 45 Pat. 198).

The instrument is duly stamped if it has been duly stamped at the time of execution and is admissible in evidence, though the stamp is subsequently removed or lost (*Mt. Mewa Kunwari v. Bourey*, AIR 1934 All. 388).

Bill of Exchange

According to Section 2(2), “bill of exchange” means a bill of exchange as defined in the Negotiable Instruments Act, 1881 and includes also a *Hundi* and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money. The Negotiable Instruments Act, defines a “bill of exchange” as an instrument in writing, containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

Bill of exchange payable on demand

Under Section 2(3) of the Stamp Act, a “bill of exchange on demand” includes:

- (a) an order for the payment of any sum of money by a bill of exchange or promissory note or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or in the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;
- (b) an order for the payment of any sum of money weekly, monthly or at any other said period; and
- (c) a letter of credit, that is to say, any instrument by which one person authorises any other person to give credit to the person in whose favour it is drawn.

It may be noted that a bill of exchange payable on demand includes even a letter of credit, as per above definition.

Thus, the definition in the Stamp Act includes many instruments which could not be classed as ‘bills of exchange’ within the definition given by the Negotiable Instruments Act, 1881.

Cheque

Under Section 2(7) of the Stamp Act, “cheque” means a bill of exchange drawn on specified banker, not expressed to be payable otherwise than on demand. This definition follows the definition given in the Negotiable Instruments Act, 1881.

It should be mentioned that in India, cheques are no longer subject to stamp duty. Entry 21 in the Schedule levying duty on cheque was deleted by Act 5 of 1927.

Bond

Under Section 2(5), a “bond” includes –

- (a) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (b) any instrument attested by a witness not payable to order or bearer, whereby a person obliges

himself to pay money to another; and

- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

The word “oblige” has been used in all sub-clauses in the definition. Therefore, no document can be a bond unless it is one which, by itself, creates the obligation to pay the money. The words “obliges himself to pay money” make it very clear, that the obligation is not a pre-existing one. Where the liability already exists it cannot be said that under a subsequent document (merely reproducing the nature of the obligation) an obligation has been created.

Chargeable

Under Section 2(6) “chargeable” as applied to an instrument executed or first executed after the commencement of the Act means chargeable under the Act and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed.

Lease

“Lease” means a lease of immovable property and includes also:

- (a) a *patta*;
- (b) a *kabuliyat* or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property;
- (c) any instrument by which tolls of any description are let;
- (d) any writing on an application for a lease intended to signify that the application is granted. [Section 2(16)]

Section 105 of the Transfer of Property Act defines lease as a transfer of a right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

A *patta* is an instrument given by the Collector of District or any other receiver of the revenue, to the cultivator, specifying the condition or conditions upon which the lands are to be held and the value or proportion of the produce to be paid therefor.

A *Kabuliyat* is executed by the lessee, accepting the terms of the lease and undertaking to abide by them. Although, it is not a lease under Section 105 of the Transfer of Property Act, it is expressly included in the definition for the purposes of the Stamp Act.

Toll is a tax paid for some liberty or privilege, such as for passage over a bridge, ferry, along a highway or for the sale of articles in a market or fair or the like. It does not include ‘*octroi*’ or ‘*chungi*’.

Promissory Note

It means a promissory note as defined by the Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. [Section 2(22)]

Requisites of a promissory note as per the Negotiable Instruments Act, 1881 are the following:

- (a) the document must contain an unconditional undertaking to pay;
- (b) the undertaking must be to pay money only;
- (c) the money to be paid must be certain;
- (d) it must be payable to or to the order of a certain person or to bearer;
- (e) the document must be signed by the maker.

Illustrations

An instrument in the form:

- “I do acknowledge myself to be indebted to B in ₹1,000 to be paid on demand for value received” is a promissory note.
- “I have received a sum of £20 which I borrowed from you and I have to be accountable for the sum with interest” held not to be a promissory note.
- “On demand I promise to pay to the trustees of W&C or their treasurer for the time being £100” was held a good promissory note.

Receipt

“Receipt” includes any note, memorandum or writing:

- (a) whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received; or
- (b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt; or
- (c) whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged; or
- (d) which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person. [Section 2(23)]

A mere acknowledgement in writing of the receipt of *immovable* property will not attract sub-clause (b). Under sub-clause (c), any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; for instance, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause.

An ordinary cash memo issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money.

A letter acknowledging the receipt of money or cheque is a receipt. A document merely saying that the signatory has received a sum of Rs. 500 is a receipt.

Settlement

“Settlement” means any non-testamentary disposition, in writing, of movable or immovable property made:

- (a) in consideration of marriage;
- (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or

(c) for any religious or charitable purpose;

and includes an agreement in writing to make such disposition. [Section 2(24)]

The definition of “settlement” excludes a will. A will is intended to operate only on death, while a settlement operates immediately.

Marketable Security

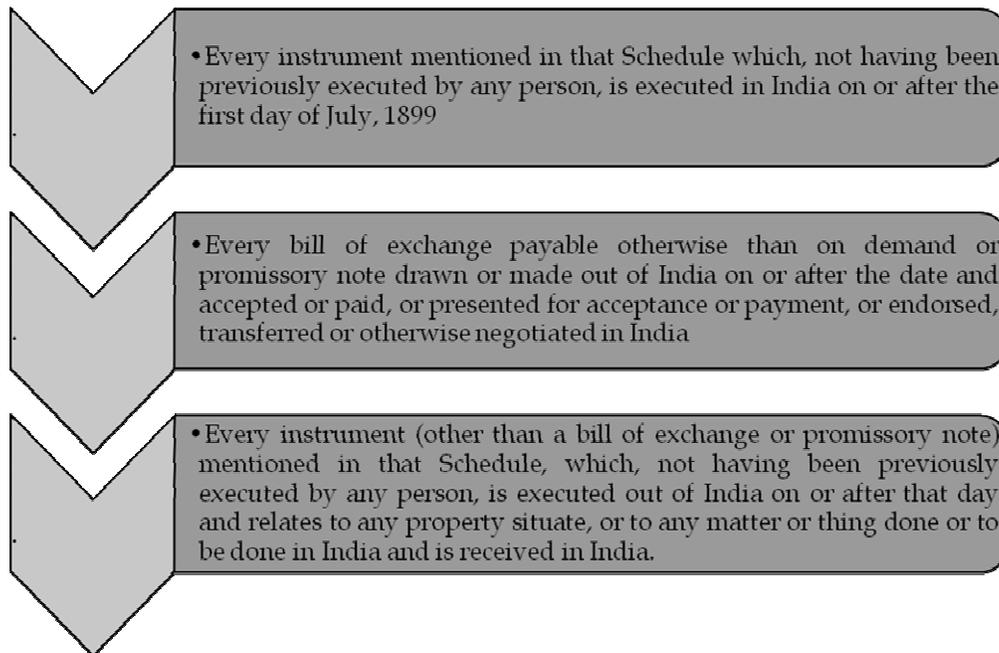
Under Section 2(16A), “marketable security” means a security of such a description as to be capable of being sold in stock market in India or in the United Kingdom.

Stamp

“Stamp” means any mark, seal or endorsement by any agency or person duly authorized by the State Government and includes an adhesive or impressed stamp for the purposes of duty chargeable under this Act. This definition of the stamp has been inserted by the Finance (No. 2) Act, 2004.

INSTRUMENTS CHARGEABLE WITH DUTY

Section 3 of the Act is the charging section. It provides that subject to the provisions of the Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with a duty of the amount indicated in that Schedule as the proper duty therefor, namely:



However, no duty shall be chargeable in respect of:

1. any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.
2. any instrument for the sale, transfer or disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel or any part, interest, share of property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838 or the Indian

Registration of Ships Act, 1841 as amended by subsequent Acts.

[The references to repealed Acts are now to be read as references to the corresponding re-enacting Act].

3. Any instrument executed by, or, on behalf of, or in favour of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone.

Explanation – For the purposes of this clause, the expressions “Developer” “Special Economic Zone” and “Unit” shall have meanings respectively assigned to them in Clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005.

Thus, Section 3 charges certain instruments to be liable to stamp duty.

The Court has observed as under in *Commissioners of Inland Revenue v. G. Angus*, 1889) 23 QBD 579, followed in *re Swadeshi Cotton Mills*, AIR 1932 All 291, “the first thing to be noticed is that thing which is made liable to duty is an instrument. If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within the section and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if any one carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction”.

In *re Swadeshi Cotton Mills*, AIR 1932 All 291, it was held that if after entry into a contract of sale the parties (in spite of the risk that either party may resile from the contract), refrain from getting an *actual deed of conveyance* prepared, they can successfully evade the payment of higher duty. It is no argument that the Government loses revenue, if such a course is permitted”.

On this point Esher M.R., in *Commissioners of Inland Revenue v. G. Angus*, (1889) 23 QBD 579, stated that “goodwill can be sold and conveyed to purchasers without any ‘conveyance’ being executed and if you treat the document as only an agreement with regard to the goodwill, there will never be any conveyance executed and the property would have been transferred to the purchaser without the Crown getting any ad valorem duty upon the transfer. If a vendor can convey the property sold to the purchaser without the execution of any instrument, he can convey it without paying any duty under Section 70. The subject may have the good fortune to escape the stamp duty, if he can get a conveyance of property sold to him without the execution of any instrument..... “The Crown must make out its right to duty and if there be a means of evading the stamp duty, so much the better for those who can evade it”.

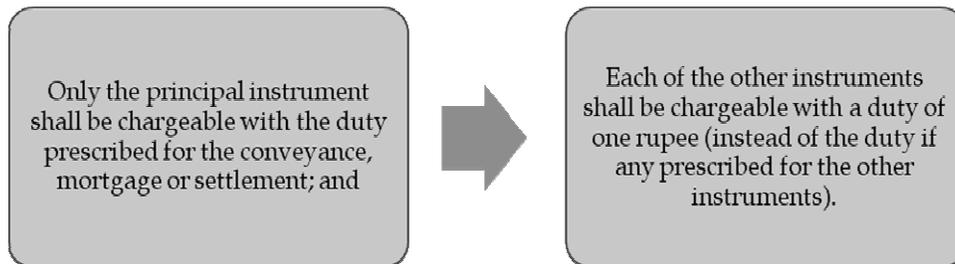
Substance and description

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of the instrument. The substance of the transaction contained in the document may not necessarily embody the description given at the head thereof.

It is the substance of the transaction as contained in the instrument and not the form of the instrument, that determines the stamp duty, though the duty is leviable on the instrument and not on the transaction. In determining whether a document comes within the description of a document upon which a stamp is required by the Act, one has to look at the entire document to find out whether it falls within the description. Where a single instrument contains several purposes, the instrument as a whole should be read to find out its dominant purpose. To determine whether a document is sufficiently stamped the Court must look at the document itself, as it stands.

EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY (SEVERAL INSTRUMENTS IN SINGLE TRANSACTION OF SALE, MORTGAGE OR SETTLEMENT)

Section 4 provides that, where in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction –



Illustrations (Section 4 held applicable)

- (i) A executed a conveyance of immovable property. On the same deed his nephew (undivided in status) endorsed his consent to the sale, as such consent was considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee (ILR 13 Bom 281).
- (ii) Subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor. These declarations were held to be chargeable, together with the sale deed, as having completed the conveyance (*Somaiya Organics Ltd. v. Chief Controlling Revenue Authority*, AIR 1972 All 252).
- (iii) Brother A executed in favour of brother B a gift of all his property. By another deed, brother B made provision for the living expenses of brother A and hypothecating in favour of brother A a part of the property included in the above mentioned gift deed, in order to secure the payment of the living expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied (*Maharaj Someshar Dutt*, ILR 37 All 264).
- (iv) B conveyed the whole of his property to three persons who undertook to provide for him and to perform his obsequies. By another document, the three donees agreed to provide for B. This was mentioned in the deed executed by A also. It was held that the two documents had to be construed as part of the same act; the first was liable to duty as a conveyance while the second was liable to a duty of Rupee 1 only (*Dadoba v. Krishna*, ILR 7 Bom. 34).
- (v) A company executed, first a deed of trust and mortgage stating that the company was to issue notes for raising loans secured by the sale deed. It was held as under:
 - (1) The deed was principal or primary security (and not a collateral security). It was chargeable as mortgage under Article 14.
 - (2) The notes issued subsequently were debentures and not principal instruments (*Madras Refinery Ltd. v. Chief Controlling Revenue Authority*, Madras, AIR 1977 SC 500).
- (vi) The Rangoon Gymkhana executed a duly stamped trust deed, mortgaging its assets as security for the repayment of the debenture stock issued by it. In addition, it had issued certificates of debenture

stock to the subscribers, but these did not contain any promise to repay any need, but merely stated the amount standing in each shock holder's name. It was held that the certificates were not debentures, but were instruments employed to complete the mortgage [*Rangoon Gymkhana In re*, AIR 1927 Rang. 37 (Section 4 applied)].

SECTION 4 NOT APPLICABLE

- (i) A lease is executed and got registered. A second document is executed altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.
- (ii) A purchaser of land executes a mortgage of the land in favour of the vendor for a portion of the purchase money. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

Instruments relating to several distinct matters

Under Section 5, an instrument comprising or relating to several distinct matters is chargeable with the aggregate amount of the duties with which each separate instrument, relating to one of such matters, would be chargeable under the Act (This is the reverse of the situation governed by Section 4).

The Section deals with multifarious instruments. The expression "distinct matter" means distinct transactions (*Ram Swarup v. Joti*, (1933) Allahabad Law Journal 427; *Board of Revenue, Madras v. Narasimhan*, AIR 1961 Mad 504).

Section 5 applies even where the two (or more) matters are of the same description.

Illustrations as to "distinct matters"

- (i) A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be chargeable. The two are "distinct matters" (*Chinmoyee Basu v. Sankare Prasad Singh*, AIR 1955 Cal. 561 (cf. AIR 1936 Lah. 449).
- (ii) An agreement containing two covenants making certain properties chargeable in the first instance and creating a charge over certain properties if the first mentioned properties are found insufficient does not fall within Section 5 (*Tek Ram v. Maqbul Shah*, AIR 1928 Lah. 370).
- (iii) A grant of annuity by several persons requires only one stamp (because there is only one transaction).
- (iv) A lease to joint tenants requires only one stamp.
- (v) A conveyance by several persons jointly relating to their separate interest in certain shares in an incorporated company requires only one stamp.
- (vi) A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.
- (vii) Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.
- (viii) The position is the same where a person is an executive or administrator and signs an instrument containing a disposition by him in his personal capacity and *also* a disposition as executor. The two capacities are different (*Member, Board of Revenue v. Archur Paul Benthall*, AIR 1956 SC 35).

Principal and ancillary

The test is – “What is the leading object? Which is principal and which is ancillary?”

If an instrument taken with reference to its primary object is exempted then stamp duty cannot be charged merely because matter ancillary to it is included and that matter is chargeable to stamp duty. A very common example of this is an agreement for sale of goods, which also contains an arbitration clause. The latter clause is incidental to the former agreement. Where a deed of dissolution of partnership contains a clause charging the partnership assets for payment of certain amounts to outgoing parties, the instrument is chargeable separately for the charge and the partnership. The former is not ancillary to the latter.

Where a document contains a transfer of mortgage and *an agreement* to make a loan, the mortgage and the loan are distinct matters and separately chargeable.

If in a lease there is also an agreement to pay a certain sum on account of the balance of previous year, the document is chargeable (i) as a lease and (ii) also as a bond.

A lease reserving *separately* rent for house and rent for furniture is chargeable separately for each of the items.

Where, at an auction, a purchaser purchases several lots and there is only one instrument in respect of all of them the separate purchases are, nevertheless, separate and distinct matters and so, the stamp duty must be determined separately.

Thus, the test usually adopted is the test of “leading object”. If there is only one leading object, Section 5 will not apply. But if there are several distinct contracts, each is taxable.

INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE-I

There may be cases where an instrument may come under several descriptions in Schedule-I to the Act. In such a circumstance, Section 6 of the Act provides that the instrument shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties. Section 6 is subject to the provisions of Section 5. However, nothing in the Act shall render chargeable, with duty exceeding one rupee, a counter part or duplicate, of any instrument chargeable with duty, in respect of which the proper duty has been paid.

Section 6 applies only where the instrument contains only one matter, but falls within two or more items in the Schedule. Section 6 covers cases where the instrument does not cover distinct matters but is ambiguous in regard to the various entries given in Schedule-I to the Act. In such cases, Section 6 clearly provides that the highest of the duties mentioned against the various descriptions against which the instrument is likely to fall is to be paid.

Where a deed (i) contains a stipulation binding the executant to deliver his sugarcane crop to the obligee under the deed and (ii) also provides that the sugarcane crop is hypothecated as security for payment of money advanced by the obligee, the deed fulfills the dual character of the mortgage and a bond and is therefore chargeable to the highest of the duties by virtue of section 6. Similarly, where an attested instrument, containing an undertaking to pay money, evidences also a pledge of immovable property as security for the money due, the higher of the stamp duty payable on its character as a bond and on its character as a pledge, was held leviable. An instrument which can be treated both as a dissolution of partnership and as an instrument of partition has to be charged to the duty prescribed for partition deed, which is the higher of the two.

BONDS, DEBENTURES, ETC. ISSUED UNDER THE LOCAL AUTHORITIES LOAN ACT, 1879

Section 8 provides that any local authority raising a loan under the provisions of the Local Authorities Loans Act, 1879 or of any other law for the time being in force by the issue of bonds, debentures or other securities, shall, in respect of such loans, be chargeable with a duty of one percent on the total amount of the bonds, debentures or other securities issued by it. Such bonds, debentures or other securities need not be stamped and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise. This is so notwithstanding anything contained in the Indian Stamp Act: In the event of willful neglect to pay the duty required by this section, the local authority shall be liable to forfeit to the Government, a sum equal to 10 percent of the amount of duty payable and a like penalty for every month after the first, during which the neglect continues.

SECURITIES DEALT IN DEPOSITORY NOT LIABLE TO STAMP DUTY

As per Section 8A of the Act—

- (a) an issuer, by the issue of securities to one or more depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such securities need not be stamped;
- (b) where an issuer issues certificate of security under sub-section (3) of Section 14 of the Depositories Act, 1996, on such certificate duty shall be payable as is payable on the issue of duplicate certificate under this Act;
- (c) the transfer of—
 - (i) registered ownership of securities from a person to a depository or from a depository to a beneficial owner;
 - (ii) beneficial ownership of securities, dealt with by a depository;
 - (iii) beneficial ownership of units, such units being units of a Mutual Fund including units of the Unit Trust of India established under sub-section (1) of Section 3 of the Unit Trust of India Act, 1963, dealt with by a depository, shall not be liable to duty under this Act or any other law for the time being in force.

Explanation 1 – For the purposes of this section, the expressions “beneficial ownership”, “depository” and “issuer” shall have the meanings respectively assigned to them in clauses (a), (e) and (f) of Sub-section (1) of Section 2 of the Depositories Act, 1996.

Explanation 2 – For the purposes of this section, the expression “securities” shall have the meaning assigned to it in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

CORPORATISATION AND DEMUTUALISATION SCHEMES AND RELATED INSTRUMENTS NOT LIABLE TO DUTY

Section 8B has been inserted by the Finance Act, 2005, w.e.f. 13.5.2005. Section 8B states that

- (a) a scheme for corporatisation or demutualisation, or both of a recognized stock exchange; or
- (b) any instrument, including an instrument of, or relating to, transfer of any property, business, asset whether movable or immovable, contract, right, liability and obligation, for the purpose of, or in connection with, the corporatisation or demutualisation, or both of a recognized stock exchange pursuant to a scheme,

as approved by the Securities and Exchange Board of India under Sub-section (2) of Section 4B of the Securities Contracts (Regulation) Act, 1956 shall not be liable to duty under this Act or any other law for the time being in force.

Explanation — For the purposes of this Section—

- (a) the expressions “corporatisation”, “demutualisation” and “scheme” shall have the meanings respectively assigned to them in clauses (aa), (ab) and (ga) of Section 2 of the Securities Contracts (Regulation) Act, 1956;
- (b) “Securities and Exchange Board of India” means the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992.

REDUCTION, REMISSION AND COMPOUNDING OF DUTIES

Section 9 empowers the Government, (Central or the State as the case may be), to reduce or remit, whether prospectively, or retrospectively, the duties payable on any instrument or class of instruments or in favour of particular class of persons or members of such class. Section 9 also empowers the Central Government to provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers where there is single transferee (whether incorporated or not) of debentures, bonds or other marketable securities.

VALUATION FOR DUTY UNDER THE ACT

Sections 20 to 28 (Chapter II of the Act) deal with valuation of instruments for duty.

- (a) According to Section 20, where an instrument is chargeable with *ad valorem* duty in respect of any money expressed in any currency other than that of India, such duty shall be calculated on the value of such money in the currency of India, according to the current rate of exchange on the date of the instrument. The Central Government notifies from time to time, in the Official Gazette the rate of exchange for conversion of certain foreign currencies into Indian currency for this purpose and such rate shall be deemed to be the current rate.
- (b) Section 21 provides that in the case of an instrument chargeable with *ad valorem* duty in respect of any stock or any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the date of the instrument. The term “marketable security” has been defined in Section 2(16-A) of the Act.

Where the shares are quoted on the stock exchange, it is easy to ascertain the price of the shares or stock. However, where the shares or stocks are not quoted on any stock exchange, the valuation has to be based upon the average of the latest private transactions, which can generally be ascertained from the principal officer of the concerned company or corporation. If, there have been no dealings at all, then unless some other reliable evidence of market value is forthcoming the value is to be taken at par. Section 22 of the Act, however, provides that if such price or value is mentioned in the instrument for the purpose of calculating duty, it shall be presumed (until the contrary is proved) to be correct.

- (c) Section 23 provides that where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with a duty higher than that with which it would have been chargeable, had no mention of interest been made therein. For instance, a promissory note for ₹10,000 is drawn with the recital of interest at the rate of 18 percent per annum, payable by the promissor; stamp is leviable on the basis that the instrument is for Rs. 10,000 only.

(d) Section 23A provides that in the case of an instrument (not being a promissory note or bill of exchange) which -

- (i) is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or
- (ii) makes redeemable or qualifies a duly stamped transfer, intended as a security, of any marketable security.

It shall be chargeable with duty as if it were an agreement or memorandum of an agreement, chargeable with duty under Article 5(c) of Schedule I to the Act.

(e) A release or discharge of any such instrument shall be chargeable only with the like duty.

(f) According to Section 24, where any property is transferred to any person in consideration (wholly or in part) of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, (whether being or constituting a charge or incumbrance upon the property or not), such debt, money or stock is to be deemed the whole or part, (as the case may be), of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty. However, nothing in this section shall affect such a certificate of sale as is mentioned in Article 18 of the First Schedule to the Act.

The object of this section is that, upon every purchase *ad valorem* duty has to be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject matter of the sale (*Collector of Ahmedabad v. Deepak Textile Industries*, AIR 1966 Guj. 227).

What Section 24 means is that where property is sold subject to the payment by the purchaser, discharging a debt charged on the property, then the purchaser is really paying a consideration which includes the amount of that debt also (*Somayya Organics Ltd. v. Board of Revenue*, AIR 1986 SC 403).

Proviso to Section 24 operates for the benefit of assignee of the mortgage.

When the mortgaged property is sold to the mortgagee along with other properties, the stamp duty already paid is to be deducted from the duty payable on the deed of sale. In order to entitle the mortgagee to a deduction of the duties payable the entire property mortgaged should be transferred and not merely a portion of it (*In re Mirabai, in re Laxman and Ganpat*, ILR 29 Bom. 203).

Explanation to Section 24 provides that in the case of sale of property subject to mortgage or other encumbrances, any unpaid mortgage money or money charged together with the interest, if any, due on the same shall be deemed to be part of the consideration for the sale provided that where property subject to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage. Three illustrations which have been appended to the Section are as under:

- (i) A owes B Rs. 1,000/-. A sells a property to B, the consideration being Rs. 500/- and the release of the previous debt of Rs. 1,000/-. Stamp duty is payable on Rs. 1,500/-
- (ii) A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000/- and unpaid interest Rs. 200/-. Stamp duty is payable on 1,700.
- (iii) A mortgages a house of the value of Rs. 10,000/- to B for Rs. 5,000/-. B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000/- less the amount of stamp duty already paid for the mortgage.

- (g) Section 25 deals with the manner of computation of duty in the case of annuities. Valuation of an annuity will be material, where the payment of annuity or other sum payable periodically is secured by an instrument or where the consideration for a conveyance is an annuity or other sum payable periodically. In such cases, the amount secured by such instrument or the consideration for such conveyance, as the case may be, shall be deemed to be:
- (i) where the sum payable is for a definite period so that the total amount to be paid can be previously ascertained such total amount;
 - (ii) where the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of such instrument or conveyance – the total amount which, according to the terms of such instrument or conveyance will or may be payable during the period of twenty years calculated from the date on which the first payment becomes due, and
 - (iii) where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance – the maximum amount which will be or which may be payable as aforesaid during the period of 12 years calculated from the date on which the first payment becomes due.

Clause (a) mentioned above applies where the sum is payable for a definite period, so that the total amount to be paid can be previously ascertained. According to clause (b), where the payment is in perpetuity or for an indefinite period, then only the amount payable for 20 years would be taken for assessment of the duty.

Illustration

By a document, 'A' binds himself and his posterity on the security of some immovable property for the annual payment to a temple of Rs. 2,200/-. It is a mortgage deed, chargeable with duty calculated on 20 years' payment.

- (h) Section 26 deals with cases where the value of the subject matter is indeterminate. The object of this section is to protect the revenue, in cases where an instrument is chargeable with *ad valorem* duty, but such duty cannot be ascertained by reason of the fact that the amount of value of the subject matter of the instrument cannot be determined at the time of the execution of the instrument. This object is sought to be achieved by providing, that the executant can value the instrument as he pleases, but he shall not be entitled to recover under such document any amount in excess of the amount for which the stamp duty is sufficient.

However, under the combined operation of Sections 26 and 35, a lessee under the mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the stamp originally affixed to the lease. [AIR 1924 PC 221; AIR 1930 Cal. 526]. Section 26 applies only when the instrument is chargeable with *ad valorem* duty. Section 26 has two provisos. Under the first proviso, in the case of mining lease, the stamp duty is to be calculated on the estimated value of the royalty or the share of the produce, as the case may be. If the lease is granted by the Government, stamp duty has to be paid on the amount or value of the royalty as determined by the Collector of Stamps. And, if subsequently any excess is claimed, proper penalty under section 35 may be paid and the claim fully recovered. But when the lease has been granted by a person other than the Government, the valuation has to be at Rs. 20,000/- a year.

The second proviso to Section 26 is intended to cover the case where an instrument has, by accident or mistake, been insufficiently stamped. The deficiency is made up in proceedings under Section 31 or 41 and the Collector having certified the amount paid, it shall be deemed to be the stamp actually used at the date of execution. By reason of this proviso, the amount claimable under the instruments would be the amount for

which the duty as certified by the Collector had been paid and not the amount for which duty was originally paid.

CONSIDERATION TO BE SET OUT

Section 27 provides that the consideration and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of duty with which it is chargeable shall be fully and truly set forth in the instrument. "Value of any property" would mean that real value of the property in the open market at the time the document was executed and not at the time when the executant acquired it. Where there is no value set forth in the instruments, there would be contravention of Section 27, but the omission does not render the document inadmissible or liable to be impounded and taxed in the manner provided in Section 35 (*Vinayak v. Hasan Ali*, AIR 1961 MP 6).

The Collector cannot proceed to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value so ascertained by the Collector. The Act does not provide for any powers to the revenue authority to make an independent enquiry into the value of the property conveyed for determining the duty chargeable. (In *Re. Muhammad Muzaffar Ali* AIR 1922 All 82)

However, the Collector can direct the prosecution of a person who executed the instrument under Section 64 of the Act. Under Section 64, what is punishable is the omission to set-forth fully and truly the value of the property, with intent to defraud the Government. The Collector, can, if he feels that there is a deliberate under-valuation of property, hold an independent enquiry to ascertain the true value of the property and to consider whether there was deliberate under-valuation rendering the executant liable to prosecution for defrauding the Government.¹

APPORTIONMENT

Section 28 prescribes certain rules for apportionment of the consideration, in cases of certain conveyances arising out of a property being contracted to be sold and thereafter conveyed in parts etc.

Under Section 28(1) where a person contracts the sale of property *as a whole* and thereafter conveys to the purchaser the property *in separate parts*, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration is set-forth for each separate part in the conveyance and thereafter the conveyances shall be chargeable with *ad valorem* in respect of such distinct consideration.

Under Section 28(2), where the contract is for the sale of a property as a whole to two or more purchasers jointly or by any person for himself and others, and the property is conveyed to them *in parts* by separate conveyance, then each distinct part of the consideration shall be chargeable with *ad valorem* duty in respect of the distinct part of the consideration so specified.

Section 28(3) covers cases where a person, after contracting to purchase a property from another and before the property has been duly conveyed to him, enters into a contract to sell the property to a third person, and the contract is given effect to only by one conveyance from the owner of the property to the sub-purchaser directly. The stamp duty payable is on the consideration paid by the sub-purchaser. This provision avoids double payment that would otherwise arise.

Section 28(4) provides that where a person contracts for the sale of property and before obtaining a conveyance in his favour, enters into a contract to sell the property in parts to other persons, the

¹ In some States, local amendments have given such powers to the collector.

conveyances which may be executed directly by the owner to each sub-purchaser would be liable to be charged with duty in respect of the consideration paid by the sub-purchaser, original price for the whole and the aggregate price paid by the sub-purchasers, subject to a minimum duty of Re. 1/-.

Section 28(5) provides that when a person contracts to sell a property to another person and again contracts to sell the same property to a third person and such third person obtains a conveyance first from the seller with whom he had contracted and later gets another conveyance of the same property from original seller, the duty is to be charged on the consideration received by the original seller subject to a maximum of Rs. 5/-.

PERSONS LIABLE TO PAY DUTY

Section 29 deals with the persons responsible for payment of duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

(a) in the case of any instrument described in any of the following articles of Schedule-I, namely, -

No. 2 (Administration Bond),

No. 6 (Agreement relating to Deposit of Title-deeds, Pawn or Pledge),

No. 13 (Bill of Exchange),

No. 15 (Bond),

No. 16 (Bottomry Bond),

No. 26 (Customs Bond),

No. 27 (Debenture),

No. 32 (Further Charge),

No. 34 (Indemnity-bond),

No. 40 (Mortgage-deed),

No. 49 (Promissory-note),

No. 55 (Release),

No. 56 (Respondentia Bond),

No. 57 (Security Bond or Mortgage-deed),

No. 58 (Settlement),

No. 62(a) (Transfer of shares, in an incorporated company or other body corporate),

No. 62(b) (Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by Section 8),

No. 62(c) (Transfer of any interest secured by a bond, mortgage-deed of policy of insurance), - by the person drawing, making or executing such instrument;

(b) in the case of a policy of insurance other than fire insurance by the person effecting the insurance;

(c) in the case of a policy of fire-insurance – by the person issuing the policy;

(d) in the case of a conveyance including a reconveyance of mortgaged property by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee;

(e) in the case of a counterpart of a lease – by the lessor;

(f) in the case of an instrument of exchange – by the parties in equal shares;

- (g) in the case of a certificate of sale – by the purchaser of the property to which such certificate relates; and
- (h) in the case of an instrument of partition – by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

RECEIPTS

Under Section 30 of the Act any person receiving any money exceeding twenty rupees in amount or any bill of exchange, cheque or promissory note for an amount exceeding five hundred rupees or receiving in satisfaction of a debt any movable property exceeding five hundred rupees in value, shall on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same.

PARTY LIABLE TO PAY

Section 29 specifies in the case of certain instruments which party should pay, for the stamp. The section is not exhaustive and makes no reference to several instruments. Section 30 contains a special provision as to stamping of receipts. There are several other instruments not mentioned in Section 29, for which there is no express provision as to who should bear the stamp expenses. The primary duty of stamping lies in all cases on the person executing the instrument as Section 17 directs that the instruments chargeable with duty shall be stamped at or before executing an instrument without the same being duly stamped. Section 29 would apply only in the absence of a special agreement between the parties as stated in the opening words of the section. An agreement to bear the cost of preparation of an instrument implies an agreement to pay stamp duty also on it.

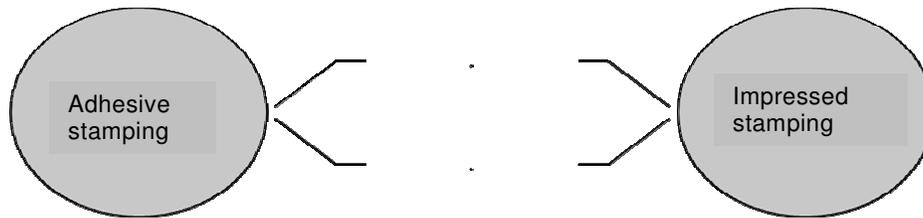
Any person receiving or taking credit for any premium or consideration for any renewal of any contract of fire-insurance, shall, within one month after receiving or taking credit for such premium or consideration, give a duly stamped receipt for the same.

METHODS OF STAMPING

- (a) According to the provisions of the Act and rules made thereunder, the duty with which an instrument is chargeable is to be paid by means of stamps indicated in the Act and the rules. Generally, rules deal with the subject.

Section 10 provides that all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamps according to the provisions contained in the Act, or when no such provision is applicable thereto, as the State Government concerned may by rule, direct. The rules may, among other matters, regulate:

- (i) in the case of each kind of instrument, the description of stamps which may be used;
 - (ii) in the case of instruments stamped with impressed stamps, the number of stamps which may be used;
 - (iii) in the case of bills of exchange or promissory notes, the size of the paper on which they are written.
- (b) There are two types of stamping, namely:



USE OF ADHESIVE STAMPS

Section 11 deals with the use of adhesive stamps. This Section provides that the following instruments may be stamped with adhesive stamps, namely –

Instruments chargeable with a duty not exceeding 10 naya paisa except parts of bills of exchange payable otherwise than on demand and drawn in sets

Bills of exchange and promissory notes drawn or made out of India

Entry as an advocate, vakil or attorney on the roll of a High Court

Notarial acts

Transfers by endorsement of shares in any incorporated company or other body corporate

The use of the words 'may be stamped' really connotes 'shall be stamped'. The rules framed under the Stamp Act as well as under the relevant state laws invariably provide that the adhesive stamps shall carry special words, to indicate the use to which the stamps can be put.

CANCELLATION OF ADHESIVE STAMPS

Section 12(1)(a) provides that any person affixing any adhesive stamp to any instrument chargeable with duty which has been executed by another person shall, when affixing such stamp cancel the same so that it cannot be used again. Under Sub-section (1)(b), an obligation has been imposed on person executing any instrument on any paper bearing an adhesive stamp, to cancel the stamp, if such cancellation has not been done, at the time of such execution. If a person fails to cancel the stamp, he becomes liable to penalty in accordance with Section 63. The object is to prevent the same stamp from being used again.

Under Sub-section (2) of Section 12, any instrument bearing an adhesive stamp which has not been cancelled is deemed to be unstamped.

MODE OF CANCELLATION OF ADHESIVE STAMPS

- (a) Section 12(3) deals with the mode of cancellation of stamp. It provides that the cancellation of an adhesive stamp may be done by the person concerned by writing on or across the stamp his name

or initials, or the name or initials of his firm with the true date of his so writing, or in any other *effectual manner*. Sub-section (3) merely lays down as a guidance one of the ways in which an adhesive stamp can be cancelled.

- (b) In *Mahadeo Koeri v. Sheoraj Ram Teli*, ILR 41 All 169; AIR 1919 All 196, it was held that a stamp may be treated as having been effectively cancelled by merely drawing a line across it.

But, in *Hafiz Allah Baksh v. Dost Mohammed*, AIR 1935 Lah. 716, it was held that if it is possible to use a stamp a second time, inspite of a line being drawn across it, there is no effectual cancellation. Again, the question whether an adhesive stamp has been cancelled in an effectual manner has to be determined with reference to the facts and circumstances of each case.

In *Melaram v. Brij Lal*, AIR 1920 Lah. 374, it was held that a very effective method of cancellation is the drawing of diagonal lines right across the stamps with ends extending on to the paper of the document. A cross marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in *Kolai Sai v. Balai Hajam*, AIR 1925 Rang. 209. Accordingly, where the adhesive stamps on promissory note were cancelled by drawing lines on them in different directions and stretching beyond the edge of the stamp on the paper on which the promissory note was written, it was held that the stamp had been effectually cancelled. Where one of the four stamps used on an instrument had a single line drawn across the face of the stamp, the second had two parallel lines, the third three parallel lines and the fourth two lines crossing each other, it was held that the stamps must be regarded as having been cancelled in manner so that they could not be used again (*In re Tata Iron Steel Company*, AIR 1928 Bom. 80). Putting two lines crossing each other is effective (AIR 1961 Raj. 43).

- (c) However, putting a date across the stamp by a third party *on a date subsequent to the date on which the bill had been drawn*, was held to be not proper cancellation in *Daya Ram v. Chandu Lal*, AIR 1925 Bom. 520 Cf. *Rohini v. Fernandes*, AIR 1956 Bom. 421, 423. Similarly, crossing by drawing lines and signing on the adjacent stamp was held to be not a cancellation of the first stamp in *U. Kyaw v. Hari Dutt*, AIR 1934 Rang. 364. Cross is a good way of cancellation. AIR 1976 Cal. 99.
- (d) Where it is alleged that the cancellation was made at later stage than that of execution, the burden of proving it, lies on the party who so alleges. Where an instrument *prima facie* appears to be duly stamped and cancelled by the drawer at the date of execution, the burden of providing the contrary lies on the party who avers that the cancellation was not effected at the time of execution. In the absence of evidence to the contrary, it may be inferred that the stamp was duly affixed and cancelled.

INSTRUMENTS STAMPED WITH IMPRESSED STAMPS HOW TO BE WRITTEN (WRITING ON STAMP PAPER)

- (a) Section 13 provides that every instrument written upon paper stamped with an *impressed stamp* shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument. The expression, 'face of the instrument' is not to be interpreted as meaning that the document must commence on the side on which the stamp is impressed or that both sides of the paper or parchment may not be written upon. In *Dowlat Ram Harji v. Vitho Radhoji*, 5 Bom. 188, it was held when the face of a deed or document is mentioned, no particular side of the parchment or paper, on which the deed or document is written, is thereby indicated. Even the last line may constitute the face (Westroph, C.J.).
- (b) Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written. However, this

section shall not prevent any endorsement which is duly stamped or is not chargeable with duty, being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of getting the receipt of any money or goods the payment or delivery of which, is secured thereby.

- (c) The object of Section 14 is to prevent a stamped paper which has been used for one instrument, from being used for another instrument thereby avoiding payment of duty in respect of second instrument, AIR 1928 Rang 262. Except for an endorsement of the kind referred to earlier, no second instrument shall be engrossed on a stamp paper on which there is already written 'an instrument chargeable with duty'.

An alteration in the instrument as originally written, if it is of such nature, as to require fresh stamp, would come within the prohibition contained in the section. It is an important question as to what would be a material alteration¹ which converts an instrument written on stamp paper into a second instrument within the meaning of Section 14. A "material alteration" is one which alters (or purports to alter), the character of the instrument itself and which affects (or may affect) the contract which the instrument contains or alters evidence of any charge, or varies the liability under the instrument in any way. An alteration which vitiates the instrument as could cause it to operate differently was also held to be a material alteration. An alteration which *may affect the contract* which the instrument contains is a material alteration.

Section 15 of the Act deems every instrument written in contravention of Section 13 or Section 14 to be unstamped and to be inadmissible in evidence as not being duly stamped.

DENOTING DUTY

Section 16 of the Act deals with denoting duty. The object of this section is to spare parties to an instrument, the inconvenience of having to produce (in cases in which the duty payable on an instrument depends upon the duty already paid on another instrument), and the original or principal instrument in order to prove that the second instrument has been duly stamped. Section 16 provides that where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last mentioned duty, shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, *be denoted upon such first mentioned instrument*, by endorsement under the hand of the Collector of Stamps or in such other manner as the rules of the State Government may provide.

TIME OF STAMPING INSTRUMENTS

- (a) *Instruments executed inside India*: Section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. The scope of Section 17 is restricted to only instruments executed in India. If the executant of a document has already completed the execution of the document and in the eye of law the document, could be said to have been executed, a subsequent stamping, (however close in time) could not render the document as one stamped at the time of execution. Thus, where a promissory note is executed by 'A' and 'B' and a stamp is afterwards affixed and cancelled by 'A' by again signing it, the stamping has taken place subsequent to the execution and hence, the provisions of Section 17 are not complied with (*Rohini v. Fernandes*, AIR 1956 Bom 421). A receipt stamped subsequent to its execution, but before being produced in the Court is not stamped in time and accordingly, not admissible in evidence.
- (b) *Instruments executed outside India*: Section 18 relates to foreign instruments (other than bills and

1. (1905) ILR 33 Cal 812; ILR 14 Rang 29.

notes), received in India; Foreign bills and notes received in India have been dealt with, in Section 19. According to Section 18, every instrument chargeable with duty executed only out of India and (not being a bill of exchange or promissory note) *may be stamped* within three months after it has been first received in India. Section 18(2) provides that where such instrument cannot with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector who shall stamp the same in such a manner as the State Government may by rule prescribe, with a stamp of that value as the person so taking such instrument may require and pay for. Where an instrument is brought to the Collector after the expiry of three months, the Collector may, instead of declining to stamp it, validate it under Sections 41 and 42 if he is satisfied that the omission to stamp in time was due to a reasonable cause.

The object of Section 18 is to facilitate the stamping of the documents within a period of three months, in as much as, by the very nature of things, Section 17 relating to instruments executed in India cannot be complied with. Section 18 is intended to mitigate the inconvenience and hardship that will entail if the instrument concerned is required to be stamped before or at the time of execution as laid down in Section 17. Instrument executed in India is not within Section 18 (*Nath Bank v. Andhar Mamik Tea Co.*, AIR 1960 Cal 779).

As far as bills of exchange and promissory notes are concerned, Section 19 makes an elaborate provision. Any bill of exchange payable otherwise than on demand or promissory note drawn or made out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India.

The proviso to Section 19 clarifies that if, (i) at any time any bill of exchange or note comes into the hands of any holder thereof in India, (ii) the proper adhesive stamp is affixed thereto and cancelled in the manner prescribed by Section 12 and (iii) such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person, and at the time required by the Act, then such stamp shall (so far as relates to such holder), be deemed to have been duly affixed and cancelled. However, nothing contained in the proviso shall relieve any person from any penalty incurred by him, for omitting to affix or cancel a stamp.

ADJUDICATION AS TO STAMPS

- (a) Chapter III, consisting of Sections 31 and 32, deals with adjudication by the Collector, as to the proper stamp that an instrument has to bear. The provisions of this Chapter are intended to assist any party who is in doubt as to the proper stamp to be affixed on an instrument but is nevertheless anxious to stamp the instrument. When the document or any draft of the document is produced to the Collector he shall determine the proper stamp duty on payment of a nominal fee. The relevant provisions of the Act and matters in regard to the performance of this function by the Collector are discussed below.
- (b) Under Section 31(1) when (i) an instrument, (whether executed or not and whether previously stamped or not), is brought to the Collector, and (ii) the person bringing it applies to have the opinion of that officer as to the duty if any, with which it is chargeable, and (iii) pays a fee (not exceeding Rs. 5 and not less than 50 naya paise as the Collector may direct), the Collector shall determine the duty if any with which in his judgment, the instrument is chargeable. Under Section 31(2), the Collector may require to be furnished with an abstract of the instrument and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of duty with which it is chargeable, are fully and truly set-forth therein, and may refuse to proceed upon accordingly. However, no evidence furnished pursuant to this section shall be used against any person in any

civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable. Every person by whom such evidence is furnished shall, on payment of the full duty, be relieved from any penalty which he may have incurred under the Act by reason of the omission to state truly in such instrument any of the facts or circumstances.

- (c) The duty of the Collector under Section 31 is only to determine the stamp duty payable upon the instrument. He is not authorised to impound the instrument or to impose any penalty if he comes to the conclusion that the instrument is not sufficiently stamped. Where a person has obtained the opinion of the Collector on any *draft instrument*, and thereafter does not want to proceed any further to execute the instrument, no consequences will follow and, after determination of the duty, the Collector becomes *functus officio*. But where the party wants to *proceed with effectuating* the instrument or using it for the purposes of evidence, he has to pay the duty determined by the Collector and obtain from the Collector under Section 32, an endorsement that the full duty with which the instrument is chargeable has been paid. Normally, the determination by the Collector of the duty payable on an instrument under Section 31 is final.
- (d) Section 32 deals with certificate by the Collector of Stamps as well as the time limit within which such a certificate can be given by the Collector of Stamps. Sub-section (1) of the section provides that when an instrument is brought to the Collector with an application for having an opinion as to the proper duty chargeable thereon, and the Collector is of the opinion that the instrument is already fully stamped or the duty determined by the Collector under Section 31 or such a sum as (with the duty already paid in respect of the instrument), is equal to the duty so determined, has been paid, the Collector shall certify by endorsement on such instrument, that the full duty (stating the amount) with which it is chargeable has been paid. When the Collector is of opinion that any such instrument brought to him is not chargeable with duty, he shall certify in the same manner that such instrument is not so chargeable. Under Section 32(3), any instrument upon which an endorsement has been made by the Collector shall be deemed to be duly stamped or not chargeable with duty as the case may be, and if chargeable with duty, shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally duly stamped.

The proviso to Section 32(3) categorically provides that the Collector shall not make any endorsement on any instrument under Section 32, where –

- (a) any instrument is executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;
- (b) any instrument is executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or
- (c) any instrument chargeable with a duty not exceeding 10 naya paise or any bill of exchange or promissory note, is brought to him after the drawing or execution thereof, on paper not duly stamped.

In effect, the proviso to Section 32(3) lays down the time limit within which the Collector of Stamps can make any endorsement on any instrument brought to him, for his opinion as to the duty chargeable thereon.

INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES (IMPOUNDING)

- (a) The definition of the term “duly stamped” has already been explained. Chapter IV of the Act (consisting of Sections 35 to 48) provides for the consequences that follow where instruments are not duly stamped.

Section 33 contains a mandate on certain officials to impound an instrument which is not duly stamped. Section 33(1) provides that every person having by law or consent of parties, authority to receive evidence and every person in charge of a public office, except an officer of police before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions, shall, if it appears to him that the instrument is not duly stamped, impound the same. The object of this Section is to protect the revenue, and the Court or public officer authorised by this Section must, exercise the powers under the Section *suo moto* and the jurisdiction of the Court does not depend upon raising of an objection by the parties. For the purposes of this section, the State Government may determine what offices are public offices. The Section also provides that the instrument must be impounded, before it can be admitted in evidence. Once it is admitted in evidence, the instrument cannot be impounded at a later stage and a court, after it becomes *functus officio*, cannot rectify an earlier error.

- (b) The word 'produced' has to be properly understood. It means produced in response to a summon or produced voluntarily for some judicial purpose, such as, for supporting an evidence. It does not refer to a document which accidentally or incidentally falls into a judge's hand. The Court is not justified in impounding a document which the witness had not been called upon to produce (*Narayandas v. Nathuram*, ILR 1943 Nag. 520; AIR 1943 Nag. 97). Similarly, a Court before which a copy of a document has been produced cannot compel the party to produce the original document with a view to impounding it, having received information that is not sufficiently stamped. It is open to the party to refuse to obey the order of the Court in this respect (*Uttam Chand v. Permanand*, AIR 1942 Lah. 265).
- (c) Where a magistrate issued a warrant with a view to discovering registers kept by the accused *containing documents not stamped in accordance with the provisions* of the Stamp Act, and in course of the search, the registers were seized and produced before the magistrate, it was held that the documents thus produced could be impounded as the word 'comes' is sufficiently wide to include documents produced by the search under a search warrant (*Emperor v. Balu Kuppayyan*, ILR 25 Mad. 525). This case should be confined to its facts.
- (d) An arbitrator has the consent of parties to adjudicate the issues coming before him and where the parties tender evidence, an arbitrator has a statutory duty under Section 33(1) to check whether the instrument so produced is duly stamped and if not, to impound the same.
- (e) However, this shall not compel any magistrate or judge of a Criminal Court to examine or impound (if he does not think it fit to do so) any instrument coming before him in the course of any proceeding other than possession proceedings and maintenance proceedings. Also, a judge of a High Court can delegate the duty of examining and impounding any instrument to any other person appointed by the court in this behalf.

UNSTAMPED RECEIPTS

Section 34 provides that where the instrument is an unstamped receipt produced in the course of an audit of any public account, the officer before whom the receipt is produced has a discretion either to impound or to require the receipt to be stamped. This section applies where the receipt is chargeable with a duty not exceeding 10 naya paisa. The officer concerned can, instead of impounding the receipt require a duly stamped receipt to be substituted therefor.

INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE

- (a) Section 35 stipulates that no instrument chargeable with duty shall be—

- (i) admitted in evidence *for any purpose* whatsoever by any person authorised by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence; or
- (ii) shall be acted upon; or
- (iii) registered; or
- (iv) authenticated by any such person as aforesaid or by any public officer.
unless such instrument is duly stamped.

An insufficiently stamped instrument is not an invalid document and it can be admitted in evidence on payment of penalty. [See *K. Narasimha Rao v. Sai Vishnu*, AIR 2006 AP 80 also at p.302]

- (b) The proviso to Section 35 provides as under:
 - (i) any instrument not being an instrument chargeable with a duty not exceeding 10 naya paisa only, or a bill of exchange, or promissory note, subject to all such expectations, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of Rs. 5/- or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5/-, on a sum equal to ten times such duty or portion;
 - (ii) where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, on payment of a penalty of Re. 1/- by the person tendering it;
 - (iii) where a contract or agreement of any kind is affected by the correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;
 - (iv) nothing contained in Section 35 shall prevent the admission of any instrument in evidence in any proceeding in a criminal Court other than the proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;
 - (v) also nothing contained in Section 35 shall prevent the admission of any instrument in the Court, when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of the Act.
- (c) The words 'shall not be admissible in evidence' used in this Section only means that the *document* shall not be made the basis of the decision or should not be relied upon to support any finding (*Sheonath Prasad v. Sorjoo Nonia*, 1943 ALJ, 189; AIR 1943 All 220 (FB)). There is no embargo upon proving the surrounding circumstances.
- (d) The words 'for any purpose' used in this Section would have their natural meaning. Where an unstamped document is admitted in proof of some collateral matter, it is certainly admitted in evidence for that purpose, which the Act prohibits. In *Ram Ratan v. Parmanand*, ILR 1946 Lah. 63, it was held that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its term. The words 'for any purpose' would in effect mean 'for each and every purpose whatsoever without any exception'.
- (e) It is immaterial whether the purpose is the main purpose or a collateral one. The words 'acted on' means that nothing can be recovered under the instrument unless it has a proper stamp. Similarly, where a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the claimant and a decree cannot be based

on such instruments. Admitting an instrument in evidence also amounts to acting upon it and an instrument which should have been stamped but is not stamped is not admissible in evidence for any purpose whatsoever.

- (f) Where an unstamped instrument is lost, the party relying on it is helpless and no payment of penalty can enable admission of secondary evidence.

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not (except as provided in Section 61) be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 36 is mandatory (*Guni Ram v. Kodar*, AIR 1971 All 434, 437).

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the Court cannot subsequently order the deficiency to be made and levy penalty (*Bhupathi Nath v. Basanta Kumar*, AIR 1936 Cal. 556; AIR 1933 Lah. 240).

However, it should be mentioned that Section 61 makes certain important provisions, details of which will be discussed later.

ADMISSION OF IMPROPERLY STAMPED INSTRUMENTS

Under Section 37, opportunity is given to a party, of getting a mistake rectified when a stamp of proper amount, but of improper description has been used. Under this section, the State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the stamp is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

DEALING WITH INSTRUMENTS IMPOUNDED

- (a) Section 38 deals with instruments impounded under Section 33. A person impounding an instrument under Section 33 and receiving the same in evidence (upon payment of penalty under Section 35 or, of duty under Section 37) shall send, to the Collector of Stamps, an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof and shall send such amount to the Collector or to such person as the Collector may appoint in this behalf. In every other case, the person so impounding an instrument shall send it in original to the Collector.
- (b) Section 39 vests the Collector with certain powers to refund penalty recovered by a court on impounding a document not duly stamped when produced before it. Under Section 38, the court so impounding the instrument and realising the penalty has to forward an authenticated copy of the instrument and the amount of penalty recovered to the Collector. The Collector, on examining the instrument so received by him may, in his discretion, refund the whole penalty if it had been imposed for contravention of Section 13 or Section 14 of the Act and in any other case any portion of the penalty in excess of Rs. 5/- in cases where a copy of the instrument under Section 38(1) has been sent to him. The Collector can act *suo motu* without any application in this behalf being made by a party affected.

Collector's Power to Stamp Instrument Impounded

Section 40 deals with Collector's powers to stamp an instrument which is impounded. Under Section 40(1), the Collector when impounding any instrument under Section 33, or receiving any instrument under Section

38(2) not being an instrument chargeable with duty not exceeding 10 naya paisa only or a bill of exchange or promissory note, shall adopt the following procedure:

- (i) if he is of the opinion that instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be;
- (ii) if he is of the opinion that such instrument, is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of Rs. 5/-, if he thinks fit and amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of Rs. 5/-.

The Collector, however, has the discretion to remit the whole penalty leviable under this Section in a case where the instrument has been impounded only because it has been written in contravention of Section 13 or Section 14.

A certificate given in the situation (i) above, shall, for the purposes of the Act be conclusive evidence of the matters stated therein. Sub-section (3) of Section 40 provides that an instrument which has been sent to the Collector under Section 38(2) shall be returned to the impounding officer after the collector has dealt with the same in the manner provided above.

INSTRUMENTS UNDULY STAMPED BY ACCIDENT

Section 41 deals with cases where a person, of his own motion bring it to the Collector's notice that the instrument is not duly stamped. In such cases, if the Collector is satisfied, that the omission to pay the proper duty was due to accident, mistake or urgent necessity, he may receive the deficit amount and certify by endorsement on the instrument that the proper duty has been levied. In order to avail of the benefit of this section, the instrument must be produced before the Collector within one year of the date of its execution. Where the instrument is brought to the notice of the Collector, beyond the period of one year, Section 47 has no application and the Collector has to proceed under Section 42 read with Section 33 and 40 of the Act. Where the instrument having been brought to the notice of the Collector within the period of one year, the Collector is in doubt regarding the amount of duty chargeable, he may refer the case to the Chief Controlling Revenue Authority and proceed in accordance with the decision of such authority. However, where no such reference is made by the Collector, the Collector's decision would be final, and the Chief Controlling Revenue Authority cannot interfere with his decision.

ENDORSEMENT OF INSTRUMENT ON WHICH DUTY HAS BEEN PAID UNDER SECTIONS 35, 40 AND 41

Section 42 deals with cases where duty and penalty, if any, have been levied and realised by the court or any other body or by the Collector. In such cases, the authority refunding and collecting the duty and penalty must make an endorsement on the instrument as to the amount paid and the name and the residence of the person paying the same. Upon such certification, the instrument becomes admissible in evidence and may be registered and acted upon as if it had been duly stamped. The duty and penalty referred to in this Section are those covered by Sections 35, 40 or 41 as the case may be. The proviso to this Section lays down that no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be delivered to the person from whom possession of it came into the hands of the officer impounding it, before the expiration of one month from the date of such impounding or if the Collector has certified that its further detention is necessary and has not cancelled such certificate. Again, nothing contained in Section 42 shall affect the provisions of clause (3) of Section 144 of the Code of Civil Procedure, 1889 [under the present Code the corresponding provision is proviso to Order 13, Rule 9(1)].

PROSECUTION FOR OFFENCES AGAINST STAMP LAW

Section 43 deals with prosecutions for offences against the Stamp Law. This section provides that a levy of a penalty or payment thereof in respect of an unstamped or insufficiently stamped document (as provided for in Chapter IV) does not necessarily exempt a person from liability for prosecution for such offence. However, the proviso to the section clarifies that no such prosecution shall be instituted in the case of any instrument in respect of which a penalty has been paid, unless it appears to the Collector that the offence was committed with the intention of evading the payment of proper duty. On receipt of copy of the instrument impounded under Section 38, the Collector can initiate criminal proceedings if he sees reasons therefor.

RECOVERY OF DUTY OR PENALTY IN CERTAIN CASES

Section 44 deals with the circumstances in which persons paying duty or penalty may recover the same in certain cases. The duty or penalty under this Section refers to the duty or penalty paid/levied under Sections 35, 37, 40 or 41 of the Act. It also includes any duty or penalty under Section 29. The remedy is available to a person who, under the Act, was not bound to bear the expense of providing the proper stamp for such instrument. Such a person shall be entitled to recover, from the person bound to bear such expense, the amount of duty or penalty, if any, paid. For the purpose of such recovery, any certificate granted in respect of such instruments under the Act shall be conclusive evidence of the matters therein certified. Sub-section (3) of Section 44 further provides that the amounts so recoverable may, if the court thinks fit, be included in any order as to cost in any suit or proceedings to which such persons are parties and in which such instrument has been tendered in evidence. If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

REFUND OF DUTY OR PENALTY IN CERTAIN CASES BY REVENUE AUTHORITY

Section 45 deals with power of the Revenue Authority to refund the penalty in excess of duty payable on instrument in certain cases. Section 39 of the Act empowers the Collector to refund a part and in some cases, the whole of the penalty paid under the provisions of Section 35. Section 45 further empowers the Chief Controlling Revenue Authority to order refunds. The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue Authority may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part. Where in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

It is necessary to appreciate the differences between the powers of the Collector under Section 39 and the powers of the Controlling Revenue Authority under Section 45 at this stage. They are:

- (i) Section 39 provides for refund of penalty, whereas Section 45 confers powers to refund even duties where they have been paid in excess.
- (ii) The Collector's power to refund penalty is restricted only to two cases mentioned in Section 39(3) but the powers under Section 45 are not subject to any such limitation.
- (iii) Section 39 does not lay down any time limit for the Collector to exercise his powers to refund, but in the case of Section 45 there is a time limit.
- (iv) The power under Section 45 is to be exercised only when an application is made by a party, whereas under Section 39 it is routine function of the Collector.

The power under Section 45 is a purely discretionary one and the Chief Controlling Revenue Authority cannot be compelled to exercise his power by any further proceedings.

NON-LIABILITY FOR LOSS OF INSTRUMENTS SENT UNDER SECTION 38

Section 46 provides that where any instrument sent to the Collector under Section 38(2) is lost, destroyed during transmission, the person sending the same, shall not be liable for such loss, destruction or damage.

However, Section 38(2) provides that when any instrument is to be sent, the person from whose possession it came into the hands of the person impounding the same may require a copy thereof to be made at his expense and authenticated by the person impounding such instruments.

POWER TO STAMP IN CERTAIN CASES

Under Section 47 when any bill exchange or promissory note chargeable with a duty not exceeding 10 naya paise is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in the manner provided in the Act, may pay the sum payable upon such bill or note and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid and such bill or note shall, so far as respects the duty, be deemed good and valid. However, nothing contained in this section shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

RECOVERY OF DUTIES AND PENALTIES

Under Section 48, all duties penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person or by any other process used for the recovery of the arrears of land revenue. This section provides for the mode of realisation of duty or penalty or other sums not voluntarily paid.

ALLOWANCE AND REFUND

Section 49 deals with different circumstances in which refund would be admissible in respect of impressed stamps not used. The section applies only to impressed stamps and not adhesive stamps. Clause (a) of the section refers to cases where the stamp paper is spoiled before any document has been written thereon, or is spoiled in the course of writing and before execution. Clause (b) refers to cases where the document has been written out wholly or in part but not executed. Clause (c) refers to bills of exchange payable otherwise than on demand and promissory notes, when these have not been accepted or made use of. Clause (d) deals with refunds after execution.

Section 49 provides that subject to such rule as may be made by the State Government, as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in Section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:

- (a) the stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person;
- (b) the stamp on any document which is written out wholly or in part; but which is not signed or executed by any party thereto;
- (c) in the case of bills of exchange payable otherwise than on demand or promissory notes:
 - (1) the stamp on any such bill of exchange signed by or on behalf of the drawer which has not been

accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance provided that the paper on which any such stamp is impressed, does not bear any signature intended as or for the acceptance of any bill of exchange to be afterwards written thereon;

- (2) the stamp on any promissory note signed by or in behalf of the maker which has not been made use of in any manner whatever or delivered out of his hands;
 - (3) the stamp used or intended to be used for any such bill of exchange or promissory note signed by, or on behalf of, the drawer thereof, but which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange may have been presented for acceptance or accepted or endorsed, or being a promissory note may have been delivered to the payee: provided that another completed and duly stamped bill of exchange or promissory note is produced identical in every particular, except in the correction of such omission or error as aforesaid, with the spoiled bill, or note;
- (d) The stamp used for an instrument executed by any party thereto which—
- (1) has been afterwards found to be absolutely void in law from the beginning;
 - (2) has been afterwards found unfit, by reason of any error or mistake therein, for purpose originally intended;
 - (3) by reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to effect the intended transaction in the form proposed;
 - (4) for want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended;
 - (5) by reason of the refusal of any person to act under the same or to advance any money intended to be thereby secured or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;
 - (6) becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument between the same parties and bearing a stamp of not less value;
 - (7) is deficient in value and the transaction intended to be thereby effected has been effected by some other instrument between the same parties and bearing a stamp of not less value;
 - (8) is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is executed and duly stamped.

Provided that, in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up to be cancelled.

TIME LIMITS

Section 50 prescribes the time limit within which an application for relief in respect of impressed stamps spoiled, can be made; different time limits have been specified for the purpose, namely:

- (1) in the cases mentioned in clause (d)(5) of Section 49, within two months of the date of the instrument;

- (2) in the case of a stamped paper on which no instrument has been executed by any of the parties thereto, within six months after the stamp has been spoiled;
- (3) in the case of a stamped paper in which an instrument has been executed by any of the parties thereto, within six months after the date of the instrument, or if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed:

Provided that –

- (a) when the spoiled instrument has been for sufficient reasons sent out of India, the application may be made within six months after it has been received back in India.
- (b) when, from unavoidable circumstances, any instrument for which another instrument has been substituted, cannot be given up to be cancelled within the aforesaid period, the application may be made within six months after the date of execution of the substituted instrument.

UNUSED FORMS

Section 51 of the Act enables the Chief Controlling Revenue Authority or the Collector if authorised by the Chief Controlling Revenue Authority, for such purpose to allow refunds in cases where refunds of stamps on printed forms used by bankers, incorporated companies/bodies corporate if required. Allowance may be made without limit of time, for stamped papers used for printed forms of instruments any bankers or by any incorporated company or other body corporate, if for any sufficient reasons such forms have ceased to be required by the said banker, company or body corporate: provided that the Chief Controlling Revenue Authority or the Collector, as the case may be, is satisfied that the duty in respect of such stamped papers has been duly paid.

MISUSED STAMPS

Section 52 deals with allowance for misused stamps and applies to both impressed and adhesive stamps in the following instances:

- (a) When any person has inadvertently used, for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or a stamp of greater value than was necessary, or has inadvertently used any stamp for an instrument not chargeable with any duty; or
- (b) When any stamp used for an instrument has been inadvertently rendered useless under Section 15, owing to such instrument having been written in contravention of the provisions of Section 13.

The Collector may, on application made within six months after the date of instrument or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if chargeable with duty, being restamped with the proper duty, cancel and allow as spoiled the stamp so misused or rendered useless.

Under Section 53, in any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof:

- (a) other stamps of the same description and value; or
- (b) if required and he thinks fit, stamps of any other description to the same amount in value; or
- (c) at his discretion, the same value in money, deducting ten naya paisa for each rupee or fraction of a rupee.

Section 54 of the Act enables a person to obtain refund of the value of stamps purchased by him, if he has no immediate use thereof. Under this section, when any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall repay to such person the value of such stamp or stamps in money, deducting ten naya paise for each rupee or portion of a rupee, upon such person delivering up the same to be cancelled and proving to the Collector's satisfaction

- (a) that such stamp or stamps were purchased by such person with a *bona fide* intention to use them; and
- (b) that he has paid the full price thereof; and
- (c) that they were so purchased within the period of six months next preceding the date on which they were so delivered.

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor without any such deduction as aforesaid.

DEBENTURES

Section 55 is intended to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture. As per this section, when any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture whichever shall be less:

Provided that the original debenture is produced before the Collector and cancelled by him in such manner as the State Government may direct.

A debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes:

- (a) the issue of two or more debentures in place of one original debenture, the total amount secured being the same;
- (b) the issue of one debenture in place of two or more original debentures, the total amount secured being the same;
- (c) the substitution of the name of the holder at the time of renewal for the name of the original holder; and
- (d) the alteration of the rate of interest of the date of payment hereof.

REFERENCE AND REVISION

Sections 56 to 61 deal with Reference and Revision. Section 56 provides that the powers exercisable by a Collector under Chapter IV and V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority. Further, if any Collector, acting under Sections 31, 40 or 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority [Section 56(2)].

Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

As per Section 57(1), the Chief Controlling Revenue Authority may state any case referred to it under Section 56(2) or otherwise coming to its notice, and refer such case, with its own opinion thereon to the High Court and the same shall be decided by not less than three Judges of the High Court and the majority decision shall prevail.

According to Section 58, if the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the court may refer the case back to the Revenue Authority for further feed back. The High Court shall decide the questions raised and give its judgment to the Authority who shall dispose of the case as per the judgment.

As per Section 60, any subordinate Court can also refer such case to the High Court like the Revenue Authority but should be through proper channel. In Section 61(1) of the Act it is provided that a Court may take into consideration on its own motion or on application of the Collector, an order of the lower Court admitting the instrument as duly stamped or as not requiring stamp duty or on payment of duty and penalty. According to sub-section 2 of Section 61, if such Court is not in agreement with the stand of the lower Court, it may require that the instrument be produced before it and may even impound the same if necessary. While doing so, the Court shall send a copy of its order to the Collector and to the office/Court from which such instrument has been received. [Section 61(3)]

PROSECUTION

As per Section 61(4), the Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower Court as to the instrument shall be valid except for the purposes of prosecution in this respect.

CRIMINAL OFFENCES

Sections 62 to 72 deal with penalties for offences. The provisions are as under:

- (1) As per Section 62(1), any person
 - (a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped; or
 - (b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or
 - (c) voting or attempting to vote under any proxy not duly stamped shall, for every such offence, be punishable with fine which may extend to five hundred rupees.

Provided that, when any penalty has been paid in respect of any instrument under Sections 35, 40 or 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty. In such a case the Collector is to make an enquiry and to give an opportunity to the accused to pay. In such cases the instrument is (i) chargeable with duty, and (ii) there is a dishonest intention not to pay the duty.

Sub-section (2) of Section 62, provides that if a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, its

managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.

- (2) Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees (Section 63). The criminal intention is necessary for an offence under this Section.
- (3) As per Section 64, any person who, with intent to defraud the Government—
 - (a) executes any instrument in which all the facts and circumstances required by Section 27 to be set forth in such instrument are not fully and truly set forth; or
 - (b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or
 - (c) does any other Act calculated to deprive the Government of any duty or penalty under this Act; shall be punishable with fine which may extend to five thousand rupees.

Here also, an intention to evade payment of proper stamp duty or intention to defraud the Government of its stamp revenue is necessary.

- (4) Any person who (a) being required under Section 30 to give a receipt, refuses or neglects to give the same; or (b) with intent to defraud the Government of any duty, upon a payment of money or delivery of property exceeding twenty rupees in amount or value, gives a receipt for amount or value not exceeding twenty rupees, or separates or divides the money or property paid or delivered shall be punishable with fine which may extend to one hundred rupees (Section 65). To constitute an offence under this section, an intention to defraud the Government is necessary.
- (5) As per Section 66, any person shall be punishable with fine which may extend to Rs. 200/- if he –
 - (a) receives, or takes credit for any premium or consideration for any contract of insurance and does not, within one month after receiving or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance; or
 - (b) makes, executes or delivers out any policy which is not duly stamped or pays or allows in account, or agrees to pay or to allow in account, any money upon, or in respect of, any such policy.
- (6) As per Section 67, if any person drawing or executing a bill of exchange (payable otherwise than on demand) or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees.
- (7) Any person who, (a) with intent to defraud the Government, of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made; or (b) knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note; or in any manner negotiates the same; (c) with the like intent, practices or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force; shall be punishable with fine which may extend to one thousand rupees. Intention to defraud is an essential ingredient for offence under Section 68.
- (8) If any person appointed to sell stamps who disobeys any rule made under Section 74, and any

person not so appointed who sells or offers for sale any stamp [other than a (ten naya paise or five naya paise) adhesive stamp] shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both (section 69). Before instituting criminal proceedings under this section against any person, sanction of the Collector must be obtained. Otherwise, the proceedings will be vitiated. A criminal court having jurisdiction to try offences under Cr. P.C. can try such offences.

TAKING COGNIZANCE

- (a) No prosecution in respect of any offence punishable under this Act or any Act hereby repealed, shall be instituted without the sanction of the Collector or such other officer as the State Government generally or the Collector specially, authorises in that behalf.
- (b) The Chief Controlling Revenue Authority, or any officer generally or specially authorised by it in this behalf, may stay any such prosecution or compound any such offence.
- (c) The amount of any such composition shall be recoverable in the manner provided by Section 48.

A Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act (Section 71).

Every such offence committed in respect of any instrument may be tried in any district or presidency town in which instrument is found as well as in any district or presidency town in which such offence might be tried under the Code of Criminal Procedure for the time being in force (Section 72).

MISCELLANEOUS PROVISIONS

Chapter VIII, containing Sections 73 to 78 deals with supplemental provisions regarding inspection of relevant registers, books, records, etc; to enter the premises for that purpose, powers of Government to frame rules for the sale and supply of stamps and to make rules generally to carry out the provisions of the Act.

Section 77A provides that all stamps in denominations of annas four or multiples thereof shall be deemed to be stamps of the value of 25 naya paise or (as the case may be), multiples thereof and shall accordingly be valid for all the purposes of the Act. From this it can be inferred that whatever the stamp duty is mentioned to be annas in the first Schedule; the instrument concerned has to be treated as leviable with duty of 25 naye paise or in multiples thereof as the case may be.

SCHEDULE

The Schedule to the Stamp Act prescribes the rates of stamp duties on instruments. Articles 13, 27, 37, 47, 49, 53 and 62(a) of the Schedule relate to instruments, the rates of duties on which are prescribed by the Central Legislature and have been subject to legislative amendments by that Legislature (See Entry 91 of List I). The other articles relate to instruments in respect of which the Central Legislature has lost its power to regulate rates of duties (except for Union Territories) since the passing of the Government of India Act, 1935. With respect to these instruments, the rates mentioned are fixed by the State Legislatures (See Entry 63 of List II).

E-Stamping

E-Stamping is a computer based application and a secured way of paying Non Judicial stamp duty to the Government. The benefits of e-Stamping are e-Stamp Certificate can be generated within minutes; e-Stamp Certificate generated is tamper proof; Easy accessibility and faster processing; Security; Cost savings and User friendly.

LESSON ROUND-UP

- The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments.
- Entry 91 of the Union List, gives power to Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. Likewise, entry 63 of the State List confers on the States power to prescribe the rates of stamp duties on other instruments.
- Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule.
- In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments.
- Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies.
- The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution. Instrument executed out of India can be stamped within three months after it is first received in India. In some cases, stamp duty is payable on ad valorem basis, i.e. on the basis of value of property, etc. In such cases, value is decided on prescribed basis.
- An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorized to receive evidence. However, the document can be accepted as evidence in criminal court. Duly stamped means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India.
- If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid.
- If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a 'duplicate certificate' has been issued. If securities are purchased or sold under depository scheme, no stamp duty is payable.
- A levy of a penalty or payment in respect of an unstamped or insufficiently stamped document does not necessarily exempt a person from liability for prosecution for such offence. Revenue Authority has been authorized to refund the penalty in excess of duty payable on instrument in certain cases.
- The Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower court as to the instrument shall be valid except for the purposes of prosecution in this respect.
- Provisions have been incorporated in the Act to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture.

Lesson 15

Registration Act 1908: Registration Of Documents

LESSON OUTLINE

- Learning Objective
- Introduction
- Registrable Documents
- Documents whose registration is compulsory
- Documents of which registration is optional
- Time-limit for presentation
- Re-registration of documents
- Documents executed out of India
- Presentation of a will for registration
- Presenting of documents for registration
- Registered document when operative
- Effect of non-registration of documents
- Certificate of registration
- Procedure after registration
- Appeal to registrar
- Application to registration
- Procedure before the registrar
- Order by registrar
- Institution of suit
- Exemption of certain documents executed by or in favour of Government
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document. Document whose registration is compulsory are instruments of gift of immovable property; other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property; leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent and non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

The Registration Act, 1908 is the law relating to registration of documents. The object and purpose of the Act among other things is to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud.

It is important for the students to be thoroughly acclimatized with this branch of law to know its practical significance.

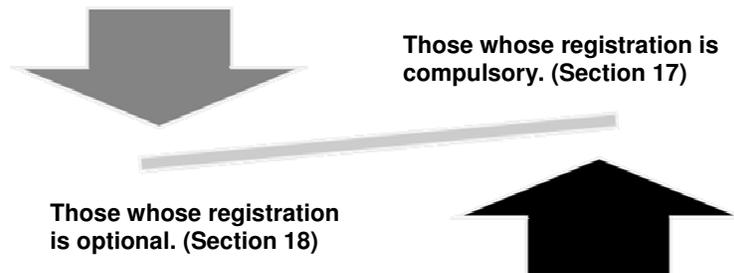
The Registration Act, 1908 is the law relating to registration of documents.

INTRODUCTION

Registration of a document *inter alia*, ensures its proper preservation and record. The Registration Act, 1908 is the law relating to registration of documents. Registration is of a *document* and not of a transaction.

REGISTRABLE DOCUMENTS

Documents can be classified into two classes:



DOCUMENTS WHOSE REGISTRATION IS COMPULSORY

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

- (a) Instruments of gift of immovable property

In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

It was held by the Privy Council in *Kalyana Sundram v. Karuppa*, AIR 1927 PC 42, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with. (Cf. Mulla Registration Act (1998), page 36)

- (b) Other non-testamentary instruments (other than instruments of gift of immovable property) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property situated in a district in which this Act is in force.

A document which is plainly intended to be operative immediately is non-testamentary (*Umrao Singh v. Lachhman*, (1911) 1 LR 33 All 344, 355 (PC); Mulla, Registration Act (1998), page 40).

Description of a document as a will does not make it a will (*Tirugnannpal v. Poonamma*, AIR 1921 PC 89).

The expressions “create”, “assign”, “limit” or “extinguish” imply a definite change of legal relation to a property by an expression of will embodied in the document. It implies a declaration of will.

The expression “declare” (as used in Section 17) has also to be interpreted on the same lines. It does not

mean a mere declaration of fact, but connotes a writing effectuating a change of relation (*Bageshwari Charan v. Jagarnath Kuare*, AIR 1932 PC 55; Mulla, Registration Act (1998), page 41).

Whether an instrument requires registration under Section 17(1)(b) depends upon whether it operates or purports to bring about a change in legal relation in respect of some property. For purposes of Section 17(1)(b) a distinction should be drawn between (i) a right in or to property and (ii) such rights as are merely incidental to the ownership of property and are really in the nature of powers or options which every owner is free to exercise in dealing with his property in a particular way. The latter may be described as rights in relation to the property, but strictly speaking, they are not rights in or to property. Generally, when a right in or to property is assigned, created, declared, limited or extinguished, then there must be a definite change of legal relation to the property.

- (c) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest.

This clause requires an acknowledgement in the form of a receipt to be registered, but not an acknowledgement of the fact that a transaction has taken place. To be registrable under this clause a receipt must satisfy the following two conditions:

- (i) it must be the receipt of a consideration; and
- (ii) it must on the face of it be an acknowledgement of payment or some consideration on account of the creation, declaration, assignment, limitation or extinction of an interest of the value of Rs. 100 or upwards in immovable property.

The receipt must be such as to be linked with the creation etc. of a right. A mere acknowledgement of payment is not compulsorily registrable.

Illustration

In a suit by *A* against *B* for lands, *B* pleads adverse possession. *B* in defence, proves *B*'s acknowledgement (in a petition to the Collector) that the gift is in her favour. The petition is not admissible and does not require registration (Mulla, Registration Act (1998), page 69; *Bageshwari v. Jagarnath Kuare*, AIR 1932 PC 55).

Delay in registration of a gift does not postpone its operation. Section 123, Transfer of Property Act, 1882 merely requires that donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration (*Kalyan Sundaram Pillai v. Karuppa Moppanar*, AIR 1927 PC 42; *Venkata Rama Reddy v. Pillai Rama Reddy*, AIR 1923 Mad. 282).

A lease for one year containing an option to the tenant to renew for a further period of one year or any other term is not a lease for a term exceeding one year, and does not require registration under this clause. Under Section 107 of the Transfer of Property Act, a lease of one year or reserving a yearly rent can be made only by a registered instrument. But where the lease is only for one year with a reserved rent for the period for which it has been granted, viz. one year, it does not require registration.

Cases under Section 107 of Transfer of Property Act, and Section 17(1)(d) of Registration Act.

A comparison of both these Sections would show that a lease of immovable property is compulsory registrable:

- (a) if it is from year to year; or

- (b) if it is for a term exceeding one year; or
- (c) if it reserves a yearly rent.

If a lease is of a very high value but is neither from year to year, nor for any term exceeding one year, nor reserving a yearly rent, it does not require registration under Section 17(1)(d).

- (d) Non-testamentary instruments transferring or assigning any decree or order of a Court or any award in order to create interests as mentioned in Clause (b).

A transfer of a decree or order of a court or of any award when such decree or order or award operates to create, declare, etc. any interest of the value of Rs. 100 and upwards in immovable property, requires registration.

However, the State Government is empowered to exempt any leases executed which do not exceed five years and the annual rents reserved which do not exceed 50 rupees, from the operation of this Sub-section.

- (e) It may be pointed out that the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A.

Exceptions to Section 17(1)

The registration of the non-testamentary documents mentioned in clauses (b) and (c) of Section 17(1) is subject to the exceptions provided in Sub-section (2) of Section 17. These are as follows:

- (i) any composition deed, i.e., every deed the essence of which is composition; or
- (ii) any instrument relating to shares in Joint Stock Company; or
- (iii) any debentures issued by any such Company; or
- (iv) any endorsement upon or transfer of any debenture; or
- (v) any document other than the documents specified under clause (e) above creating merely a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest; or
- (vi) any decree or order of a court; or
- (vii) any grant of immovable property by the Government; or
- (viii) any instrument of partition made by Revenue-officer; or
- (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or
- (x) any order granting loan made under the Agriculturists Loans Act, 1884 or instrument for securing the repayment of a loan made under that Act; or
- (xi) any order made under the Charitable Endowments Act, 1890 vesting any property in a treasurer of a charitable endowment or divesting any such Treasurer of any property; or
- (xii) any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money, due under a mortgage when the receipt does not purport to extinguish the mortgage; or

- (xiii) any certificate of sale granted to the purchaser of any property sold by public auction by Civil or Revenue Officer.

Explanation

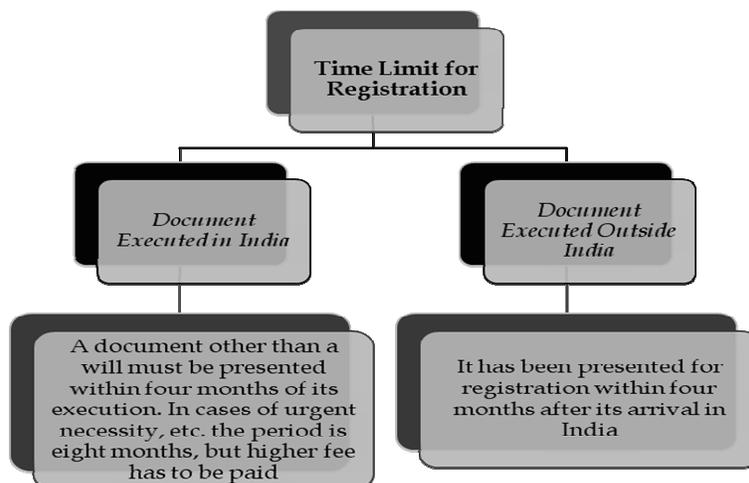
A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require for ever to have required registration by reason only of the fact that such document contains a recital of payment of any earnest money or of the whole or any part of the purchase money.

DOCUMENTS OF WHICH REGISTRATION IS OPTIONAL

Whereas Section 17 of the Act has made registration of certain documents compulsory, Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:

- (a) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value less than one hundred rupees, to or in immovable property;
- (b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any such right, title or interest;
- (c) leases of immovable property for any term not exceeding one year and leases exempted under Section 17;
- (d) instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of a value less than one hundred rupees, to or in immovable property;
- (e) instruments (other than wills) which purport or operate to create declare, assign, limit or extinguish any right, title or interest to or in movable property;
- (f) wills; and
- (g) other documents not required by Section 17 to be registered. (Section 18)

TIME LIMIT FOR PRESENTATION



A document other than a will must be presented within four months of its execution. In cases of urgent necessity, etc. the period is eight months, but higher fee has to be paid (Sections 23-26). These limits are mandatory (*Ram Singh v. Jasmer Singh*, AIR 1963 Punj. 100). If delay is due to act of Court, it has to be disregarded (*Raj Kumar v. Tarapa*, AIR 1987 SC 2195).

Section 23, proviso prescribes a period of four months for presenting a copy of a decree or order. It is counted from the date of the decree.

Unstamped document

If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied (*Mahaliram v. Upendra Nath*, AIR 1960 Pat 470).

RE-REGISTRATION

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was by a person not duly authorised. It overrides the decision in *Jambu Prasad v. Mohammed Aftab Ali Khan*, (1914) ILR 37 All 49).

SEVERAL EXECUTANTS

Under Section 24 a document executed by several persons at different times may be presented for registration and re-registration within four months from the date of each execution.

The registration is "partial" in regard to each party. (Mulla, Registration Act (1998), page 163).

DOCUMENTS EXECUTED OUT OF INDIA

As per Section 26 Where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within four months after its arrival in India, he may accept such document for registration on payment of proper registration fee. A document executed outside India is not valid unless it is registered in India (*Nainsukhdas v. Gowardhandas*, AIR 1948 Nag. 110).

Incidentally, Section 26 indicates that the Act applies to ex-India documents relating to property in India. (Mulla, page 166).

PRESENTATION OF A WILL

Section 27 provides that a *will* may be presented for registration at any time or deposited in a manner provided in Sections 40-46. Registration of a will is optional under Section 18(e).

PLACE OF REGISTRATION

Section 28 provides that documents affecting immovable property mentioned in Sections 17(1) and (2) and Sections 17(1)(a)(b)(c) and (cc)(d) and (e), Section 17(2), etc. shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole *or some portion* of the relevant property is situated and any other document may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar under the State Government at which all the persons executing desire the document to be registered. (All these documents relate to immovable property). Registration of a document elsewhere has been held to be void (*Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*, (1914) ILR 41 Cal. 972, 988 (PC); Mulla, Registration Act (1998), page 167 and cases in footnote 2).

There is nothing in law to prohibit a person conveying property in one district and residing and owing property in another district and asking the vendee to accept a conveyance also of some small property in the district in which he resides, so that the sale-deed may be registered there and he may not be put to the trouble and expense of a journey to the other district. It is not correct to say in such a case that the sale-deed is not validly registered at the place where it is got registered.

However, there should be no fraud or collusion. Smallness of the area does not necessarily lead to inference of fraud. (Mulla Registration Act (1998), pages 169-171. See in particular the cases cited in Mulla page 170, footnotes 15-19).

COPY OF A DECREE OR ORDER

A copy of a decree or order may be registered with the Sub-Registrar within whose sub-district it was made. If the decree or order does not affect immovable property, it may be presented for registration in the office of any other Sub-Registrar under the State Government at whose office all persons claiming under the decree or order desire it to be registered.

REGISTRATION IN CERTAIN CITIES

In any city comprising a Presidency town or in Delhi, a document relating to property situated anywhere in India may be registered (Section 30). Delhi was added by Amendment Act 45 of 1969.

Under Section 31, registration is permitted in cases of necessity under extra-ordinary circumstances, at the residence of the executant.

PRESENTING OF DOCUMENTS FOR REGISTRATION

Section 32 specifies the persons who can present documents for registration at the proper registration office. Such persons are as follows:

- (a) some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or
- (b) the representative or assign of such person, or
- (c) the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in the manner hereinafter mentioned.

It is immaterial whether the registration is compulsory or optional; but, if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void (*Kishore Chandra Singh v. Ganesh Prashad Bhagat*, AIR 1954 SC 316). However, Sections 31, 88 and 89 provide exceptions to this requirement.

For the purpose of Section 32, a special power of attorney is required as provided under Section 33. A general power of attorney will not do. Section 33 requires that a power of attorney, in order to be recognised as giving authority to the agent to get the document registered, should be executed before and then authenticated by the Registrar within whose district or sub-district the principal resides. (Sections 32 to 35)

ENQUIRY BEFORE REGISTRATION BY REGISTERING OFFICER

For registering a document the persons executing such document or their representatives, assigns or authorised agents must appear before the registering officer within the time allowed for presentation. (Section 34)

In Section 34, the expression “person executing” not only includes the agent who has signed (with authority), but also the principal who is a party (*Puran Chand v. Manmotho Nath*, AIR 1928 PC 38).

It is the compliance with the provisions of Sections 34, 35, 58 and 59 of the Act, which really constitutes registration and not the presence of the certificate. Hence, subsequent acts of the Registrar which are ministerial acts, cannot affect the validity of the registration and the absence of final certificate of registration under section 60 cannot affect its validity.

PRESENTING WILLS AND AUTHORITIES TO ADOPT

Who is entitle to present Wills and authorizes to adopt

- The testator, or after his death, any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration. In case of authority for adoption, the donor or (after his death) the donee, or any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration. (Section 40) Thus, even a legatee can present a will (*Venkatapayya v. Venkata Ranga*, AIR 1929 PC 24).

Registration of will and authority to adopt

- A will, or an authority to adopt, if presented by the testator or the donor, may be registered in the same manner as any other document. [Section 41(1)].
- If presented by any other person entitled to present it, it shall be registered if the registering officer is satisfied about the particulars mentioned in Section 41(2).

DEPOSIT OF WILLS

Any testator may, either personally or by duly authorised agent, deposit with any Registrar his will in a sealed cover superscribed with the name of the testator and that of his agent, if any, and with a statement of the nature of the document.

On receiving such documents, the Registrar on being satisfied shall transcribe in his Registrar Book No. 5, the superscription and shall note the date, time, month, etc. of such receipt and shall then place and retain the sealed cover in his fire-proof box.

However, the testator may withdraw it by applying for the same and the Registrar shall deliver it accordingly (Sections 42 to 46).

REGISTERED DOCUMENT WHEN OPERATIVE

- (a) A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. (Section 47)
- (b) As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one (*K.J. Nathan v. S.V. Maruthi Reddy*, AIR 1965 SC 430; Mulla page 207).

In effect¹ Section 47 means that a document operates from the date of execution (as between the parties). [Mulla, *Registration Act* (1998), pages 207, 209]

REGISTERED DOCUMENT RELATING TO PRIORITY WHEN TO TAKE EFFECT AGAINST ORAL AGREEMENT

Generally, priority to rights accorded by different transfers is governed by the principles embodied in the maxim *qui prior tempore potior est jure* that is “he who is first in time is better in law”. But this general rule is subject to exceptions created by Sections 48 and 50. Section 48 refers to the priority of the registered agreements over oral agreements and Section 50 refers to the priority of registered agreements over non-registered agreements. (Section 48)

Notice

In spite of the explicit wording of Section 48, it has for long time been held, that a subsequent registered deed will not prevail over a prior unregistered deed or a prior oral transaction if the subsequent transferee had notice of the prior transaction. (Mulla *Registration Act* (1998), pages 215-216)

EFFECT OF NON-REGISTRATION OF DOCUMENTS REQUIRED TO BE REGISTERED

Section 49 of the Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall:

- (a) affect any immovable property comprised therein; or
- (b) confer any power to adopt; or
- (c) be received as evidence of any transaction affecting such property or conferring such power *unless it has been registered*.

Section 49 is mandatory, and a document which is required to be registered cannot be received in evidence as affecting immovable property. (Mulla, pages 223 to 228)

An unregistered document which comes within Section 17 cannot be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required by this Act or the Transfer of property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 or as evidence of any collateral transaction not to be effective by registered instrument. All that the proviso to Section 49 permits is that in a suit for specific performance an unregistered document affecting immovable property may be given in evidence. The purpose is that the document which has not conveyed or passed title may still be used as evidence of the terms.

In *K. Narasimha Rao v. Sai Vishnu*, AIR 2006 NOC (A.P.) p. 80, it has been held that: It is settled legal principle that an unstamped instrument is not at all admissible in evidence even for collateral purpose. But an unregistered instrument originally unstamped, if duly stamped subsequently can be admitted in evidence even though it continues to be unregistered for collateral purpose but actual terms of transaction cannot be looked into. In instant case, however settlement deed in question produced by defendant was not only

¹. Section 47 does not affect rules of personal law requiring possession. [Mulla (1998), page 209].

unregistered but also insufficiently stamped. That apart on an objection raised by plaintiff, Court had already passed an order directing impounding of document, which was never complied with by defendant. In such circumstances, document in question, which still remained insufficiently stamped could not be admitted in evidence even for collateral purpose. Application filed by defendant seeking to admit said document for collateral purpose is liable to be dismissed.

REGISTERED DOCUMENTS RELATING TO PROPERTY WHEN TO TAKE EFFECT AGAINST ORAL AGREEMENT

Registered documents relating to any property whether movable or immovable shall take effect against any oral agreements or declaration relating to such property unless followed by delivery of possession which constitutes a valid transfer under any law for the time being in force. (Section 48)

CERTAIN REGISTERED DOCUMENTS RELATING TO LAND WHICH WILL TAKE EFFECT AGAINST UNREGISTERED DOCUMENTS

Section 50 provides as under:

- (1) Every document of the kinds mentioned in clause (a), (b), (c) and (d) of Section 17, Sub-section (1) and clauses (a) and (b) of Section 18, shall if duly registered, take effect as regards the property, comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.
- (2) Nothing in Sub-section (1) applies to leases exempted under the proviso to Sub-section (1) of Section 17 or to any document mentioned in Sub-section (2) of the same section or to any registered document which had no priority under the law in force at the commencement of this Act.

MISCELLANEOUS PROVISIONS

Duties and powers of registering officer

The following books must be kept in the several offices as follows:

- | | | |
|--------|---|--|
| A | – | In all Registration Offices |
| Book 1 | – | “Register of non-testamentary documents relating to immovable property”; |
| Book 2 | – | “Record of reasons for refusal to register”; |
| Book 3 | – | “Register of wills and authorities to adopt”; |
| Book 4 | – | “Miscellaneous Register”; |
| B | – | In the Offices of Registrars |
| Book 5 | – | “Register of deposits of Wills”. |
- (2) In Book 1 shall be entered or filed all documents or memorandum registered under Sections 17, 18 and 89 which relate to immovable property, and are not *wills*.
 - (3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of Section 18 which do not relate to immovable property.

The registering officer should enter the registration in the proper book. However, if by mistake and in good faith the registration was entered in the wrong book, it will not make the registration invalid.

When the document is presented for registration, the day, hour and place of presentation and signature of every person presenting it shall be endorsed.

The registering officer should give a receipt for such document to the person presenting it and shall make a copy of the document in the appropriate book.

All such books shall be authenticated from time to time as prescribed by the Inspector General. (Sections 51 to 57)

PROCEDURE ON ADMISSION TO REGISTRATION

Particulars to be endorsed on documents admitted to registration:

- (1) On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely:
 - (a) the signature and addition of every person admitting the execution of the document and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;
 - (b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and
 - (c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration, whole or in part, made in his presence in reference to such execution.
- (2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal. (Sections 58 to 62)

CERTIFICATE OF REGISTRATION

- (a) After the provisions of Sections 34, 35, 58 and 59 as applicable to the document are complied with, the registering officer shall endorse thereon a certificate containing the word "registered" along with the number, and page of the book in which the document has been copied. The certificate shall be signed, sealed and dated by the registering officer.
- (b) The certificate of registration in respect of a document is *prima facie* an evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law. (Section 60) (See Mulla (1998), pages 296, 297)

PROCEDURE AFTER REGISTRATION OF DOCUMENTS RELATING TO LAND

- (1) On registering any non-testamentary document relating to immovable property the Registrar shall forward a memorandum of such document to each Sub-Registrar subordinate to himself in whose sub-district any part of the property is situate.
- (2) The Registrar shall also forward a copy of such document, together with a copy of map or plan (if any) mentioned in Section 21 to every Registrar in whose district any part of such property is situate.

- (3) Such Registrar, on receiving any such copy, shall file it in his Book No. 1 and shall also send a memorandum of the copy to the Sub-Registrar subordinate to him within whose sub-district any part of the property is situate.
- (4) Every Sub-Registrar receiving any memorandum under this Section shall file it in his Book No. 1. (Sections 64 to 65)

PROCEDURE AFTER REGISTRATION

On any document being registered under Section 30(2), a copy of such document and of the endorsements and certificate thereon shall be forwarded to every Registrar within whose district any part of the property to which the instrument relates is situate, and the Registrar receiving such copy shall follow the procedure as prescribed in Sub-section (1) of Section 66.

REFUSAL TO REGISTER BY THE SUB-REGISTRAR

Reasons for refusal to register to be recorded

- (1) Every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situate within his sub-district, shall make an order of refusal and record his reasons for such order in his Book No. 2 and endorse the words "Registration refused" on the document; and, on application made by any person executing or claiming under the document, shall without payment and unnecessary delay, give him a copy of the reasons so recorded.
- (2) No registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered. (Section 71)

Registration cannot be refused on the ground of undervaluation for stamp or any other extraneous reason. (Mulla (1998), page 308)

APPEAL TO REGISTRAR

According to Section 72(1), an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution.

If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in Sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration. [Section 72(2)]

APPLICATION TO REGISTRAR

Refusal to register on the ground of denial of execution is governed by Section 73, under which the aggrieved party can make an "application" not appeal to the Registrar. (Section 73) (For denial of execution see Section 35)

PROCEDURE BEFORE THE REGISTRAR

In the case falling under Section 73 (refusal to register on the ground of denial of execution before the Sub-Registrar) and also where denial of registration is made before the Registrar himself, the Registrar shall

inquire:

- (a) whether the document has been executed; and
- (b) whether the requirements of the law have been satisfied so as to entitle the document to registration. (Section 74)

If a person denies execution, the Sub-Registrar *must* refuse registration leaving the parties to appeal under Section 73 (*Chhotey Lal v. Collector of Moradabad*, AIR 1922 PC 279). Ultimate remedy is a suit under Section 77 (*Ka Plinis Mysthong v. Ring Pyrbot*, AIR 1965 A.N. 42).

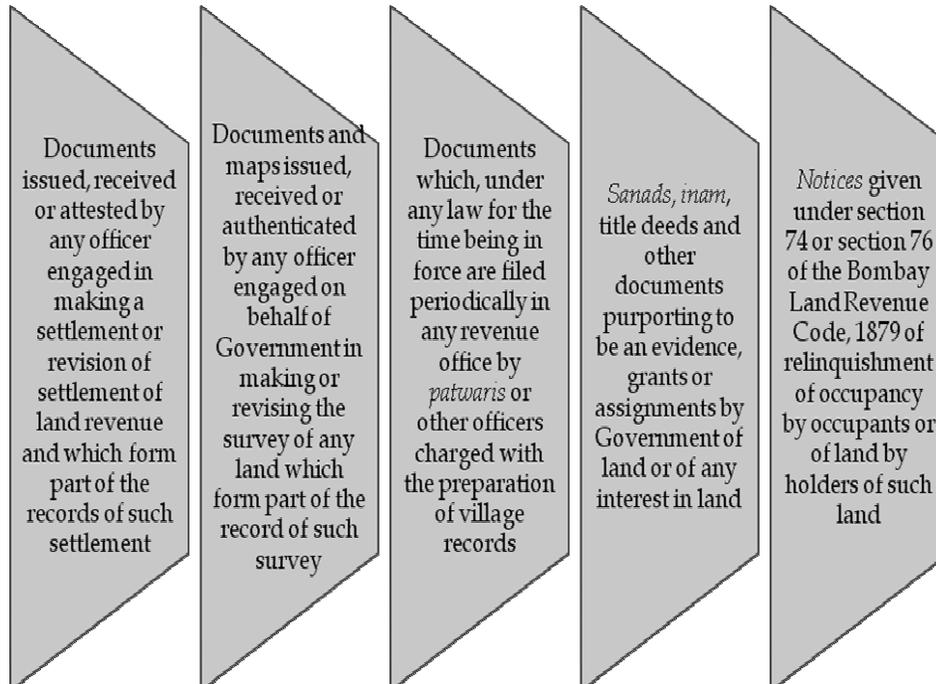
ORDER BY REGISTRAR TO REGISTER AND PROCEDURE THEREON

If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered (*Section 75*).

INSTITUTION OF SUIT IN CASE OF ORDER OF REFUSAL BY REGISTRAR

Where the Registrar refuses to order the document to be registered any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree. (Section 77)

EXEMPTION OF CERTAIN DOCUMENTS EXECUTED BY OR IN FAVOUR OF GOVERNMENT



LESSON ROUND-UP

- Registration of documents relating to immovable property is compulsory. Registration of will is optional. Some documents though related to immovable property are not required to be registered. These are given in Section 17(2) of the Act.
- Document should be submitted for registration within four months from date of execution. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within four months from date of each execution. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India.
- If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within four months from the date he became aware of the fact that registration of document is invalid.
- Documents relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated. Other documents can be registered in the office of Sub- Registrar. Where all persons executing the document desire it to be registered. Registrar can accept a document which is registrable with Sub-Registrar who is subordinate to him. Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will.
- All persons executing the document or their representatives, assign or agents holding power of attorney must appear before registering officer. They have to admit execution and sign the document in presence of Registrar, as required under Section 58(1)(a). Appearance may be simultaneous or at different times. If some of the persons are unable to appear within four months, further time up to additional four months can be given on payment of fine up to 10 times the proper registration fee.
- If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document. He will make necessary entries in the Register maintained by him.
- After all formalities are completed, the Registering Officer will endorse the document with the word 'Registered', and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document.
- A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date.
- Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are: (a) if possession of property (movable or immovable) is delivered on the basis of such oral agreement and such delivery of possession is valid transfer under any law (b) mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to some property.

SELF-TEST QUESTIONS

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

1. What is the object of the law of Registration?
2. Discuss the validity of the agreements in the following cases :
 - (a) A agrees to sell certain vehicles to B, the agreement is oral.

Lesson 16

Right to Information Act, 2005

LESSON OUTLINE

- Learning Objectives
- Introduction
- Right to Know
- The Right to Information Act
- Salient Features of the Act
- Definitions
- Obligations of Public Authority
- Designation of Public Information Officers
- Request for obtaining information
- Duties of a PIO
- Exemption from Disclosure
- Rejection of Request
- Partial Disclosure Allowed
- Information Commissions
- Powers of Information Commissions
- Appellate Authorities
- Penalties
- Jurisdiction of Courts
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

Supreme Court of India in the case of *State of Rajasthan v. Raj Narain*, AIR 1975 SC 865, observed that “In a Government of responsibility like ours where the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings.” Right to information is not a mere statutory right created by the Right to Information Act. It is essentially a Fundamental Right guaranteed by the Constitution of India.

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. In India also, the Government enacted Right to Information (RTI) Act in 2005 allowing transparency and autonomy, and access to information in public authorities.

It is important for the students to understand the significance of right to information in the changing scenario, and be well versed with the important provisions of this legislation as well as to know the process regarding how to apply for information, where to apply, how much fees etc. and various other related aspects.

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.

INTRODUCTION

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. In India also, the Government enacted Right to Information (RTI) Act in 2005 which came into force w.e.f. October 12, 2005.

RIGHT TO KNOW

Before dwelling on the RTI Act, 2005, mention should be made that in *R.P. Limited v Indian Express Newspapers*, the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression "liberty" must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information.

It may be pointed out that the right to impart and receive information is a species of the right to freedom of speech and expression. Article 19(1) (a) of our Constitution guarantees to all citizens freedom of speech and expression. At the same time, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the Constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence.

Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a). The State is not only under an obligation to respect the Fundamental Rights of the citizens, but it is equally under an obligation to ensure conditions under which these rights can meaningfully and effectively be enjoyed by one and all.

Right to freedom of speech and expression in Art.19 (1)(a) carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions as mentioned above. The prerequisite for enjoying this right is knowledge and information. Information adds something "new to our awareness and removes vagueness of our ideas".

THE RIGHT TO INFORMATION (RTI) ACT, 2005

The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. It may be pointed out that the Right to Information Bill was passed by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005. The Act considered as watershed legislation, is the most significant milestone in the history of Right to Information movement in India allowing transparency and autonomy and access to accountability.

SALIENT FEATURES OF THE ACT

The RTI Act extends to the whole of India except Jammu & Kashmir

It provides a very definite day for its commencement i.e. 120 days from enactment

It shall apply to Public Authorities

All citizens shall have the right to information, subject to provisions of the Act

The Public Information Officers/ Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information

Fee will be payable by the applicant depending on the nature of information sought

Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act

Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions

OBJECTIVE

As stated above, the RTI Act confers on all citizens a right to information. The Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority.

DEFINITIONS

The meaning of important terms has been incorporated under section 2 of the RTI Act. These have been discussed herein below:

“**Public authority**” means any authority or body or institution of self government established or constituted

- By or under the Constitution;
- By any other law made by Parliament;
- By and other law made by State Legislature;
- By notification issued or order made by the appropriate Govt. [Section 2(h)]

“**Record**” includes—

- (a) any document, manuscript and file;
- (b) any microfilm, microfiche and facsimile copy of a document;
- (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
- (d) any other material produced by a computer or any other device; [Section 2(l)]

“**Information**” means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data

material held in any electronic form. [Section 2(f)]

"Right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

- (i) taking notes, extracts, or certified copies of documents or records;
- (ii) inspection of work, documents, records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device; [Section 2(j)]

"Third party" means a person other than the citizen making a request for information and includes a public authority. [Section 2(n)]

OBLIGATIONS OF PUBLIC AUTHORITY

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. [Section 4(1)(a)]

As per Section 4(1)(b), every public authority has to publish within one hundred and twenty days of the enactment of this Act:

- the particulars of its organization, functions and duties;
- the powers and duties of its officers and employees;
- the procedure followed in its decision making process, including channels of supervision and accountability;
- the norms set by it for the discharge of its functions;
- the rules, regulations, instructions, manuals and records used by its employees for discharging its functions;
- a statement of the categories of the documents held by it or under its control;
- the particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;
- a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;
- a directory of its officers and employees;
- the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
- the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
- the manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;

- particulars of recipients of concessions, permits or authorizations granted by it;
- details of the information available to, or held by it, reduced in an electronic form;
- the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
- the names, designations and other particulars of the Public Information Officers.
- Such other information as may be prescribed; and thereafter update the publications every year.

DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

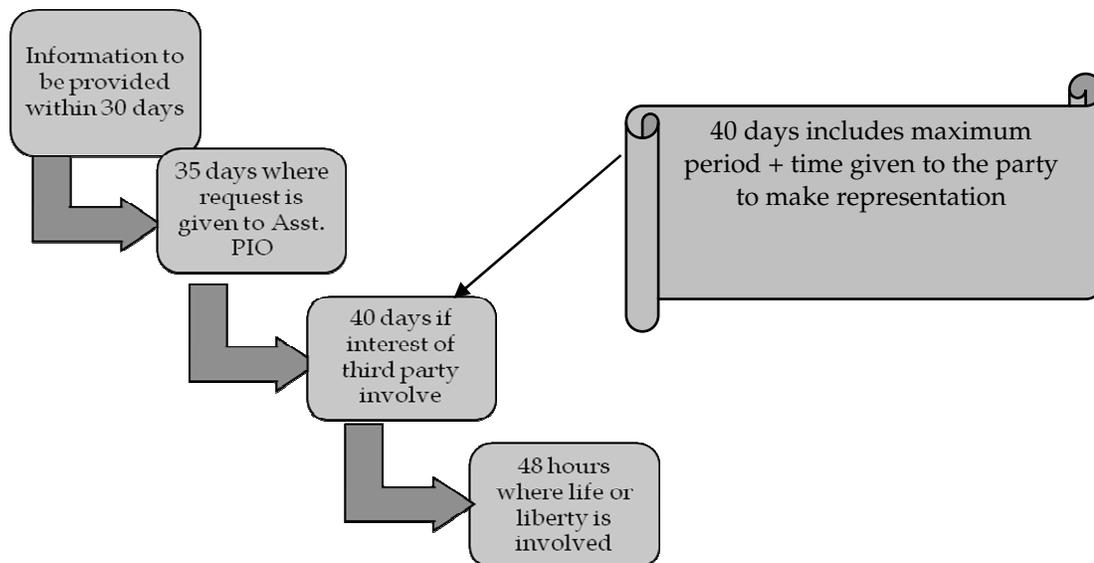
Every public authority has to—

- Designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information.
- Designate at each sub-divisional level or sub-district level Central Assistant or State Assistant Public Information Officers to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers.
- No reason to be given by the person making request for information except those that may be necessary for contacting him. (Section 5)

REQUEST FOR OBTAINING INFORMATION

The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).



Note:

- Time taken for calculation and intimation of fees excluded from the time frame.
- No action on application for 30 days is a deemed refusal.
- No fee for delayed response.

DUTIES OF A PIO

PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing. If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.

PIO may seek the assistance of any other officer for the proper discharge of his/her duties. PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Section 8 or Section 9.

Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.

Where a request has been rejected, the PIO shall communicate to the requester - (i) the reasons for such rejection, (ii) the period within which an appeal against such rejection may be preferred, and (iii) the particulars of the Appellate Authority.

PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to the safety or preservation of the record in question.

If allowing partial access, the PIO shall give a notice to the applicant, informing:

- that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;
- the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;
- the name and designation of the person giving the decision;
- the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and
- his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided.

If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request.

Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice. (Sections 5,7,10 &11)

EXEMPTION FROM DISCLOSURE

Certain categories of information have been exempted from disclosure under the Act. These are:

- 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;

- Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court;
- Where disclosure would cause a breach of privilege of Parliament or the State Legislature;
- 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;
- Information received in confidence from a foreign government;
- Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance;
- Information that would impede the process of investigation or apprehension or prosecution of offenders;
- Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

Personal information which would cause invasion of the privacy unless larger public interest justifies it. (Section 8)

REJECTION OF REQUEST

The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved. (Section 9)

PARTIAL DISCLOSURE ALLOWED

Under Section 10 of the RTI Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.

As per Section 10 of the Act if the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure, in that event access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can be reasonably severed from any part that contains exempt information.

WHO IS EXCLUDED?

The Act excludes Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, the Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police. Agencies specified by the State Governments through a Notification will also be excluded.

The exclusion, however, is not absolute and these organizations have an obligation to provide information

pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of human rights violation shall be given only with the approval of the Central Information Commission within forty-five days from the date of the receipt of request. (Section 24]

INFORMATION COMMISSIONS

The Act envisages constitution of Central Information Commission and the State information Commissions.

Central Information Commission (CIC): The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of the Chief Information Commissioner and Central Information Commissioners not exceeding 10. These shall be appointed by the President of India on the recommendations of a committee consisting of PM who is the Chairman of the Committee; the leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister.

The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory. He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

The general superintendence, direction and management of the affairs of the Commission vests in the Chief Information Commissioner who shall be assisted by the Information Commissioners. Commission shall have its Headquarters in Delhi. Other offices may be established in other parts of the country with the approval of the Central Government. Commission will exercise its powers without being subjected to directions by any other authority. (Section 12)

CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment. Salary will be the same as that of the Chief Election Commissioner. This will not be varied to the disadvantage of the CIC during service. (Section 13)

State Information Commission (SIC): The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of one State Chief Information Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC). These shall be appointed by the Governor on the recommendations of a committee consisting of the Chief Minister who is the Chairman of the committee. Other members include the Leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.

The qualifications for appointment as SCIC/SIC shall be the same as that for Central Commissioners. The salary of the State Chief Information Commissioner will be the same as that of an Election Commissioner. The salary of the State Information Commissioner will be the same as that of the Chief Secretary of the State Government.

The Commission will exercise its powers without being subjected to any other authority. The headquarters of the State Information Commission shall be at such place as the State Government may specify. Other offices may be established in other parts of the State with the approval of the State Government. (Section 15 & 16)

POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person—

- who has not been able to submit an information request because a PIO has not been appointed;

- who has been refused information that was requested;
- who has received no response to his/her information request within the specified time limits;
- who thinks the fees charged are unreasonable;
- who thinks information given is incomplete or false or misleading; and
- 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)

APPELLATE AUTHORITIES

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

First Appeal: First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).

Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).

Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

Burden of proving that denial of information was justified lies with the PIO. First Appeal shall be disposed of within 30 days from the date of its receipt or within such extended period not exceeding a total of forty-five days from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary. (Section 19)

PENALTIES

Section 20 of the Act imposes stringent penalty on a Public Information Officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs. 250 per day, up to a maximum of Rs. 25,000/-, for -

- (i) not accepting an application;
- (ii) delaying information release without reasonable cause;
- (iii) malafidely denying information;
- (iv) knowingly giving incomplete, incorrect, misleading information;
- (v) destroying information that has been requested; and
- (vi) obstructing furnishing of information in any manner.

The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty. They can also recommend disciplinary action for violation of the law against the PIO for persistently

failing to provide information without any reasonable cause within the specified period.

JURISDICTION OF COURTS

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

Role of Central/State Governments

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:

Develop and organize educational programmes for the public especially disadvantaged communities on RTI.

Encourage public authorities to participate in the development and organization of such programmes.

Promote timely and effective dissemination of accurate information by the public authorities.

Train officers and develop training materials.

Compile and disseminate a User Guide for the public in the respective official language.

Publish names, designation, postal addresses and contact details of PIOs and other information such as notices regarding fees to be paid, remedies available in law if request is rejected etc.

LESSON ROUND-UP

- Right to know is a necessary ingredient of participatory democracy. The Government enacted Right to Information (RTI) Act, 2005 which came into force on October 12, 2005.
- The RTI Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority. Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. Further, it is obligatory on every public authority to publish the information about various particulars prescribed under the Act within one hundred and twenty days of the enactment of this Act.
- Every public authority has to designate in all administrative units or offices, Central or State Public Information Officers to provide information to persons who have made a request for the information. The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.

- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.
- The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved.
- Only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.
- The Act envisages constitution of Central Information Commission and the State Information Commissions.
- The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of: (i) The Chief Information Commissioner; (ii) Central Information Commissioners not exceeding 10.
- The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
- -CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment.
- The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of: (i) One State Chief Information Commissioner (SCIC) and (ii) Not more than 10 State Information Commissioners (SIC).
- The Central /State Commission have been authorized to receive and enquire into a complaint from any person who has been denied information by the concerned authorities due to various reasons as specified under the Act. If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.
- Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.
- -Stringent penalty may be imposed on a Public Information Officer for failing to provide information. The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty.
- The Act also stipulates the role of the Central/State Governments.

SELF-TEST QUESTIONS

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

1. The right to impart and receive information is a species of the right to freedom of speech and expression. Discuss
2. The RTI Act confers on all citizens a right to information. Enumerate the salient features of the Act.
3. Describe the constitution and powers of the Central Information Commission under the Act.
4. Can a person who does not receive a decision within the specified time or is aggrieved by the decision of the PIO file an appeal under the Act?
5. Specify the categories of information that have been exempted from disclosure under the Act.

Lesson 17

Information Technology Act, 2000

LESSON OUTLINE

- Learning Objective
- Introduction
- Definitions of basic expressions
- Digital signature
- Electronic signature
- Electronic governance
- Retention of information
- Audit of documents maintained in electronic form
- Validity of contracts formed through electronic means
- Attribution and dispatch of electronic records
- Time and place of dispatch
- Secure electronic records
- Certifying authorities
- Penalties
- Adjudications
- Appellate tribunal
- Offences
- Lesson Round Up
- Self-Test Questions

LEARNING OBJECTIVES

Information Technology Act, 2000 is the primary law in India dealing with electronic commerce and Cyber Crime. It is based on the United Nations Model Law on Electronic Commerce (UNCITRAL Model) recommended by the General Assembly of United Nations by a resolution dated 30th January 1997.

Information Technology Act, 2000 provides legal recognition to any transaction which is done electronically or use of internet.

It is important for the students to be thoroughly acclimatized with this branch of law to know its practical significance.

Information Technology Act, 2000 provides legal framework for electronic governance by giving recognition to electronic records and digital signatures.

INTRODUCTION

“Information technology”, in a broad sense, connotes that technology which is connected with information. More particularly, it connotes that technology which has taken shape during the last five decades or so, involving electronics. The use of such technology for the storage, retrieval and dissemination of information has given rise to several legal, social and ethical problems. In this context, the word “information” is not to be taken as limited to news or informative material. Rather, it is to be understood as encompassing all matter that is intended to be recorded electronically, whether it be correspondence, Government documents, legal instruments, private exchanges of news and views or any other matter which emanates from man and is transformed into machine-recorded data.

The United Nations General Assembly by resolution A/RES/51/162, dated the January 30, 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law. This is referred to as the UNCITRAL Model Law on E-Commerce. Subsequent to the adoption of this Resolution, Indian government has passed the Information Technology Act, 2000. With the changing needs and requirement of the information technology and communication, the Information Technology Act 2000 has been substantially amended through the Information Technology (Amendment) Act 2008 which was passed by the Indian Parliament on December 24, 2008 and received the Presidential assent on February 5, 2009. The amendment Act came into force on October 27, 2009.

The Information Technology Act, 2000, was enacted to make, in the main, three kinds of provisions, as under:

- (a) It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, usually referred to, as “electronic Commerce”.
- (b) It facilitates the electronic filing of documents with the Government agencies, (and also with the publication of rules etc, in the electronic form).
- (c) It amends the, Indian Penal Code, the Indian Evidence Act, 1872, the Bankers’ Book Evidence Act, 1891, and the Reserve Bank of India Act, 1934, so as to bring in electronic documentation within the purview of the respective enactments.

DOCUMENTS OR TRANSACTIONS TO WHICH THE ACT SHALL NOT APPLY

1. A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.
2. A power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882.
3. A trust as defined in section 3 of the Indian Trust Act, 1882.
4. A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.
5. Any contract for the sale or conveyance of immovable property or any interest in such property.

DEFINITIONS OF BASIC EXPRESSIONS

Section 2(1) of the Information Technology Act, 2000, contains definitions of various expressions. Some of the definitions are important, for understanding the detailed provisions of the Act and are quoted below:

“**Access**” with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer

system or computer network. [Section 2(1)(a)]

“Addressee” means a person who is intended by the originator to receive the electronic record, but does not include any intermediary. [Section 2(1)(b)]

“Affixing electronic signature” with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature.[Section 2(1)(d)]

“Appellate Tribunal” means the Appellate Tribunal referred to in sub-section (1) of section 48. [Section 2(1)(da)]

“Asymmetric crypto system” means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature [Section 2(1)(f)]

“Certification practice statement” means a statement issued by a Certifying Authority to specify the practices that the Certifying Authority employs in issuing electronic signature Certificates. [Section 2(1)(h)]

“Communication device” means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image;.[Section 2(1)(ha)]

“Computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions, by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. [Section 2(1)(i)]

“Computer network” means the interconnection of one or more computers through -

- (i) the use of satellite, microwave, terrestrial line or other communication media; and
- (ii) terminals or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained. [Section 2(1)(j)]

“Computer resource” means computer, computer system, computer network, data, computer database or software. [Section 2(1)(k)]

“Computer system” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions. [Section 2(1)(l)]

“Cyber cafe” means any facility from where access to the internet is offered by any person in the ordinary course of business to the members of the public.[Section 2(1)(na)]

“Cyber security” means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.[Section 2(1)(nb)]

“Digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3. [Section 2(1)(p)]

“Electronic form” with reference to information, means any information generated, sent, received or stored

in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device. [Section 2(1)(r)]

“Electronic record” means data, recorded or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche. [Section 2(1)(t)]

“Electronic signature” means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.[Section 2(1)(ta)]

“Electronic Signature Certificate” means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate.[Section 2(1)(tb)]

“Information” includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche. [Section 2(1)(v)]

“Intermediary” with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes; [Section 2(1)(w)]

“Key pair” in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key. [Section 2(1)(x)]

“Originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary. [Section 2(1)(za)]

“Prescribed” means prescribed by rules made under this Act. [Section 2(1)(zb)]

“PrivateKey” means the key of a key pair, used to create a digital signature. [Section 2(1)(zc)]

“Public key” means the key of a key pair, used to verify a digital signature and listed in the Digital Signature Certificate. [Section 2(1)(zd)]

“Secure system” means computer hardware, software, and procedure that—

- (a) are reasonably secure from unauthorised access and misuse;
- (b) provide a reasonable level of reliability and correct operation;
- (c) are reasonably suited to performing the intended functions; and
- (d) adhere to generally accepted security procedures;

“Verify” in relation to a digital signature, or electronic record or its grammatical variations and cognate expressions, means to determine whether -

- (a) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber;
- (b) the initial electronic record is retained intact, or has been altered since such electronic record was so affixed with the digital signature. [Section 2(1)(zh)]

DIGITAL SIGNATURE AND ELECTRONIC SIGNATURE

Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognised as a valid method of authentication. The authentication is to be effected by the use of “asymmetric crypto system and hash function”, which envelop and transform electronic record into another electronic record. [Sections 3(1), 3(2)]

Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning “key pair”.

Section 3A deals with electronic signature. Section 3A(1) provides that notwithstanding anything contained in section 3(1), but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which—

- (a) is considered reliable; and
- (b) may be specified in the Second Schedule.

For the purposes of above any electronic signature or electronic authentication technique shall be considered reliable if—

- (a) the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or, as the case may be, the authenticator and to no other person;
- (b) the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person;
- (c) any alteration to the electronic signature made after affixing such signature is detectable;
- (d) any alteration to the information made after its authentication by electronic signature is detectable; and
- (e) it fulfils such other conditions which may be prescribed.

Central Government may prescribe the procedure for the purpose of ascertaining whether electronic signature is that of the person by whom it is purported to have been affixed or authenticated.

ELECTRONIC GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)

The Act grants legal recognition to electronic records by laying down that where (by any law) “information” or any other matter is to be in:

- (a) writing or
- (b) typewritten form or
- (c) printed form, then, such requirement is satisfied, if such information or matter is:
 - (i) rendered or made available in an electronic form; and
 - (ii) accessible, so as to be usable for a subsequent reference. (Section 4)

It may be pointed out that “information”, as defined in Section 2(1) (v) of the Act, includes data, text, images, sound, voice, codes, computer programmes, software and data-bases or micro-film or computer-generated “micro-fiche”.

Private transactions

Thus, Section 4 of the Information Technology Act, practically equates electronic record with a manual or typed or printed record. Section 5 deals with legal recognition of electronic signatures. It states that where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.

It may be noted that "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly.

Public records

Above provisions are primarily intended for private transactions. The Act then proceeds to bring in the regime of electronic records and electronic signature in public records, by making an analogous provision which grants recognition to electronic records and electronic record signatures, in cases where any law provides for

- (a) the filing of any form, application or any other document with a Governmental office or agency or
- (b) the grant of any licence, permit etc. or
- (c) the receipt or payment of money in a particular manner. (Section 6)

Delivery of services by service provider

According to Section 6A the appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorise, by order, any service provider to set up, maintain and upgrade the computerised facilities and perform such other services as it may specify, by notification in the Official Gazette.

It may be noted that service provider so authorised includes any individual, private agency, private company, partnership firm, sole proprietor firm or any such other body or agency which has been granted permission by the appropriate Government to offer services through electronic means in accordance with the policy governing such service sector.

RETENTION OF INFORMATION

The Act also seeks to permit the retention of information in electronic form, where any law provides that certain documents, records or information shall be retained for any specific period. Certain conditions as to accessibility, format etc. are also laid down. (Section 7)

AUDIT OF DOCUMENTS MAINTAINED IN ELECTRONIC FORM

Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in the electronic form. (Section 7A)

SUBORDINATE LEGISLATION

Subordinate legislation is also authorised, by the Act, to be published in the Official Gazette or the electronic

Gazette, and the date of its first publication in either of the two Gazette shall be deemed to be the date of publication. (Section 8)

But the provisions summarised above shall not confer any right upon any person to insist, that any Government agency shall accept, issue etc. any document in electronic form or effect any monetary transaction in electronic form. (Section 9)

VALIDITY OF CONTRACTS FORMED THROUGH ELECTRONIC MEANS

As per section 10A of the Act, where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose

ATTRIBUTION AND DISPATCH OF ELECTRONIC RECORDS

Since, in an electronic record, the maker remains behind the curtain, it was considered desirable to make a provision for “attribution” of the record. An electronic record is attributed to the “originator”. [Defined in Section 2(1)(za)]

Broadly, the “originator” is the person at whose instance it was sent in the following cases -

- (a) if it was sent by the originator himself; or
- (b) if it was sent by a person authorised to act on behalf of the originator in respect of that electronic record; or
- (c) if it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

Regarding acknowledgement of receipt of electronic records, the Act provides that where there is no agreement that the acknowledgment be given in a particular form etc. then the acknowledgement may be given by:

- (a) any communication by the addressee (automated or otherwise) or
- (b) any conduct of the addressee which is sufficient to indicate to the originator that the electronic record has been received. [Section 12(1)]

Special provisions have been made for cases where the originator has stipulated for receipt of acknowledgment, [Section 12 (b)] or where the acknowledgement is not received by the originator in time. [Section 12(2), 12(3)]

TIME AND PLACE OF DISPATCH ETC.

After these provisions, there follows a provision which is of considerable significance for the law of contracts. The date of offer and the date of acceptance are crucial, in determining whether and which contract has come into existence. The two terminal points - despatch and receipt, are dealt with, in detail. Subject to agreement between the parties, the dispatch of an electronic record occurs, when it enters a “computer resource” outside the control of the originator. [Section 13 (1)]

“Computer resource”, as defined in Section 2 (k), means a computer, computer system, computer network, data, computer database or software.

Time of receipt

As regards the time of receipt of electronic records, two situations are dealt with, separately. Subject to agreement, if the addressee has designated a computer resource for receipt, then receipt occurs when the electronic record enters the designated resource. However, if the record is sent to a computer resource of the addressee which is not the designated resource, then receipt occurs at the time when the electronic record is retrieved by the addressee. [Section 13(2)(a)]

If the addressee has not designated a computer resource (with or without specified timings), then receipt is deemed to occur, when the electronic record enters the computer resource of the addressee. [Sections 13(1), 13(2)] Above provisions apply, even where the place of location of the computer is different from the deemed place of receipt.

The Act also contains provisions as to the place of dispatch and receipt. [Section 13(3)]

SECURE ELECTRONIC RECORDS

The Central Government is required, by the Act, to prescribe the security procedure for electronic records, having regard to the commercial circumstances prevailing at the time when the procedure is used (Section 16). When the procedure has been applied to an electronic record at a specific point of time, then such record is deemed to be a secure electronic record, from such point of time to the time of verification. (Section 14)

An electronic signature shall be deemed to be a secure electronic signature if—

- (i) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and
- (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed. (Section 15)

CERTIFYING AUTHORITIES

The Act contains detailed provisions as to “Certifying Authorities” (Sections 17-34). A Certifying Authority is expected to reliably identify persons applying for “signature key certificates”, reliably verify their legal capacity and confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate. To regulate the Certifying Authorities, there is a Controller of Certifying Authorities. (Section 17) Obligations of Certifying Authorities are also set out, in the Act. (Sections 30-34)

ELECTRONIC SIGNATURE CERTIFICATES

Sections 35-39 of the Act deal with Electronic Signature Certificates. As per section 35 of the Act, Certifying authority to issue electronic signature Certificate. Followings are the procedure of obtaining electronic signature Certificate:

- (1) Any person may make an application in prescribed form to the Certifying Authority for the issue of electronic signature Certificate in such form as may be prescribed by the Central Government.
- (2) Every such application shall be accompanied by prescribed fees
- (3) Every such application shall be accompanied by a certification practice statement or where there is no such statement, a statement containing such particulars, as may be specified by regulations.
- (4) On receipt of an application, the Certifying Authority may, after consideration of the certification

practice statement or the other statement and after making such enquiries as it may deem fit, grant the electronic signature Certificate or for reasons to be recorded in writing, reject the application.

It may be noted that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection.

PENALTIES AND ADJUDICATIONS

The Act contemplates a dual scheme in regard to wrongful acts concerning computers etc. Certain acts are visited with (so called) “penalties”, which are however, adjudicated, not before courts, but before adjudication officers. (Sections 43-47)

In fact, however, though the heading of Section 43 speaks of “penalty and compensation for damage to computer, computer system”.

Section 43 provides that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network,—

- (a) accesses or secures access to such computer, computer system or computer network or computer resource;
- (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
- (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
- (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
- (e) disrupts or causes disruption of any computer, computer system or computer network;
- (f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
- (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
- (h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network;
- (i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
- (j) steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

he shall be liable to pay damages by way of compensation to the person so affected.

For the purposes of Section 43,—

- (i) “Computer contaminant” means any set of computer instructions that are designed—

- (a) to modify, destroy, record, transmit data or programme residing within a computer,

computer system or computer network; or

- (b) by any means to usurp the normal operation of the computer, computer system, or computer network;
- (ii) “computer data-base” means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;
- (iii) “Computer virus” means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;
- (iv) “Damage” means to destroy, alter, delete, add, modify or rearrange any computer resource by any means.
- (v) “Computer source code” means the listing of programme, computer commands, design and layout and programme analysis of computer resource in any form.

COMPENSATION FOR FAILURE TO PROTECT DATA

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected. (Section 43A)

It may be noted that:

- (i) “body corporate” means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;
- (ii) “reasonable security practices and procedures” means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;
- (iii) “sensitive personal data or information” means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.]

A person failing to provide information or failing to file a return etc. (as required by the Act), has to pay a penalty not exceeding ten thousand rupees for every day during which the failure continues. (Section 44)

Contravention of a rule or regulation attracts liability to pay compensation upto 25,000 rupees, to the person affected by such contravention or to pay penalty upto that amount. (Section 45)

Adjudicating officer

An adjudication officer is to be appointed by the Central Government for adjudging whether any person has committed a contravention of the Act or of any rule, regulation, direction or order issued under the Act. He

may impose penalty or award compensation in accordance with the provisions of the relevant section (Section 46).

The Act takes care to set out the factors to be taken into account by the Adjudicating officer, in adjudging the quantum of compensation under this Chapter. He has to have due regard to the following factors:

- (a) the amount of gain of unfair advantage (wherever quantifiable), made as a result of the default;
- (b) the amount of loss caused to any person as a result of the default; and
- (c) the repetitive nature of the default.

APPELLATE TRIBUNAL

Chapter X of the Act provides for the establishment of Appellate Tribunal. (Sections 48-62). The Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

The Central Government shall specify, by notification the matters and places in relation to which the Appellate Tribunal may exercise jurisdiction.

In the same Chapter, there are provisions regarding the compounding of offences and recovery of penalties. (Sections 63 and 64).

Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Appellate Tribunal, within 45 days. (Section 57)

Any person aggrieved by “any decision or order” of the Appellate Tribunal may appeal to the High Court, within 60 days. Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Appellate Tribunal has power to determine.

OFFENCES

Chapter XI of the Act, (Sections 65-78) deals with offences relating to computers etc. and connected matters.

Tampering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

It may be noted that “computer source code” means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form. (Section 65)

Computer related offences

If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both. (Section 66)

The offences listed in the Act are the following –

- Dishonestly receiving stolen computer resource or communication device
- Identity theft
- Cheating by personation by using computer resource
- Violation of privacy
- Cyber terrorism
- Publishing or transmitting of material containing sexually explicit act, etc., in electronic form
- Publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form
- Misrepresentation
- Breach of confidentiality and privacy
- Disclosure of information in breach of lawful contract
- Publishing electronic signature Certificate false in certain particulars
- Publication for fraudulent purpose.

This Chapter XI of the I T Act also contains certain provisions empowering the Controller of Certifying Authorities to issue certain directions to certifying Authorities (Section 68).

Further, as per section 69 where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do , in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of safeguard and procedure as may be prescribed , for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

Extraterritorial operation

Extra-territorial operation of the Act is provided for, by enacting that the provisions of the Act apply to any offence or contravention committed outside India by any person, irrespective of his nationality, if the act or conduct in question involves a computer, computer system or computer network located in India. (Section 75)

LIABILITY OF NETWORK SERVICE PROVIDERS

The Internet system depends, for its working, on network service providers- i.e. intermediaries. An “intermediary”, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.(Section 2(1)(w)).

In his capacity as an intermediary, a network service provider may have to handle matter which may contravene the Act. To avoid such a consequence, the Act declares that no network service provider shall be liable “under this Act, rule or regulation made thereunder”, for any third party information or data made available by him, if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. (Section 79)

LESSON ROUND-UP

- The Information Technology Act has been passed to give effect to the UN resolution and to promote efficient delivery of Government services by means of reliable electronic records. The Act came into effect on 17.10.2000.
- The purpose of the Act is (a) to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information and (b) to facilitate electronic filing of documents with the Government agencies.
- Any subscriber may authenticate an electronic record by affixing his electronic signature.
- “Digital Signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3 of the Act.
- The digital signature will be certified by ‘Certifying Authority’. The ‘certified authority’ will be licensed, supervised and controlled by ‘Controller of Certifying Authorities’.
- The Act contemplates a dual scheme in regard to wrongful acts concerning computers, etc. Certain acts are visited with (so called) “penalties”, which are however, adjudicated, not before courts, but before adjudication officers.
- The Act provides for the establishment of one or more Appellate Tribunal and lays down various provisions regarding its jurisdiction, composition, powers and procedure.
- Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Appellate Tribunal.
- Chapter XI of the Act spells out provisions regarding offences relating to computers, etc. This chapter also contains provisions empowering the Controller of Certifying Authorities to issue certain directions to Certifying Authorities and to subscribers. There is also a provision for confiscation.

SELF-TEST QUESTIONS

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

1. Summarises the main provisions contained in the Information Technology Act, 2000.
2. What is the significance of electronic records under the Information Technology Act, 2000?
3. State very briefly the gist of the concepts of “computer network”, “electronic form” and “key pair”, under the Information Technology Act, 2000.
4. What are the offences provided in the Information Technology Act, 2000, for various kinds of misuse of computer?
5. State, in brief, about the Appellate Tribunal, under the Information Technology Act, 2000.

EXECUTIVE PROGRAMME
JURISPRUDENCE, INTERPRETATION AND GENERAL LAWS

EP-JI&GL

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

“27. Suspension and cancellation of examination results or registration

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation - Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute”.

EXECUTIVE PROGRAMME
JURISPRUDENCE, INTERPRETATION AND GENERAL LAWS

TEST PAPER

Time Allowed: 3 hours

Maximum Marks: 100

Total number of questions: 6

1. (a) Discuss significance of Law in society. *(5 marks)*
- (b) With reference to decided cases, explain the provisions of the Constitution guaranteeing the Fundamental Right to profess and propagate the religion and limitations thereto. *(5 marks)*
- (c) Explain the writ of mandamus as an extra-ordinary constitutional remedy. *(5 marks)*
- (d) Define the concept of 'State' with respect to fundamental rights enshrined in the Constitution of India. *(5 marks)*

(Attempt all parts of either the Question No. 2 or 2A)

2. (a) What is a declaratory decree? When is such a decree granted? *(8 marks)*
- (b) What is strict and liberal construction of statutes? *(8 marks)*

Or

(Alternate Question to Question. No. 2)

- 2A. (i) What is the limitation period for taking cognizance of certain offences under Criminal Procedure Code, 1973. *(8 marks)*
- (ii) Discuss validity of contracts formed through electronic means. *(8 marks)*
3. (a) Discuss the provisions relating to correction and interpretation of an award under the Arbitration and Conciliation Act, 1996. *(8 marks)*
- (b) Explain the doctrine of "sufficient cause" for the condonation of delay under the Limitation Act, 1963. *(8 marks)*
4. (a) Define the expression 'Bond' under the Indian Stamp Act, 1899. Can Parliament impose by law stamp duty on cheques? *(8 marks)*
- (b) What do you understand by privileged communications? Discuss. *(8 marks)*
5. (a) Explain the provisions relating to summary procedure under the Code of Civil Procedure, 1908. *(8 marks)*
- (b) Specify the categories of information that have been exempted from disclosure under the RTI Act, 2005. *(8 marks)*

(Attempt all parts of either the Question No. 6 or 6A)

6. (a) Enumerate the various modes of judicial control of administrative action in India. *(8 marks)*
- (b) Tribunals are Quasi-Judicial Authorities. Discuss. *(8 marks)*

Or

(Alternate Question to Question. No. 6)

- 6A. (a) Distinguish between bailable and non-bailable offence. *(8 marks)*
- (b) Explain the provisions relating to summary procedure under the Code of Civil Procedure, 1908. *(8 marks)*
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GLOSSARY OF LEGAL TERMS/MAXIMS

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| <i>A priori:</i> | From the antecedent to the consequent. |
| <i>Ab initio:</i> | From the beginning. |
| <i>Absolute sententia expositore non indiget:</i> | Plain words require no explanation. |
| <i>Actio mixta:</i> | Mixed action. |
| <i>Actio personalis moritur cum persona:</i> | A personal right of action dies with the person. |
| <i>Actionable per se:</i> | The very act is punishable and no proof of damage is required. |
| <i>Actus Curiae Neminem Gravabit:</i> | Act of the Court shall prejudice no one. |
| <i>Actus non facit reumnisi mens sit rea:</i> | An act does not make a man guilty unless there be guilty intention. |
| <i>Actus reus:</i> | Wrongful act. |
| <i>Ad hoc:</i> | For the particular end or case at hand. |
| <i>Ad idem:</i> | At the same point. |
| <i>Ad valorem:</i> | According to value. |
| <i>Aliunde:</i> | From another source. |
| <i>Amicus Curiae:</i> | A friend of court member of the bar who is appointed to assist the Court. |
| <i>Animus possidendi:</i> | Intention to possess |
| <i>Audi alteram partem:</i> | Hear the other side. |
| <i>Benami:</i> | Nameless. |
| <i>Bona fide:</i> | Good faith; genuine. |
| <i>Caveat:</i> | A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator. |
| <i>Caveat emptor:</i> | Let the buyer beware. |
| <i>Caveat actor:</i> | Let the doer beware. |
| <i>Caveat venditor:</i> | Let the seller beware. |
| <i>Certiorari:</i> | A writ by which records of proceeding are removed from inferior courts to High Court and to quash decision that goes beyond its |

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| | jurisdiction. |
| <i>Cestui que trust:</i> | The person who has the equitable right to property in India he is known as beneficiaries. |
| <i>Consensus ad idem:</i> | Common consent necessary for a binding contract. |
| <i>Contemporanea expositio est optima et fortissima lege:</i> | A contemporaneous exposition or language is the best and strongest in Law. |
| <i>Corpus delicti:</i> | Body/gist of the offence. |
| <i>Cy pres:</i> | As nearly as may be practicable. |
| <i>Damnum sine injuria:</i> | Damage without injury. |
| <i>De facto:</i> | In fact. |
| <i>De jure:</i> | By right (opposed to <i>de facto</i>) in Law |
| <i>Dehors:</i> | Outside; foreign to (French term). |
| <i>De novo:</i> | To make something new; To alter. |
| <i>Dies non:</i> | Day on which work is not performed. |
| <i>Deceit:</i> | Anything intended to mislead another. |
| <i>Del credere agent:</i> | Is a mercantile agent who in consideration of extra remuneration called a <i>del credere</i> commission undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts. |
| <i>Delegate potestas non-potest delegari:</i> | A delegated power cannot be delegated further. |
| <i>Delegatus non potest delegare:</i> | A delegate cannot delegate. |
| <i>Dictum:</i> | Statement of law made by judge in the course of the decision but not necessary to the decision itself. |
| <i>Dispono:</i> | Convey legally. |
| <i>Ejusdem generis:</i> | 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. |
| <i>Estoppel:</i> | Stopped from denying. |
| <i>Ex parte:</i> | Proceedings in the absence of the other party. |
| <i>Expressio unius est exclusio alterius:</i> | Express mention of one thing implies the exclusion of another or which is shortly put. |
| <i>Ex turpi causa non oritur</i> | No action arises from an illegal or immoral cause. |

actio:

Fatum: Beyond human foresight.

Fait accompli: Things done and no longer worth arguing against; an accomplished act.

Factum probandum: Fact in issue which is to be proved.

Factum probans: Relevant fact.

Ferae naturae: Dangerous by nature.

Force majeure: Circumstance beyond one's control, irresistible force or compulsion

Generalia specialibus non derogant: General things do not derogate from special.

Habeas corpus: A writ to have the body to be brought up before the judge.

Ignorantia legis neminem excusat: Ignorance of law excuses no one.

Injuria sine damno: Injury without damage.

Interest reipublicae ut sit finis litium: State or public interest requires that there should be a limit to litigation.

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 the outset.

In lieu of: Instead of.

Inter alia: Among other things.

Inter se: Among themselves.

In specie: In kind.

Inter vivos: Between living persons.

Intra vires: Within the powers.

In personam: A proceeding in which relief is sought against a specific person.

Indicia: A symbol; token; mark.

Innuendo: Allusive remark.

Jus in personam: Right against a person.

Jus in rem: Right against the world at large.

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| <i>Jus non scriptum:</i> | Unwritten law; Customary Law. |
| <i>Jus scriptum:</i> | Written Law. |
| <i>Lex Mercatoria:</i> | The law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards became incorporated into it. |
| <i>Lex fori:</i> | The law of the forum of court. |
| <i>Lis:</i> | A suit cause of action. |
| <i>Lis pendens:</i> | A pending suit. |
| <i>Locus standi:</i> | Right of a party to an action to appear and be heard on the question before any tribunal. |
| <i>Mala fide:</i> | In bad faith. |
| <i>Mandamus:</i> | A writ of command issued by a Higher Court to a Lower Court/Government/Public Authority. |
| <i>Mens rea:</i> | Guilty mind. |
| <i>Manesuetae natureae:</i> | Harmless by nature. |
| <i>Mesne profits:</i> | The rents and profits which a trespasser has received/made during his occupation of premises. |
| <i>Misnomer:</i> | A wrong name. |
| <i>Mutatis-mutandis:</i> | With necessary changes in points of detail. |
| <i>Noscitur a sociis:</i> | A word is known by its associated, one is known by his companions. |
| <i>Obiter dictum:</i> | An incidental opinion by a judge which is not binding. |
| <i>Onus Probandi:</i> | Burden of proof. |
| <i>Pari passu:</i> | On equal footing or proportionately. |
| <i>Per se:</i> | By itself taken alone. |
| <i>Persona non-grata:</i> | Person not wanted. |
| <i>Per incuriam:</i> | Through want of care; through inadvertance. |
| <i>Prima facie:</i> | At first sight; on the face of it. |
| <i>Profit a prendre:</i> | A right for a man in respect of his tenement. |
| <i>Pro bono publico:</i> | For the public good. |
| <i>Pro forma:</i> | As a matter of form. |

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| <i>Pro rata:</i> | In proportion. |
| <i>Posteriori:</i> | From the consequences to the antecedent. |
| <i>Puisne mortgage:</i> | Second mortgage. |
| <i>Pari causa:</i> | Similar circumstances, with equal right. |
| <i>Pari materia:</i> | Relating to same person or thing. |
| <i>Qui facit per alium facit per se:</i> | He who acts through another is acting by himself. |
| <i>Quo warranto:</i> | A writ calling upon one to show under what authority he holds or claims an office. |
| <i>Quia timet:</i> | Protective justice for fear. It is an action brought to prevent a wrong that is apprehended. |
| <i>Quid pro quo:</i> | Something for something. |
| <i>Ratio decidendi:</i> | Principle or reason underlying a decision. |
| <i>Res judicata:</i> | A decision once rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be agitated again. |
| <i>Res ipsa loquitur:</i> | The things speak for itself. |
| <i>Respondent superior:</i> | Let the principal be liable. |
| <i>Res sub judice:</i> | Matter under consideration. |
| <i>Res gestae:</i> | Facts relevant to a case and admissible in evidence. |
| <i>Rule nisi:</i> | A rule which will become imperative and final unless cause to be shown against it. |
| <i>Scire facias:</i> | Your cause to know. |
| <i>Status quo:</i> | The existing state of things at any given date. |
| <i>Scientiet volenti non fit injuria:</i> | Injury is not done to one who knows and wills it. |
| <i>Spes successionis:</i> | Chance of a person to succeed as heir on the death of another. |
| <i>Supra:</i> | Above; this word occurring by itself in a book refers the reader to a previous part of the book. |
| <i>Suppressio veri:</i> | Suppression of previous knowledge. |
| <i>Sui juris:</i> | Of his own right. |
| <i>Simpliciter:</i> | Simply; without any addition. |
| <i>Scienter:</i> | Being aware of circumstances, the knowledge of which is necessary to make one liable, as applied to the keeper of a vicious dog, means no more than reasonable cause to |

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| | apprehend that he might commit the injury complained of. |
| <i>Sine qua non:</i> | An indispensable condition. |
| <i>Situs:</i> | Position; situation; location. |
| <i>Suo motu:</i> | On its own motion. |
| <i>Stare decisis:</i> | Precedent. Literally let the decision stand |
| <i>Sine die:</i> | Without a day being appointed. |
| <i>Travaux preparatoires:</i> | Preparatory records. |
| <i>Tortum:</i> | Civil wrong actionable without contract. |
| <i>Uberrimae fide:</i> | Of utmost good faith. |
| <i>Ubi jus ibi remedium:</i> | Where there is a right there is remedy. |
| <i>Ultra vires:</i> | Beyond the scope, power or authority. |
| <i>Ut lite pendente nihil innovertur:</i> | Nothing new to be introduced during litigation. |
| <i>Usufructuary:</i> | One who has the use and reaps the profits of property, but not ownership. |
| <i>Ut res magis valeat quam pereat:</i> | The words of a statute must be construed so as to give a sensible or reasonable meaning to them. |
| <i>Vis major:</i> | Act of God. |
| <i>Vigilantibus, non dormientibus, jura subveniunt:</i> | The laws help those who are vigilant and not those who are slumber or lazy. |
| <i>Vice versa:</i> | The order being reversed; other way round. |
| <i>Volenti non fit injuria:</i> | Damage suffered by consent gives no cause of action. |